

Questionnaire on sector utilities procurement of Electricity and Gas Transmission system operators

Fields marked with * are mandatory.

Context

Undertakings operating as network operator in the natural gas and electricity transmission (TSO) and distribution system (DSO) are, as far as they **enjoy special or exclusive rights** granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned, **contracting entities** according to Art 4 of Directive 2014/25/EU on Sector Utilities Procurement.

Transmission and distribution system operators are **natural monopolies**, that need to be regulated.

National regulatory authorities (NRA) have the main task to oversee the development of the market, establish transport tariffs and guarantee that the costs incurred by transmission system operators are transparent, non-discriminatory, efficiently incurred and reflect actual costs.

In this context, it is of the utmost importance that all the **costs incurred by the transmission system operator are transparent, efficient and based on market values.**

Since public service obligations exist, special attention must be paid to how costs of TSO are incurred, and NRAs have a positive obligation to guarantee that tariffs paid by end-users will be spent pursuing the best value for money.

On the other side TSOs could generally have little interest to reduce costs, since their remuneration depends from the regulated asset base (RAB), which increases with the capital expenditures.

The European Energy Law in force (the 3rd Energy Package from 2009) does not make any direct reference when it comes to the aspect related to procurement of TSOs. **The regulatory authority does not have any specific mandate from the energy law to investigate the procurement activities of TSOs.** Everything is left to the proactive attitude of the single NRA who, during the costs verification phase, for contracts subject to but not assigned according to the rules of the utility sector procurement, could decide to reduce these costs and to recognize the TSO only the part that could correspond to the fair market value. This solution is unfortunately very difficult to pursue.

In this context, we assume that probably the majority of TSOs are subject to the national law on sector utilities procurement, while others will claim that they are not subject to it because they do not enjoy special or exclusive rights granted by the Member States.

This category of TSOs applies internal corporate rules based primarily on the prequalification of tenderers and on framework agreements. The use of "ad hoc" business rules could lead to:

- direct award of contracts without tender
- slicing up of the main contract in many unrelated contracts
- not accurate estimation of the contract's volume generating additional costs after the awarding phase
- limited advertising of the tenders (low bidders' number – discrimination and competition issue)
- enforcement problems by how aggrieved parties can seek redress in cases where TSO have awarded contracts in breach of the procurement rules.
- potential competition problems on specific activities? Hinder the creation of a new market?
Existence of Cartels?

In the last years, the regulated sector has experienced a consolidation in the governance and the shareholding structures across Europe. Some TSOs have consolidated their position and portfolio of activities by acquiring other TSOs operating in different Member States. Mergers could bring synergies and eventually decrease of transportation costs. According to Art 29 of the Directive, the rules for procurement of sector utilities allow for exclusion of certain services awarded to an **affiliate undertaking** having as its principal activity the provision of such services, supplies or works to the group of which it is part, from the obligation to offering them to the market. Also certain services, supplies and works contracts awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by Directive 2014/25 /EU and of which that entity is part are excluded.

In fact, the possibility to award contracts to affiliate companies represents an "hidden" return for the shareholders of the TSO. At the same time, if the costs are not incurred at market conditions, they will increase the system costs that must be paid by network users.

Goals:

The questionnaire will investigate the following topics:

- **Shareholding structure and certification of both gas and electricity TSOs**
- **NRA's awareness of procurement rules followed by TSOs**
- **Costs transparency in the local regulatory framework and exemptions**
- **Role of the NRA in verifying costs incurred by TSOs**
- **General questions and potential suggestions and improvements**

The main goal is to trace the different approaches governing the rules applied in each Member State regarding the topic of procurement by sector utilities (TSOs); to find best practices, increase awareness about the topic and to collect suggestions for improvements or best practices.

Reference to the **Sector Utilities Procurement Directives:**

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0025>

Reference to the **Public Utilities Procurement Directives:**

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0024>

Every Member State has transposed the above-mentioned directives into National Law.

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Disclaimer:

By answering this survey, you will consent to publish the information provided on ACER website. You confirm that information is provided in good faith. The information delivered will be used for general informational purposes only.

