



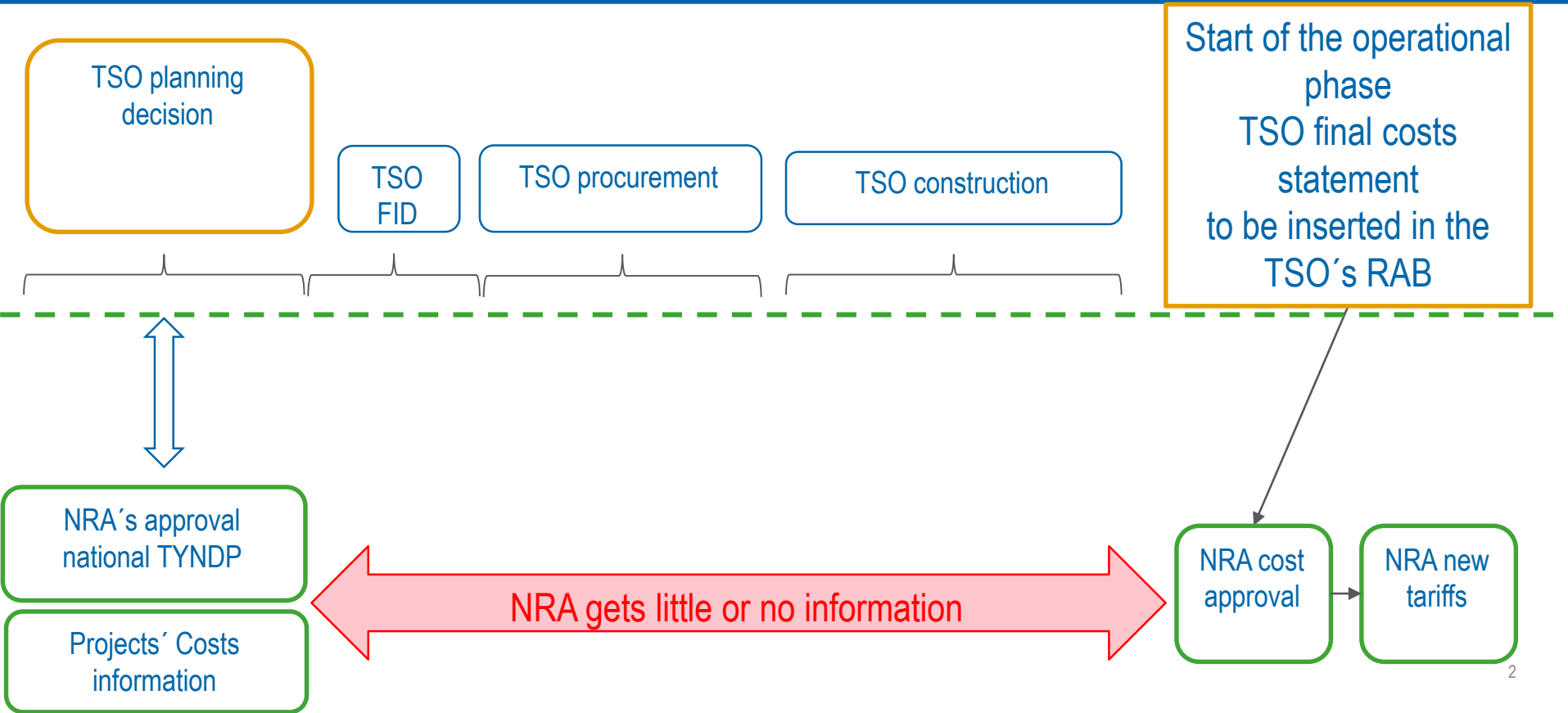
# Sector Utilities Procurement

GRI SSE Prague

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# NRA project cost control

CAPEX increase



- TSOs invest financial recourses either in **fix assets** or in **running costs**
- Part of these costs are represented by investments in assets that have been **inserted in the national TYNDP**, and that have been approved by the NRA
- In the national TYNDP, the **NRA approves new projects (investments and reinvestments)** but it does not approve their costs (Austria) but just take them for information. Approval of costs should follow with a specific request by the TSO, generally for incremental capacity.
- NRAs do not check some costs in detail and do **not have enough resources to verify ex-post (final balance)** the correctness of the (project) costs
- **TSO does not have incentives to minimize costs under many regulatory regimes.** New costs are added to the existing RAB, without detailed checking
- NRAs are not able, **do not have skills** and competencies and do not know the different markets so well to understand whether a work/supply/service was awarded at the right price.
- **NRAs have a positive obligation to guarantee** that end-user money will be spend according the **best value for money**

