

The Impact of the EC Procurement Rules on Corporate Responsibility in the Supply Chain: a Study of Utilities

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I. Introduction

This paper offers an overview of research done so far for the author's PhD project, examining the impact of the European Community (EC) procurement rules on the inclusion of corporate social responsibility (CSR) policies in utilities procurement. The project aims to identify risks and uncertainties caused by the legal regime along with any positive aspects of the framework in guiding the creation of CSR policies. The project also aims to examine the response of the utilities sector to any constraints and uncertainties within the legal framework. The project involves both doctrinal research of the relevant legal framework and qualitative empirical research to examine the response of the utilities sector to that framework.

The paper begins with an overview of the concept of CSR, setting out a definition of CSR and examining the reasons why many companies, including those in the regulated utilities sector, have recently felt the need to include CSR in their business. Following this, the paper examines the EC legal regime governing the inclusion of CSR policies in utilities procurement, aiming to highlight possible issues utilities may encounter in practice. Finally, the paper briefly sets out methodology for the planned empirical research.

II. Corporate Social Responsibility and Labour Policies

CSR has emerged as a major business development in recent years. The European Commission has defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with

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stakeholders on a voluntary basis.”¹ In recent years, environmental issues have been seen as increasingly important, and the possibility of including environmental issues in procurement has been examined by several authors.² Social policies do not appear to have been examined in as much detail, but are of increasing importance for utilities (as discussed further below). For this reason, this research focuses in particular on labour-related policies, which aim to improve the working conditions of the workforce of the utility and that utility’s suppliers further down the supply chain. This section aims to set out the reasons utilities may feel the need to adopt CSR policies in their business.

Milton Friedman famously claimed in 1970 that “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits”.³ Under this argument, a company has no responsibility to consider social or environmental issues. In extreme versions of this argument CSR is seen as actively harmful, giving too much power to companies and activist groups and requiring companies to make political decisions.⁴

In recent years, however, it is often argued that CSR and profitability are not mutually exclusive. Indeed, as stated by the European Commission, “[t]here is a growing perception that sustainable business success and shareholder value cannot be achieved solely through maximising short-term profits but instead through market-oriented yet responsible behaviour.”⁵ Under this argument (often known as the “business case” for CSR), socially responsible companies will in fact be more profitable than their less ethical competitors. Following this position, companies face pressure to be more socially responsible from their stakeholders, with the main sources of pressure being investors,

¹ European Commission, *Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development* COM(2002) 347, (“Commission Communication concerning Corporate Social Responsibility”), at p.5.

² See, for example, Kunzlik, P. ‘The procurement of ‘green’ energy’, Ch. 9 in Arrowsmith and Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge: CUP); Westphal, T. ‘Greening Procurement: An Attempt to Reduce Uncertainty’ (1999) 8 PPLR 196; Nijholt, H. ‘Environmental Provisions in Public Procurement Directive 2004/18/EC’ (2004) 21 ICLR 268.

³ Friedman, M. ‘The social responsibility of business is to increase its profits’, *New York Times Magazine*, September 13th 1970.

⁴ See Wolf, M. ‘Sleep-walking with the enemy: Corporate social responsibility distorts the market by deflecting business from its primary role of profit generation’, *Financial Times*, May 16th 2001, and Henderson, D. *Misguided Virtue: False Notions of Corporate Social Responsibility*, (2001, London: Institute of Economic Affairs).

⁵ Commission Communication concerning Corporate Social Responsibility, above n.1, at p.5.

the company's employees, and consumers, and it is argued that a company which satisfies the demands of these stakeholders will gain more custom than a company which does not.⁶ It has been suggested that utilities may be particularly sensitive to such public pressure due to their historical position as part of the public sector and the fear that private utilities are still subject to state influence.⁷ In addition to these pressures, companies may also be influenced by the desire to avoid the stricter regulation which might result if they do not regulate themselves.⁸

