

## Practice in Poland – utilities largely owned by the public

### Has your country adopted a new separate law to implement the 17/2004/EC directive?

Polish Public Procurement Law (PPL) of 29 January 2004 (Journal of Laws of 2010 No 113, item 759 with amendments) regulates all aspects of PP procedure, from the commencement of the process until the conclusion of the contract. It refers both to the so-called “classical” sector (2004/18/EC Directive) as well as to utilities (2004/17/EC). It also provides for detailed rules concerning legal protection measures in that respect. PPL comprises 203 articles divided into several titles and chapters devoted to different instruments and aspects of the PP process. Specific rules concerning utilities are contained in Title III (“Specific Provisions”) and Chapter 5 (“Utilities”); however it is important to note that there are a lot of references to the provisions contained in other parts of the PPL, notably to Title I (“General Provisions”) and Title II (“Award Procedures”).

There are several acts of secondary legislation issued in order to implement and make more precise provisions of the PPL. Due to the fact that utilities are comprised in the PPL, most of the implementing regulations are to be followed also in this regard.

### Has your country fully implemented the 17/2004/EC directive or its mandatory instruments only?

Polish legislators decided to implement all the instruments provided for in 2004/17/EC Directive, apart from one. PPL does not contain direct provisions regarding the qualification system (art. 53 of 2004/17/EC); however the establishment of such systems is possible.

It is worth mentioning that some of the mechanisms, in spite of being implemented, have not been commonly used in practice. This is the case for dynamic purchasing systems (art. 15 of 2004/17/EC) and central purchasing bodies (art. 29 of 2004/17/EC) and is due to the fact that both instruments are relatively new in Poland, so for the time being there is a lack of guidelines or best practice in this regard.

On the other hand, recently there has been a growth in the use of electronic means, including electronic auctions, in the PP procedures that may contribute to the development of the above mentioned mechanisms in the near future.

Regarding the procedure for establishing whether a given utility activity is subject to 2004/17/EC Directive (art. 30 of 2004/17/EC), PPL does not allow the contracting entity to submit a request directly to the European Commission. According to PPL, only the authority competent for that activity – indicated in the Council of Ministers implementing regulation – acting either on its own initiative or at the request of the contracting entity, is entitled to lodge such an application. Since the implementation of 2004/17/EC Directive there has been only one request submitted up until August 2010, concerning the production and wholesale of electricity. However, according to Decision 2008/741/EC the production and sale of electricity in Poland is not directly exposed to competition and is still considered to be one of the utilities activities subject to 2004/17/EC Directive.

### What are the main differences between state and utilities public procurement in your country?

Apart from the fact that provisions concerning utilities under PPL are more flexible – which is a direct consequence of 2004/17/EC Directive – there are two particularities of the Polish PP system in respect of utilities procurement.

First of all, provisions of the PPL concerning utilities are applicable if the contract value exceeds the relevant thresholds in accordance with 2004/17/EC, whereas for classical procurement this threshold is set at €14,000.

Additionally, neither state and regional or local contracting authorities are covered by utilities provisions contained in the PPL. As a consequence, only bodies governed by public law, public undertakings as well as private entities operating on the basis of special or exclusive rights, may be considered as utilities entities under the PPL.

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