# EU Directives in Procurement

deadline for the transposition by Member States into their domestic law was 18 April 2016

## **Public Sector Directive 2014/24/EU**

Repealing  
Directive 2004/18/EC

## **Utilities Directive 2014/25/EU**

Repealing  
Directive 2004/17/EC

In four sectors:  
water, energy, transport and postal  
services

# Which utilities are subject to procurement rules?

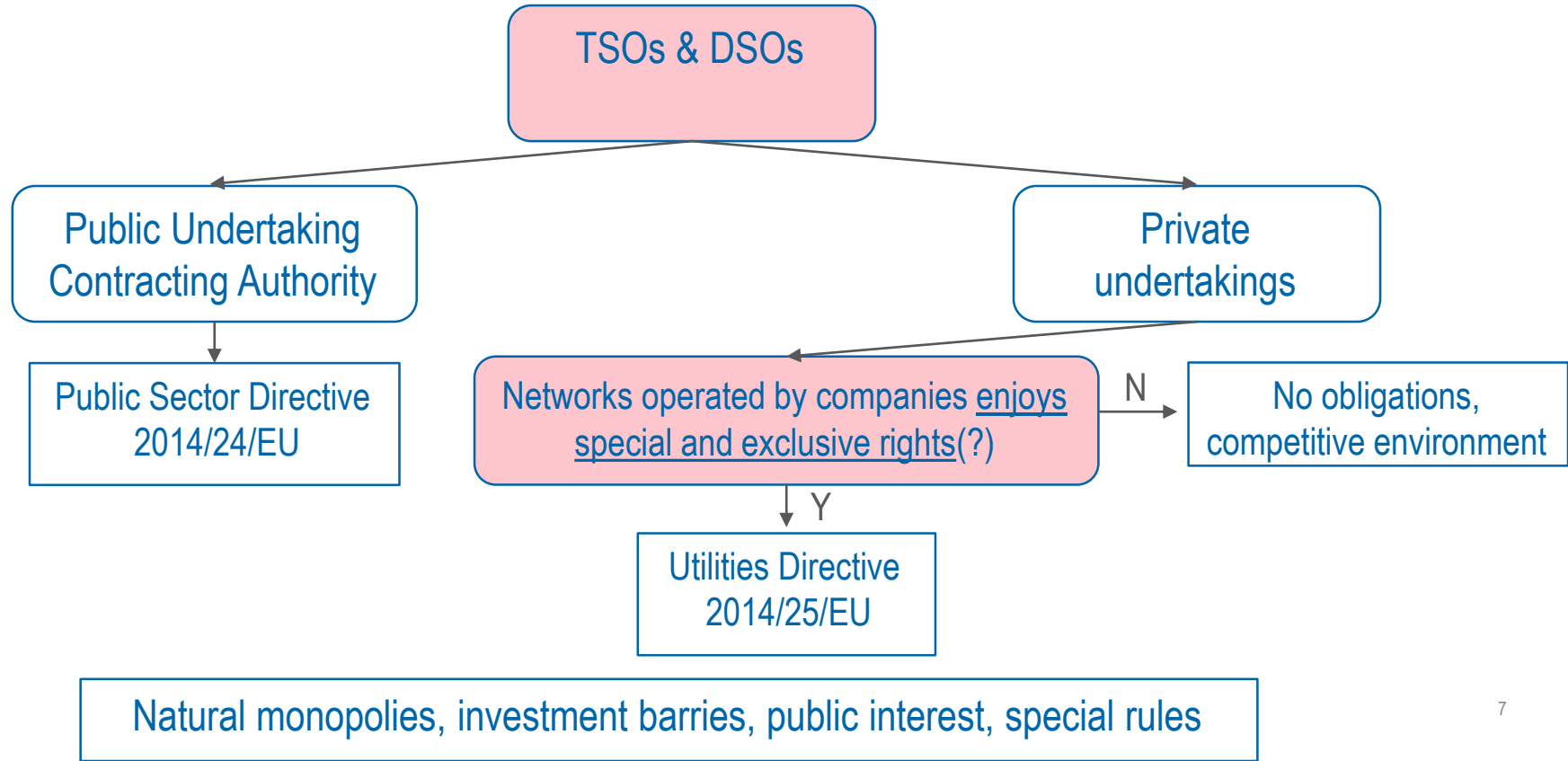
Articles 8-14

It apply to contracts for procurement of works, services and supplies in the field of „**relevant activities**“

- **Gas** and heat
- **Electricity**
- Water
- Transport services
- Ports and airports
- Postal services
- Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels

The Directive shall apply to the following activities:

- a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or electricity;
- b) the supply of gas or electricity to such networks.