In practice, however, it is difficult to prove this link between social responsibility and profit. This relationship between CSR and profits has been examined in many academic studies and the results are often contradictory.⁹ Orlitzky, Schmidt and Rynes conducted a meta-analysis of the previous literature and concluded that the overall relationship was positive, with increased CSR leading to increased profitability.¹⁰ Margolis and Walsh also found a generally positive relationship reported in the literature, but argued that the results were unsatisfactory due to the different measurements for CSR and profitability used in the various studies.¹¹ A recent study by Margolis and Anger Elfenbein examining 167 previous studies concluded that there was a small correlation between positive corporate behaviour and increased profits, which they noted could equally be explained by the fact that more profitable firms are simply more able to engage in CSR.¹² Margolis and Anger Elfenbein also note that CSR policies, while not increasing profits, also do not appear to increase costs, suggesting that CSR is effectively neutral.¹³ Vogel, however, argues that while it may be true that CSR will not cost a firm, "some more responsible

⁶ Vogel, D. *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005, Washington DC: Brookings Institution Press), Ch. 3.

⁷ Arrowsmith, S. and Maund, C. 'CSR in the utilities sector and the implications of EC procurement policy: a framework for debate', Ch. 11 in Arrowsmith and Kunzlik, above n.2, at p.440.

⁸ *Ibid*, at p.438.

⁹ See Margolis, J.D. and Walsh, J.P., *People and Profits? The Search for a Link Between a Company's Social and Financial Performance*, (2001, Mahwah, NJ: Lawrence Erlbaum Associates) for the most comprehensive review of these studies.

¹⁰ Orlitzky, M., Schmidt, F. and Rynes, S. 'Corporate Social and Financial Performance: A Meta-Analysis' (2003) *24 Organisation Studies* 403, at 415.

¹¹ Margolis and Walsh, above n.9, at p.13.

¹² Margolis, J.D. and Anger Elfenbein, H. 'Do Well by Doing Good? Don't Count on It' (Jan 2008) *Harvard Business Review* 19, at 19.

¹³ *Ibid*, at 20.

firms might be even more profitable if they were less responsible”,¹⁴ and concludes that economic benefit from CSR policies may be limited to those cases where the companies make CSR an explicit part of their business drive.¹⁵

Regardless of whether or not the business case for CSR is true, the pressure on companies to become socially responsible appears to be having an effect. Arrowsmith and Maund note the increase in CSR reporting amongst large corporations, which have developed into detailed statistical reports and which are now often independently audited.¹⁶ The authors also note the recent action by utilities to be listed in social accountability indices such as FTSE4Good and the increased use of CSR policies by many utilities to protect their brand image.¹⁷ This increasing importance of CSR leads to the need to determine the scope for including such policies in procurement under the EC rules.

III. Corporate Social Responsibility and EC Procurement

This section aims to highlight grey areas in the law which utilities may encounter when implementing labour policies in procurement. The discussion will first briefly discuss general problems which may arise relating to the various regulatory regimes to which utilities may be subject. Specific problems which may arise under Directive 2004/17/EC¹⁸ (the Utilities Directive) will then be examined.

1. Regulatory Regimes

One uncertainty in this area is the applicability of the EC Treaty provisions to utilities which are regulated due to being public undertakings or having special or exclusive rights. Article 86 EC prohibits Member States from enacting any measure which breaches a Treaty provision in connection with a public undertaking or a private entity with special

¹⁴ Vogel, above n.6, at p.33.

¹⁵ *Ibid*, Ch. 2 and 3.

¹⁶ Arrowsmith and Maund, above n.7, p.439.

¹⁷ *Ibid*, p.440.

¹⁸ Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 No. L134/1.

or exclusive rights. One interpretation of Article 86 suggests that any action which would breach the EC Treaty if done by a Member State will also breach the Treaty when done by an entity mentioned in Article 86.¹⁹ Contrary to this, it has also been argued that Article 86 only refers to the situation where a Member State is directly involved in the breach, by influencing the actions of the relevant entity.²⁰ The issue has not yet been considered by the European Court of Justice (ECJ). If the Treaty does cover public undertakings and private entities with special or exclusive rights, then utilities must consider those Treaty rules for all procurements, including those below the Directive's threshold and procurement excluded from the Directive such as services concessions. Equally, utilities who have gained an exemption from the Directive under Article 30 of that Directive must still comply with the Treaty rules, which may limit the freedom they have in practice. If, however, the Treaty is not applicable, procurement which does not fall within the Directive will be completely exempt from any regulation.