Please tick the box if you accept these terms and also if you have read the DPN for Interactions with Stakeholders

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I. Introduction

Your organisation's name:

Your country:

Your name:

Your role in the organisation:

Your telephone number:

Your e-mail address:

You provide information about:

- Gas TSO(s):
- Electricity TSO(s):
- Both:

II. Shareholding structure and certification of both gas and electricity TSOs

1.1 How many TSOs are active in your country in the gas sector (nr.)?

1.2 How many TSOs are active in your country in the electricity sector: (nr.)?

2. How are your TSO certified (ISO, ITO, ownership unbundling) according to Art. 3 regulation 715/2009 or 714 /2009 and art. 10 &11 Directive 2009/73/EU or Directive 2009/72/EU? (List of TSOs and their certifications)

3. Are the TSOs in your country stately (public undertaking)(Art 3 Directive 2014/25/EU) or privately owned (private undertaking)? (Please state the name of the TSOs, their shareholding structure and specific governance rules if needed, and state if they are considered stately or privately owned)

4.1 Are other TSOs/ DSOs, directly or indirectly, shareholder of your TSOs? Please list for every TSO, which TSO/DSO owns its shares directly or indirectly, and in which percentage.

4.2 Are those TSOs/DSOs, in your knowledge also owner of other TSOs in other countries?

- Yes
- No

4.2.1 If yes: please state according to your knowledge which other company do they own?

4.3 Are your TSOs shareholders of other TSOs in other countries or in your country? If yes, please explain.

5. In the certification decrees (ISO, ITO, ownership unbundling) of your TSOs, are there specific conditions set for their shareholders in terms of delivery of services, supplies and work to the TSOs?

- Yes
- No

5.1 If yes, which conditions?

6. Are the rights of the TSO to provide the services (e.g. concession to operate the network) been granted by means of procedure based on objective criteria (Art 4 (3) Directive 2014/25/EU) for which adequate transparency has been ensured?

- Yes
- No

6.1 If yes: please indicate which procedure and the link to documents that refers to?

6.2 if no: please state for each TSO how the rights for the concession to operate has been originated?

III. NRA's awareness of procurement rules followed by TSOs

7. Has your NRA already dealt with the topic of the procurement carried out by the TSOs?

- Yes
- No

7.1 If yes, could you state in which occasion and for which reason? Please explain.

7.2 If yes, do you have a department or at least one employee that deals with the topic procurement of services works and supplies of regulated entities (TSOs)?

7.2.1 If yes, which are his/her/their duties? Please explain.

8. Do the TSOs apply the national procurement rules based on the transposition of Directive 2014/25/EU for sector utility procurement (contracting entity)?

- Yes
- No

8.1 If no (they are neither contracting entity nor contracting authority), have they obtained an exception according to Art. 34 and 35 of Directive 2014/25/EU because they carry out an activity exposed to competition?

- Yes
- No

8.2 If no, could you please explain why they do not apply the rules on procurement according to the mentioned directives?

9. Do your TSOs operate their activities based on special or exclusive rights (art. 4 (1) b of Directive 2014/25 /EU) granted by a competent authority of a member state?

- Yes
- No

9.1 If yes: could you explain what these special or exclusive rights consist in?

9.2 If yes: in which national law these special or exclusive rights are defined? Please explain and quote the articles, if possible.

9.3. If no: is there a court judgement that confirms that the TSOs do not enjoy special or exclusive rights:

- Yes
- No

9.3.1 If yes, please explain

9.4 If no: have their rights been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria and hence, they do not constitute special or exclusive rights (Art.4(3))?

- Yes
- No

9.4.1 Please explain.

9.5 If no: do they think that special or exclusive rights have not been granted and hence they are not subject to the directive provisions?

- Yes
- No

9.5.1 If yes, please explain.

10. Which procurement rules do the TSOs apply, if they do not apply the provision of the above-mentioned directives? Please also check the options below.

