

CSR in the utilities sector: the implications of the EU procurement rules

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Aim of lecture/paper

- Highlight the implications of the current EU rules on procurement for CSR in the utilities sector
- Where next? Framework for debate and legal development

Outline

- Background – growth of CSR “supply chain” issues for utilities
- Impact of EU procurement rules – a brief review
- Where next? Principles and issues for debate

Drivers for CSR

- Social concern
- Business drivers:
 - Investors (publicly quoted utilities)
 - Customers (increased competition in utility markets)
 - Employees

But does CSR affect profitability?

CSR policies in the supply chain

- Labour conditions
 - Increase in outsourcing to India, China etc
- Environmental concerns
- Bribery and corruption

EU procurement rules

- EC Treaty prohibits discrimination by public bodies on grounds of nationality
 - Applies to award of public contracts
 - E.g. *Storebaelt* case; *Du Pont De Nemours*
- Procurement Directives
 - Require transparent procedures for awarding major contracts (advertising, competition and pre-disclosed criteria), to prevent and monitor discrimination
 - Removes other barriers e.g. requires reasonable time limits

EU procurement rules

- Public Sector Directive 2004/18
 - Applies to most major public contracts (government departments, local authorities etc)
- Utilities Directive 2004/17
 - Adopted later (1990)
 - Applies to major contracts awarded by utilities
 - More flexible procedures

Utilities Directive 2004/17

- Sectors:
 - Water; energy; transport; postal services
- Covers utilities considered at risk of discriminating in their purchasing:
 - Contracting authorities
 - Public undertakings
 - Undertaking with special or exclusive rights (e.g. monopoly licences)

Impact of EU rules on CSR: general points

- Relatively recent issue
- For utilities sector is absence of:
 - Jurisprudence
 - Guidance
 - Literature
 - Public debate

Impact of EU rules on CSR: general points

- Much uncertainty
- Is often a question of acceptable risk
 - Legal risks reduced by uncertainty and requirement for “prompt” challenge; and political sensitivity for Commission
 - Current environment is favourable to a flexible judicial interpretation

Impact of EU rules on CSR: specific impact

1. Substance of policies
2. Use of evidence in applying CSR policies
3. Impact on qualification systems
4. Impact of divergent regulatory regimes

1. Substance of policies

- Policies limited to performance of the contract being awarded
 - E.g. purchase of low-energy light bulbs
- Policies that go beyond the contract (“using buying power to *regulate*”)
 - E.g. suppliers must follow fair labour policies in all their factories

Requirements concerning contract performance

- Technical specifications
 - E.g. low-energy light bulbs; low-floor buses
 - Possible even if discriminatory
- Special conditions: Art.38/Reg.36
 - Compliance with basic ILO conventions during the contract work
 - Employment of handicapped persons on the contract
 - Electricity supplied on the contract to be produced from renewable sources

Requirements concerning contract performance

- Can utilities include requirements on labour or environmental conditions relating to *production of supplies outside their own state*?
 - Commission Communication on social considerations suggests not (contravenes Treaty and equal treatment principle)
 - However, there is no direct legal authority for this
 - Do external standards e.g. ILO conditions affect this?

Requirements concerning contract performance: compliance

- Can utilities exclude suppliers that they consider will not comply with special conditions?
 - Public sector cannot: *Beentjes*
 - Utilities must use “objective” rules and criteria – is this covered? (see pp.17-19 of the paper)
 - Even if not generally covered, can exclude where are (serious) past violations of utility’s contracts, as “grave misconduct”?

Requirements not limited to contract performance

- e.g. - whole business (and sub-contractors) to adhere to specified labour standards
- suppliers should not have investment in Myanmar or in tobacco companies
 - suppliers must not be involved in activities that damage the environment
 - suppliers must engage in joint community/environmental development projects

Requirements not limited to contract performance

- Contract conditions:
 - Art.38 by authorising some conditions (those concerning performance) excludes others?
 - reinforced by the provisions on environmental management measures
- Exclusion from contracts:
 - Above implies *criteria for exclusion* cannot include non-compliance with such requirements?

Requirements not limited to contract performance

- But:
 - May be exception, whereby utility can exclude based on external standards as “grave misconduct” e.g. ILO, SA 8000
 - or court may treat Art.38 as merely clarifying that some conditions are allowed, not as excluding others?

2. Evidence

- Cannot require to duplicate objective evidence already available: Art.52(1)(b):
 - cannot e.g. require *certification* to SA 8000
 - cannot require EMAS to show ability to comply with environmental requirements of the contract
 - but can require “equivalent” standards, *with onus on supplier to prove that meets such standards*
- Equal treatment/Art. 52(1)(a)
 - How to treat suppliers in different risk categories?

3. Qualification systems

- Must criteria be relevant for all/most contracts covered by the system?
 - Problem with joint systems
- Can utilities require/seek information that is not relevant for all contracts covered by the system?

4. Divergent regulatory regimes

- Regimes:
 - Utilities Directive “regular regime”
 - Treaty only (e.g. smaller contracts)
 - Art.30 exemption for activities in competitive markets
 - Exemptions preserved from old directive
 - No regulation
 - Public sector regime

4. Divergent regulatory regimes

- Problems increased by:
 - Larger and more global/European utility groups
 - Diverse activities within groups
 - Co-operation between utilities
 - Co-operation with non-utilities (public and private)

Where next?

- How to deal with existing constraints and uncertainties
- Development through:
 - Guidance
 - Judicial interpretation
 - Legislation

First question

- Should utilities outside traditional public sector be regulated at all?
 - Need for research on markets

Second question

- For regulated entities, how should internal market concerns (discrimination; access) be balanced against utility's interests in CSR?

General principles (Public Sector and Utilities)

- EC procurement rules are concerned only with internal market (discrimination; barriers to access)
- Thus balance between “commercial” and “social” considerations remains for Member States
- Equal status of these policies
- Community policies include:
 - Equal treatment (on grounds of race, gender etc)
 - Environmental policy (Article 6 EC requires consideration of this)
 - CSR
- Principles of subsidiarity and proportionality

Should the utilities regime be more flexible than the Public Sector regime?

- It is already more flexible on “commercial” aspects
- Barriers to trade are not so great?
- CSR policies are more central to utilities as aim at commercial success
- Alternative policy tools not available

Should the utilities regime be more flexible than the Public Sector regime?

- Drivers are commercial – so does it matter whether social policies achieve their social objectives, or even whether they are counterproductive?
- Who is to assess what is a suitable *commercial* strategy for utilities?
- Greater impact because of diversity of regulatory regimes

Empirical research project

- Funded by Achilles and ESRC under CASE (collaborative) studentship scheme
- To examine the impact of the EU rules on utilities CSR practices e.g:
 - Impact on the policies followed by utilities
 - Interpretation of the rules
 - Response to legal risks
 - Perceived problems