It has also been suggested that problems may be caused by the number of regulatory regimes which may apply to utilities. Arrowsmith and Maund argue that liberalisation of the utility sector in recent years has led to utilities consolidating into fewer, much larger utilities, which often operate in several countries both within the EC and beyond.²¹ This liberalisation has also led to utilities diversifying out of their traditional areas of activity, meaning that different sections of the same utility may be subject to different procurement regulation, for example where one activity has an exemption from the Utilities Directive.²² Arrowsmith and Maund argue that the EC rules may prevent utilities from implementing CSR policies which cover more than one country or activity, or from co-operating with other entities which operate in other countries/activities to design or implement a joint CSR initiative.²³ They also note that the variation in regulatory

¹⁹ Buendia Sierra, J. *Exclusive Rights and EC Monopolies under EC Law*, (1999, Oxford: OUP), at p.192.

²⁰ Arrowsmith, S. *The Law of Public and Utilities Procurement*, (2nd Ed), (2005, London: Sweet and Maxwell), at p.236.

²¹ Arrowsmith and Maund, above n.7, p.472.

²² *Ibid*, at p.473.

²³ *Ibid*, at p.474.

regimes may confuse both utilities and suppliers.²⁴ If this argument is correct, it may limit the ability of utilities to create their own industry-wide labour codes of conduct.

2. Utilities Directive

The EC has regulated utilities procurement since 1990, when Directive 90/531/EEC was adopted.²⁵ The regulation was designed to combat the possibility of discriminatory behaviour which it was felt might occur due to the non-competitive environment in which most utilities operated. In addition to covering contracting authorities of the type usually covered by Directive 2004/18/EC²⁶, the Utilities Directive also covers public undertakings (companies subject to the dominant influence of a public authority)²⁷ and private entities which operate on the basis of special or exclusive rights.²⁸ Regulating such private entities is felt to be justified due to the limited number of firms which hold such rights, meaning such firms are not subject to the usual competitive pressures which affect most private firms.²⁹ Equally, it is argued that firms with special or exclusive rights be vulnerable to pressure from the government bodies which award those rights, especially given the absence of other competitive pressures.³⁰

The regulation covers the utility sectors in which it is felt there is a significant risk of discrimination, and a utility which does in fact operate in a competitive market may apply to the European Commission for an exemption from the Utilities Directive under Article 30. The sectors currently covered are energy (production, transport or distribution of gas, electricity or heat and extraction of oil, gas, coal or other solid fuels), water (operation or provision of a network for distributing drinking water and disposal or treatment of sewage), transport (provision or operation of a public transport network, by railway, tram, bus or similar, and providing port or airport services), and postal

²⁴ *Ibid.*

²⁵ Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 No. L297/1.

²⁶ Directive 2004/18/EC of the European Parliament and of the Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L132/114 ("the Public Sector Directive").

²⁷ Art. 2(1) Utilities Directive.

²⁸ Art. 2(3) Utilities Directive.

²⁹ Kotsonis, T. 'The Definition of Special or Exclusive Rights in the Utilities Directive: *Leased Lines* or *Crossed Wires*?' [2007] 1 PPLR 68, at 88.

³⁰ *Ibid.*, at 87.

services.³¹ The UK has currently obtained two exemptions under Article 30 of the Utilities Directive, for entities operating in the fields of electricity generation and supply of gas or electricity.³² In addition, UK companies operating in the oil and gas extraction sector have a partial exemption from the requirements of the Utilities Directive, under which they must simply prove certain non-discriminatory and competitive standards in their procurement.³³

As a general rule, the Utilities Directive is more flexible than the Public Sector Directive. A utility has a free choice between the open procedure, the restricted procedure and the negotiated procedure with a call for competition when awarding a contract,³⁴ and also has greater flexibility in other areas, for example operating a qualification system and excluding tenderers from the contract award procedure. The impact of these differences on the inclusion of CSR policies has not been examined by the ECJ and is not considered in the official guidance from the Office of Government Commerce or the European Commission. The sections following will discuss possible issues specific to the Utilities Directive which may arise when a utility wishes to implement a labour policy.