10.1 No specific rules

- Yes
- No

10.2 Internal TSO rules

- Yes
- No

10.2.1 If yes: has the NRA ever received them?

- Yes
- No

10.2.2 If yes: has the NRA approved them?

- Yes
- No

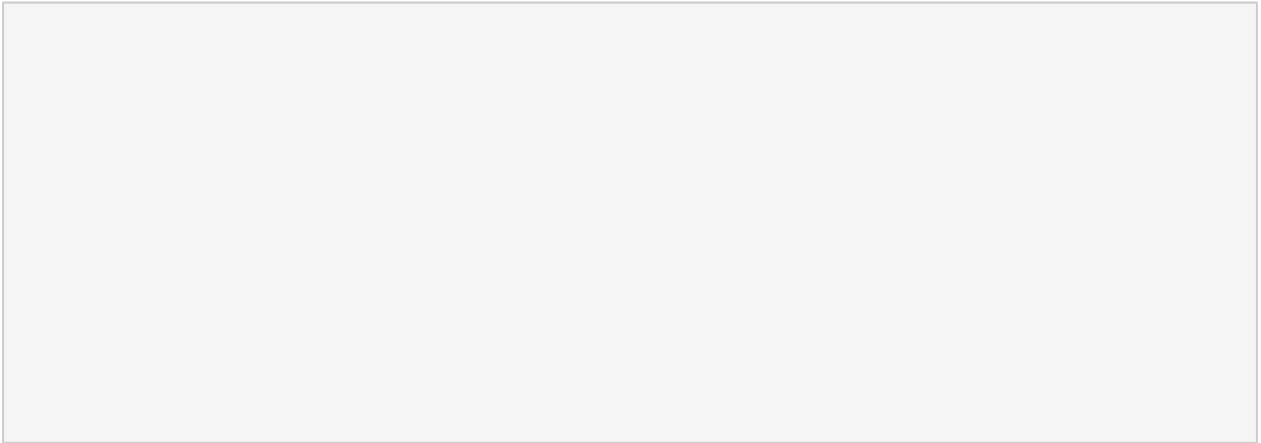
10.2.3 If yes: have these rules been published by the TSOs?

- Yes
- No

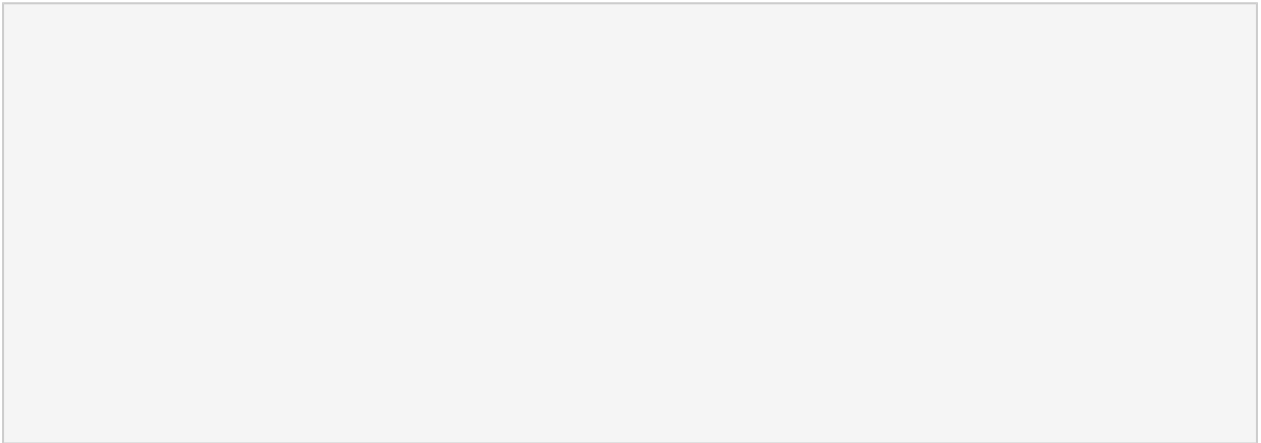
10.2.4 If yes: please specify the where: (link)