- ❖ **Contracting “authorities”:** The definition of a contracting authority is the same as in the Directive. There are two main types of contracting authority: “**public authorities**” and “**bodies governed by public law**”.
- ❖ **Public undertakings:** “any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it”.
- ❖ **Entities operating on the basis of special or exclusive rights:** The Utilities Directive also applies to entities that fall within a three-part definition. These are entities that:
  - are not contracting authorities or public undertakings;
  - have as one of their activities any of the relevant activities outlined below;
  - operate on the basis of “**special or exclusive rights**” **granted by a competent authority of a Member State.**

For this purpose, “special or exclusive rights” means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of relevant activities to one or more entities, and which substantially affects the ability of other entities to carry out such activity.



# Exemption under Article 34

*Activities directly exposed to competition*

....shall not be subject to this Directive if the **Member State** or the **contracting entities** having introduced the request pursuant to Article 35 **can demonstrate that**, in the Member State in which it is performed, **the activity is directly exposed to competition on markets to which access is not restricted.**

The exemption is granted by means of a Decision by the European Commission on a case-by-case basis

The Utilities Directive covers three main types of contracts with the following thresholds:

- **works: 5.186.000 €**
- **supplies: 414.000 €**
- **services: 414.000 €**

Updated thresholds are published every two years by the European Commission

<http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/#t1>

There must be a **genuine and transparent evaluation** of the contract at issue by the contracting entity

**Unlawful is to spilt the contract in different parts** to fall under the thresholds to avoid the application of the Utility Directive.

***Unsere Energie gehört der Zukunft.***

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# References to the law

# Exemption under Article 34

*Activities directly exposed to competition*

The criteria may include the characteristics of the products or services concerned, **the existence of alternative products or services considered to be substitutable** on the supply side or demand side, the prices and the actual or potential presence of more than one supplier of the products or provider of the services in question.

That assessment shall take account in particular of the nature and **characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences**, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences

Such **exemptions apply in respect of the purchase of fuel and energy for the production of energy**

The Utilities Directive does not apply:

- **Activities outside the EU**
- **Affiliated undertakings:** Where “undertakings” consist of a number of mutually owned or mutually dependant companies, the Utilities Directive provides a specific exemption for purchases made between them under certain conditions. They are **treated like “in-house” contracts**, referred to as **“intra-group transactions”**.
- **Joint ventures:** The Utilities Directive does not apply to contracts awarded by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out relevant activities, to one of those contracting entities, or by a contracting entity to such a joint venture of which it forms a part.
- **Purchases for re-sale or lease**
- **Contracts between contracting authorities**

# Back-up



## Treaty on the Functioning of the European Union (TFEU)

- Prohibition against discrimination on grounds of nationality;
- Free movement of goods;
- Freedom to provide services;
- Freedom of establishment.

## General Principles of EU Law

*From the case law of the Court of Justice (CJEU)*

- Equality of treatment (non-discrimination);
- Transparency;
- Mutual recognition;
- Proportionality;
- Legal certainty

**Two “remedies” Directives** apply to complaints and review:

- public sector remedies Directive 89/665/EC
- utilities sector remedies Directive 92/13/EC.

These two remedies Directives were both significantly amended by Directive 2007/66/EC

**The “defence” Directive 2009/81/EC**

applies a more flexible and confidential regime to the procurement of military supplies and related works and services

## Procurement procedures

The Utilities Directive provides for five main procurement procedures:

- open procedure
- restricted procedure
- negotiated procedure with a prior call for competition
- competitive dialogue
- innovation partnership

Contracting entities are free to use either the open, restricted or negotiated procedure with prior call for competition.

Contracting entities therefore have the freedom to choose any of the five procedures

Contracting entities also have flexibility in terms of how they advertise – the process is referred to in the Utilities Directive as a “call for competition”.

When conducting an **open procedure**, contracting entities have no choice and must use a **Contract Notice**.

When conducting a restricted procedure or a negotiated procedure with a prior call for competition, contracting entities can choose to use one of the following:

- a contract-specific notice
- an annual “periodic indicative notice”
- a notice on the existence of a qualification system.

When conducting a competitive dialogue procedure or an innovation partnership, contracting entities have two choices:

- a contract-specific notice
- a notice on the existence of a qualification system.

Statutory time limits apply, and a standard format Contract Notice must be used and published in the ***Official Journal of the European Union (OJEU)***.