Technical Specifications and Special Conditions

One of the first opportunities a utility has to consider labour issues in procurement is when setting out the technical requirements of the contract – what precisely the utility wishes to buy – and when setting out any contract conditions which must be complied with by the firm completing the contract. International labour codes often set out certain

³¹ Articles 4-7 Utilities Directive.

³² Commission Decision 2007/141/EC of 26 February 2007 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the supply of electricity and gas in England, Scotland and Wales, OJ 2007 L62/23, and Commission Decision 2006/211/EC of 8 March 2006 establishing that Art. 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales, OJ 2006 L76/6.

³³ Commission Decision 97/367/EC: Commission Decision of 30 May 1997 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the United Kingdom an activity defined in Article 2 (2) (b) (i) of Council Directive 93/38/EEC and that entities carrying on such an activity are not to be considered in the United Kingdom as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive, OJ 1997 L 156.

³⁴ Art. 40(2) Utilities Directive.

minimum standards to be met by firms and contract conditions which must be accepted in their entirety are the easiest way for a utility to ensure this minimum is met.

Generally a contract condition will be lawful if it does not contravene the free movement provisions of the EC Treaty, that is, if it does not create a barrier to trade or, if it does, if that barrier can be justified under a Treaty exception or under a justification recognised by the ECJ. It was noted above that it is unclear whether the Treaty rules apply to private utilities. If they do not, such utilities may have a broad discretion regarding contract conditions and would be able to include labour conditions where they felt it was socially or commercially required. However, it has been argued that the Utilities Directive seeks to mirror the principles applying to public authorities under the EC Treaty, and under this principle even if the Treaty rules do not generally apply to private utilities, the ECJ will apply those rules to utilities covered by the directive.³⁵

Presuming the Treaty principles do apply, several questions arise. As a general rule, for a measure to be justifiable it must be intended to fulfil a genuine social aim of the utility, be suitable for obtaining its objective and must not go beyond what is necessary to achieve that objective.³⁶ This raises a number of possible issues:

- External labour standards

Where a utility is relying on an externally designed labour code or has designed its own code to support external standards, will that code be accepted by the ECJ as suitable simply because it supports those standards, or will it have to be proved that the code actually has a concrete impact on labour standards?³⁷ If the utility must prove actual benefit from the code, the degree of monitoring provided for in the code may be relevant. Some standards, such as the UN Global Compact, provide for virtually no monitoring, making the actual impact of the code hard to measure and suggesting that the code is often no more than a PR exercise. Others, such as the

³⁵ Arrowsmith and Maund, above n.7, p.449.

³⁶ Case C-234/03, *Contse SA, Vivisol Srl & Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingresa)* [2005] ECR I-9315, at para. 25.

³⁷ Arrowsmith and Maund, above n.7, p.447.

OECD Guidelines for Multinational Enterprises, make provision for some external enforcement of the code provisions and so may be more easily justified.

- Commercial benefit

A utility may adopt a social policy not, or not only, to achieve that social aim but because they believe that doing so will make the company more profitable (see the discussion of the business case for CSR above). This raises possible two problems. Firstly, the ECJ has held that economic objectives cannot generally justify a hindrance to trade.³⁸ Secondly, even if an economic objective may be a justification, it was noted previously that the link between CSR and profit has not been proved, making it hard to claim that a labour policy is suitable for achieving a commercial aim.

- Conditions affecting work done outside the home state of the utility

There has been an increase amongst the utilities sector in outsourcing to countries which are considered high-risk for labour issues, and this raises the issue of the extent to which a utility can justify contract conditions affecting work which is undertaken outside their home state. Where the country in which the contract is performed is also an EU Member State the opportunities for implementing worker protection policies seem limited since it must be shown that the protective measures of that country are inadequate.³⁹ More often, however, the relevant firms will be based in a non-EC state. Unlike EC Member States there is probably no presumption that the worker protection regulation of these countries is adequate, and so the policy will fall to be justified under the general rules for justification discussed above. Arrowsmith suggests that in these cases the policy may be justifiable not only by the protection which it offers the contract workers, but also possibly by a firm's desire to

³⁸ See, for example, Case C-353/89, *Commission v Netherlands* [1991] ECR I-4069 and Case C-398/95, *Syndemos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias* [1997] ECR I-3091.