10.3 Rules given by the NRA? If yes: please specify.

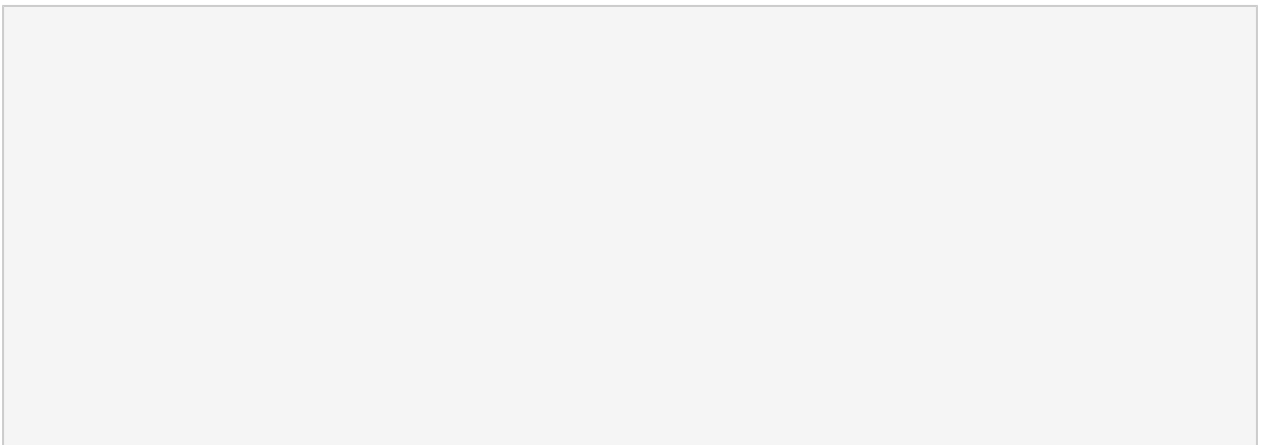
11. How does your NRA verify, if services/goods/works procured directly from the shareholder(s) or its affiliate undertaking(s) (Art 29 Directive 2014/25/EU) are compliant with the principle of non- discrimination and arm's length principle? (please explain)



12. Has your TSO ever established a joint venture (Art 30 Directive 2014/25/EU) with another TSO for the scope to carry out procurement activities? (Contract awarded to a contracting entity of such joint venture of which it forms part) (outside the procurement of energy products, please explain which was the case)?



13. Are you aware if your TSOs advertise their tenders? Can you state where and provide a link? Which thresholds does the TSO apply for contracts that are advertised?



IV. Costs transparency in the local regulatory framework

14. The Third Energy package foresees that TSOs' costs are incurred transparently, efficiently, reflect the actual costs incurred by a comparable network operator and comply with the principle of non-discrimination. Could you please state, which measures are in place at your NRA to guarantee that procurement activities that generate such costs are incurred according to the law? Please explain.

15. Have you ever carried out an audit regarding the procurement activities of your TSOs?

- Yes
- No

15.1 If yes, could you reveal what was the reason and reveal more details about the audit?

16. Has a company (potential bidder) ever brought to court the TSO for possible abuses of procurement law?

- Yes
- No
- I don't know

16.1 If yes: could you, please explain the specific case?

17. Are you aware of the fact your TSOs have ever directly awarded contracts for activities/ services/ goods and works to the shareholder itself or to an affiliated company of the shareholder?

- Yes
- No

17.1 If yes, could you mention what activities? (explain)

17.2 If yes, have these activities been awarded in the contest of a competing tender that the shareholder or affiliate company of the shareholder won (no direct awarding)?

- Yes
- No

17.2.1 If no, have you ever verified, if the price paid by the TSO was market based?

- Yes
- No

17.2.2 If yes, how? (Explain)

V. Role of the NRA in verifying costs incurred by TSOs

18. Which regulatory model do you apply for the calculation of the allowed revenue of the TSOs?

- Incentive base regulation: just revenue cap methodology
- Incentive base regulation: just price cap methodology
- Cost based regulation: just cost-plus methodology
- Cost based regulation: just rate of return methodology
- Hybrid regulation: mix of different methodologies (e.g.: different for OPEX and CAPEX)
- Other systems

18.1 Please explain which methodology is applied in your country for the Electricity TSOs and for the Gas TSOs and in case of hybrid or other methodologies, please specify how OPEX and CAPEX are treated in this respect:

19.1 Is your NRA responsible to approve ex-ante: investments of TSOs?

- Yes
- No

19.1.1 If yes: do you apply a threshold, below that you don't check?

- Yes
- No

19.1.2 If yes: in which specific procedure (e.g. national network development plan)? (Explain)

19.2 Is your NRA responsible to approve ex-ante: reinvestments of TSOs?

- Yes
- No

19.2.1 If yes: do you apply a threshold, below that you don't check?

- Yes
- No

19.2.2 If yes: in which specific procedure? (Explain)

19.3 Is your NRA responsible to approve ex-ante: single operating costs of TSOs?

- Yes
- No

19.3.1 If yes: do you apply a threshold, below that you don't check?

- No
- Yes

19.3.2 If yes: in which specific procedure? (Explain)

19.4 If no, who is responsible for approval? (please explain)

19.5 Does the NRA verify the technical / numerical consistency between the project it has approved and the project implemented?

- Yes
- No

19.5.1 If yes: what procedure is followed? (please explain)

19.5.2 If no: on what basis does the NRA recognize the final projects costs?

19.6 Does the NRA monitor the utilization of essential system components (e.g. compressor machines) that are already in operation?

- Yes
- No

19.6.1 If yes: what are you doing to recover unused components (e.g. relocation of compressor machine to reduce new investment cost)? (please explain)

20. In the phase of planning of new projects, does your TSO(s) take into consideration the concept of life-cycle costing of different alternatives (e.g. pipeline vs compressor station)?

- Yes
- No

20.1 If yes: please explain how it is carried out?

20.2 If no: please explain why not and which is the rationale behind the choice of a solution towards the other.

21. Does the NRA verify the technical suitability and validity of the projects of the national development plan?

- Yes
- No

21.1 If yes: by what method (e.g. hydraulic calculation model)?

21.2 If no: why not and who is responsible for design adequacy?

21.3 Does the NRA have a database (its own or of third parties (e.g. ACER unit Investment Costs)) suitable for ex-ante cost estimates of (re)- investments?

- Yes
- No

21.3.1 If yes: can this database be accessed by other NRAs?

- Yes
- No

21.3.2 If this database be accessed by other NRAs, please attache the link.

21.3.3 If no: on what basis is the eligibility of the planned project cost (CAPEX) checked? (please explain).

21.4 Does the NRA apply a national specific CBA to evaluate the projects of the national network development plan?

- Yes
- No

21.4.1 If yes: what is the procedure in case of a negative CBA? (please explain).

21.4.2 If no: who will perform this verification?

21.4.3 Please explain.

22. From the moment that certain TSO's investments are approved by your NRA and/or the TSO takes the final investment decision, and until the moment the TSO activates the related costs from a regulatory point of view (e.g. RAB), do you verify that the costs incurred are market based?

- Yes
- No

22.1 If yes, could you please explain which measure do you take?

22.2 If no, which measure do you have in place to verify that the costs are transparent and efficiently taken? Please explain.

23. Has the NRA ever taken action (such as a specific enforcement procedure) against the TSOs for failing to apply public procurement law?

- Yes
- No

23.1 Please explain.

V. General questions and potential suggestions and improvements

24. For the procurement of services, goods and works are there special thresholds in the public procurement that differ from those referred to in Art 15 of Directive 2014/25/EU?

- Yes
- No

24.1 If yes, please indicate:

1. supply contracts: (Value in Euro equivalent)
2. service contract: (Value in Euro equivalent)
3. works contracts: (Value in Euro equivalent)

25. Are there specific works/good/ services procured by the TSO, with exception of energy products procurement, that are subject to the stricter national procurement rules than those foreseen by the directive?

- Yes
- No

25.1 If yes, please explain.

26. Do you think that the European energy legal framework should be improved to allow NRAs to have a better and more detailed overview of the costs incurred by TSOs?

- Yes
- No

26.1 If yes, could you explain how could it be improved? (Please explain)

27. Is your NRA provided by direct powers of supervision and/ or enforcement regarding public procurement in the national law?

- Yes
- No

27.1 If yes: which kind of powers does the NRA detain?

27.1.1 Please explain

27.2 If no: Do you think that the NRA should be provided by direct powers of supervision and/ or enforcement regarding public procurement in both European and national law?

- Yes
- No

28. Do you think that the link between European Energy right and Public procurement right should be improved?

- Yes
- No

28.1 If yes, what do you suggest? Please explain