³⁹ See, for example, Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd*, [1991] ECR I-4221.

disassociate itself from exploitative behaviour.⁴⁰ Arrowsmith's argument refers to the need of public authorities to set a good example, but the argument seems equally applicable to private utilities who wish to avoid consumer criticism. The situation has not yet been examined by the ECJ.

- Production methods

The extent to which a utility may specify conditions relating to the production of supplies (for example, requiring that products are made under fair trade conditions) is uncertain. The European Commission argue that the possible effects on the supplier's whole business structure mean that such conditions may be considered a restriction on trade and would be difficult to justify.⁴¹ In addition to this, in its Communication relating to Environmental Considerations, the Commission suggests that production matters may only be considered where they impact on the actual characteristics of the product.⁴² This would appear to rule out the possibility of including production conditions relating to the workforce since these would generally have no impact on the product itself. The Commission's argument has been criticised as internally incoherent, however, given their example of green energy which fails their own test for impacting on the characteristics of the product.⁴³ Once again, the issue has not been considered by the ECJ.

- Conditions going beyond contract performance

Article 38 of the Utilities Directive states that conditions "relating to the performance of the contract" are allowable. The provision parallels Article 26 of the Public Sector Directive, and the provisions are generally taken to imply that conditions which do

⁴⁰ Arrowsmith, S. 'Application of the EC Treaty and directives to horizontal policies: a critical review', Ch. 4 in Arrowsmith and Kunzlik, above n.2, at p.174.

⁴¹ European Commission, *Interpretive Communication of the Commission on the Community Law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, COM(2001) 566, sec. 1.6 ("Commission Communication on Social Issues").

⁴² European Commission, *Interpretive communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*, COM(2001) 274, at Part II, section 1.2.

⁴³ Kunzlik, above n.2, at p.395. See also Kunzlik, P. 'Making the market work for the environment: acceptance of (some) "green" contract award criteria in public procurement' 15 *Journal of Environmental Law* 175.

not relate to the performance of the contract are thus not lawful.⁴⁴ However, it is arguable that some labour conditions, such as a condition prohibiting child labour, will be ineffective if limited purely to contract performance. Supporting measures, such as schemes promoting education for former child labourers, will also be required. Where this is the case, problems may arise in justification, since it will be hard to prove a measure limited to contract performance is "suitable" for attaining its objective.⁴⁵

Exclusion

Where a utility has set out contract conditions relating to its labour policies, it may wish to exclude any firm which it does not believe will comply with the condition, or who has failed to comply in the past, from the tendering process. The Utilities Directive states that firms may exclude firms "in accordance with objective rules and criteria".⁴⁶ Article 54(4) states that these objective criteria may include the criteria allowable under the Public Sector Directive. Under the public sector rules, a procuring entity may exclude a firm for lack of financial standing, lack of technical or professional ability, or for certain other specified reasons relating to the professional conduct of the firm, including holding any criminal convictions or being guilty of "grave professional misconduct".⁴⁷ It may also be noted that where the utility is classed as a public authority, they are *required* to exclude firms for the reasons set out in Article 45(1) of the Public Sector Directive, which covers convictions for certain criminal offences such as corruption or money laundering.

It is unclear, however, whether the discretion for excluding firms extends beyond the matters covered by the Public Sector Directive and, if so, how far it extends. The Commission's Communication on Social Issues notes that utilities have a wider discretion than the public sector when excluding firms, but does not discuss precisely how wide that

⁴⁴ See, for example, Arrowsmith, above n.20, p.1280.

⁴⁵ Arrowsmith and Maund, above n.7, p.447.

⁴⁶ Art. 54.

⁴⁷ Art. 45 Public Sector Directive.

discretion is.⁴⁸ Arrowsmith and Maund offer several possible interpretations of “objective criteria” which could be adopted by the ECJ, ranging from requiring exclusion to be done for reasons of commercial procurement and to be related to the particular contract (which would prevent exclusion for labour policy reasons), to allowing exclusion for any legitimate policy reason (which would allow exclusion for labour policy reasons).⁴⁹ The issue has not been examined by the ECJ and so remains unclear.

Qualification Systems

Unlike bodies in the public sector, utilities have the option of choosing possible tenderers on the basis of a qualification list. Under this system, possible suppliers are chosen on the basis of certain advertised criteria and future contracts may be limited to suppliers on the qualification system.⁵⁰ In the same way that utilities may use labour criteria to exclude firms for individual procurements, utilities may also use these criteria to exclude firms from the qualification system. Utilities may also choose to simply collect information from suppliers at the registration stage and exclude suppliers only for particular procurements.

It has been suggested that problems may arise from the fact that many qualification systems cover all contracts for those utilities, not only those which are regulated under the Utilities Directive’s rules.⁵¹ Even if utilities may exclude firms for labour-related considerations, it is unclear whether they may do so for registration to a scheme where it is possible that those criteria will only be relevant for a proportion of the contracts awarded under the system. Arrowsmith and Maund argue that, while it is unlikely that utilities may exclude firms only for reasons relevant to a particular type of contract, it is equally unrealistic to expect firms to ensure that every exclusion criterion is relevant to every procurement.⁵² Equally, where utilities do not exclude suppliers at registration but

⁴⁸ Commission Communication on Social Issues, above n.41, sec. 1.3.

⁴⁹ Arrowsmith and Maund, above n.7, pp.451-453.

⁵⁰ Art. 53 Utilities Directive.

⁵¹ Arrowsmith and Maund, above n.7, p.469-471.

⁵² *Ibid*, p.470.

merely collect information for later exclusion, it is unclear whether utilities may request information which will only be relevant for a proportion of the contracts.⁵³

Proving compliance with CSR considerations

Setting conditions relating to labour considerations in the contract and having the ability to exclude those who cannot comply will not aid the utility in practice if they cannot request the relevant information from the supplier in order to determine whether they can in fact comply. Unlike the rules under the Public Sector Directive, the Utilities Directive does not set out an explicit list of the types of evidence which may be requested. The Directive does, however, state that utilities may not impose any “administrative, technical or financial conditions” on certain companies but not others.⁵⁴ Utilities may wish to request additional evidence from firms operating from high-risk areas, which would appear to be prevented by this requirement. Equally, however, if utilities respond by requesting large amounts of evidence from all suppliers, they may be seen as imposing an unnecessary burden on companies which operate in low-risk areas.⁵⁵

IV. Future Research

The issues discussed above have been raised by various authors in doctrinal research, and their precise impact remains unclear. The issues identified may in fact cause no problems in practice and, conversely, it may be that utilities encounter practical problems on a regular basis which have not been identified in previous doctrinal research. In order to investigate the extent to which utilities are experiencing these problems in practice, empirical research will be conducted.

Qualitative Research

Empirical research may be split into two categories: qualitative and quantitative. Quantitative research focuses on collecting and interpreting numerical data and is best

⁵³ *Ibid.*

⁵⁴ Art. 52(1)(a) Utilities Directive.

⁵⁵ Arrowsmith and Maund, above n.7, p.466.

suitable to identifying broad trends over a population.⁵⁶ In contrast, qualitative research is “interested in the perspectives of participants, in everyday practices and everyday knowledge referring to the issue under study”.⁵⁷ It is traditionally associated with a focus on analysis of text rather than numbers and generally takes an interpretivist approach, aiming to understand the social world by examining the subjective interpretations of that world by the research participants.⁵⁸ The research emphasises depth and detail in data and can be used to gain information on concepts which are too complex to quantify accurately.⁵⁹ Given that this research focuses on personal experiences of applying the law, qualitative methodology has been chosen as the most suitable research methodology.

The Research Sample

Mason defines sampling and selection as “principles and procedures used to identify, choose, and gain access to relevant data sources”.⁶⁰ For this research, a form of purposive sampling will be used, based on the theoretical sampling used in grounded theory research.⁶¹ Under this method, rather than the sample being definitively decided at the beginning of the research, the sample evolves as the research is conducted. Potential interviewees will be chosen based on their relevance to the research questions and the developing theory.⁶² Theoretical sampling leads to an iterative process of data collection and data analysis in which the data analysed leads to refinement of the theory guiding future data collection. While the potential sample is very broad in the early stages of data collection when the theory is still fairly general, sampling will become more specific and focused as data collection continues.⁶³

⁵⁶ For more on quantitative research, see Bryman, A., *Social Research Methods*, (2nd Ed), (2004, Oxford: OUP), Chapters 3-12.

⁵⁷ Flick, U., *Designing Qualitative Research*, (2007, London: SAGE Publications), at p.2.

⁵⁸ Bryman, above n.56 at p.266.

⁵⁹ Mason, J., *Qualitative Researching*, (2nd Ed), (2002, London: SAGE Publications), at p.65.

⁶⁰ *Ibid*, at p.120.

⁶¹ For more on grounded theory, see Strauss, A. and Corbin, J., *Basics of Qualitative Research Techniques and Procedures for Developing Grounded Theory*, (2nd Ed), (1998, Thousand Oaks, Calif: SAGE Publications).

⁶² Mason, above n.59, at p.124.

⁶³ Strauss and Corbin, above n.61, at p.203.

The initial sample has been chosen on the basis of two main criteria. Firstly, the sample has been chosen so as to include at least some companies which have an interest in including CSR policies in their procurement. Secondly, companies have been chosen based on the need for diversity in the companies covered by the sample. This covers several requirements:

1. The need to cover all relevant legal regimes. This requires companies which are covered fully by the Utilities Directive, oil and gas companies which have obtained an exemption under Art. 3 of the previous directive, which are subject to a more flexible regime, and finally companies which have gained an exemption under Art. 30 of the current directive and are subject only to the rules under the EC Treaty.
2. The need to cover entities which operate in more than one of the legal regimes mentioned above.
3. The need to cover entities which operate in more than one region, including companies which operate in more than one EU member state and also companies which operate in countries outside the EU.
4. The need to cover both public and private companies.
5. The need to include companies which have moved from the public sector regime to the utilities regime.
6. The need to include both companies which use the joint qualification lists operated by Achilles Information Ltd, and companies which operate their procurement individually.

Based on these considerations, the initial sample will include utilities in the electricity and gas sectors, the water and sewerage sector and the postal services sector. The electricity and gas sector contains companies subject to full regulation (companies operating in the transmission and distribution sectors) and companies subject to partial

regulation (companies operating in the supply and generation sectors, which have an exception under Art. 30 of the Utilities Directive and companies operating in the oil and gas extraction sector, which have a partial exemption from the Utilities Directive). Both the water and electricity and gas sectors include companies which operate over more than one legal regime and within more than one geographical region. Finally, the postal services sector was included since it was, until 2004, regulated by the Public Sector Directive, and so allows an investigation into the effects of moving from a strict legal regime to a more flexible regime.

Data Collection

The empirical research will be conducted using semi-structured interviews. In semi-structured interviewing the researcher will have a brief interview guide which will allow key issues to be addressed in the interview, but the emphasis is on the input of the interviewee and this guide may be departed from if it becomes necessary.⁶⁴ This will allow the issues highlighted in the doctrinal research to be examined, but will also allow the practitioners to discuss the issues which they come across most in practice, which may not be the issues mentioned in the guide. The data collection process should hopefully be completed during the second year of the PhD.

V. Conclusion

As can be seen from the discussion above, the EC legal framework relating to the use of social policies lacks clarity and may constrain the possible use of such policies by utilities. Many of the problems raised have not been examined by the ECJ and their precise impact in practice remains unclear. It is hoped that the planned empirical research will reveal more about the use of labour policies and the impact of the EC legal framework in the UK utilities sector, aiding further discussion over the adequacy of the legal framework in this area.

⁶⁴ Bryman, above n.56, at p.320.