

**Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC****List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors <sup>(1)</sup> pursuant to Article 8 thereof**

(2004/C 115/03)

**(Text with EEA relevance)**

Directive 93/38/EEC is applicable in particular to contracts awarded by telecommunications operators; however its constraints are no longer justified where there is effective competition after the liberalisation of this sector. For this purpose Article 8 of the Directive lays down that where there is effective competition in the telecommunications services market, procurements for the provision of these services may be exempted from the scope of the Directive. In its Communication on public procurement in the European Union <sup>(2)</sup>, the Commission indicated that it would examine whether this Article could be applied.

In a Communication published on 3 June 1999 in the *Official Journal of the European Communities* <sup>(3)</sup>, the Commission provided, for information purposes, a list of telecommunications services regarded as excluded from the scope of Directive 93/38/EEC by virtue of Article 8 thereof. This list was based on the competitive situation, as referred to by the Court of Justice of the European Communities in its judgment of 26 March 1996 in Case C-392/93 *The Queen v. HM Treasury, ex parte British Telecommunications plc* <sup>(4)</sup>, in connection with the interpretation of the same article in the precedent directive <sup>(5)</sup>, which existed at that time. The Communication stated that the list would be updated according to developments in the conditions of effective competition in telecommunications markets in question.

Subsequently, the Commission submitted to the European Parliament and to the Council a proposal for a directive coordinating the procurement procedures of entities operating in the water, energy and transport sectors <sup>(6)</sup>. This proposal excluded the telecommunications sector as a relevant activity since it was no longer necessary to regulate purchases by entities operating in this sector. It was consequently proposed that the exclusion comes into force simultaneously in all Member States, since the Commission, when adopting its proposal in May 2000, was certain that rapid progress following liberalisation would continue and produce effects before the proposal could come into force.

The Commission also submitted to the European Parliament and to the Council a proposal for a directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts <sup>(7)</sup>. In view of the situation of effective competition in the telecommunications sector following the implementation of the Community rules aimed at liberalising that sector, public contracts relating to telecommunications are to be excluded from the scope of this Directive whenever they are awarded with the principal purpose of enabling contracting authorities to carry out specific activities in the telecommunications sector.

<sup>(1)</sup> OJ L 199, 9.8.1993, p. 84. Directive as last amended by Directive 98/4/EC (OJ L 101, 1.4.1998, p. 1).

<sup>(2)</sup> Public Procurement in the European Union, Communication of the Commission 11.3.1998, COM(98) 143 final.

<sup>(3)</sup> List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors pursuant to Article 8 thereof, Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC (OJ C 156, 3.6.1999, p. 3).

<sup>(4)</sup> [1996] ECR I-1631.

<sup>(5)</sup> Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 297, 29. 10. 1990, p. 1).

<sup>(6)</sup> Proposal for a directive of the European Parliament and the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors, COM(2000) 276 of 10 May 2000 (OJ C 29E, 30.1.2001, p. 112).

<sup>(7)</sup> Proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2000) 275 of 10 May 2000 (OJ C 29E, 30.1.2001, p. 11).

On 31 December 2000, the last additional implementation period granted to a Member State <sup>(1)</sup> for full liberalisation of the telecommunications market has elapsed, which now formally completes the liberalisation process in all 15 Member States.

Moreover, in its Sixth Report on the Implementation of the Telecommunications Regulatory Package <sup>(2)</sup>, the Commission noted the progress achieved by the Member States in implementing the legislative framework underpinning the full liberalisation of telecommunications markets. In particular, it noted that the national regulatory authorities are applying the key regulatory principles of the current framework and are active in opening up the market to competition. Liberalisation has now occurred in the telecommunications sector and effective competition exists in all Member States, as indicated in the annexes to the sixth report.

On 2 January 2001, the Regulation of the European Parliament and of the Council on unbundled access to the local loop <sup>(3)</sup> entered into force. This regulation sets out the obligations on notified operators and on national regulatory authorities to ensure the provision of unbundled access to the local loop in order to promote and to enforce further competition in voice telephony and data services. Its provisions are directly applicable in all 15 Member States.

In a notice published on 13 March 2002 in the *Official Journal of the European Communities* <sup>(4)</sup>, the Commission invited the contracting authorities in the telecommunications sector in Greece, Luxembourg and Portugal to inform it, under Article 8(2) of Directive 93/38/EEC, of which of the remaining telecommunications services they considered to be excluded from the scope of that Directive, pursuant to its Article 8(1), given that other entities were free to offer the same services in the same geographical area under essentially identical conditions <sup>(5)</sup>.

Since the regulatory framework for telecommunications had been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition, the European Parliament and the Council adopted a new regulatory framework for electronic communications networks and services <sup>(6)</sup>, which replaced the former one by 25 July 2003 <sup>(7)</sup> and 31 October 2003 <sup>(8)</sup> respectively.

On 31 March 2004, the European Parliament and the Council adopted the legislative package on public procurement <sup>(9)</sup>, which excludes telecommunications, as a sector now subject to effective competition, from the scope of the legislation <sup>(10)</sup>.

<sup>(1)</sup> Commission Decision 97/607/EC (OJ L 245, 9.9.1997, p. 6).

<sup>(2)</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2000) 814 of 7 December 2000.

<sup>(3)</sup> Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ L 336, 30.12.2000, p. 4).

<sup>(4)</sup> Notice to contracting authorities in the telecommunications sector in Greece, Luxembourg and Portugal (2002/C 64/07) (OJ C 64, 13.3.2002, p.10).

<sup>(5)</sup> One contracting entity from the Member States concerned replied to the Commission's invitation.

<sup>(6)</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108, 24.4.2002, p. 21); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

<sup>(7)</sup> Articles 26 to 28 of the Framework Directive.

<sup>(8)</sup> Article 19 in conjunction with Article 17(1) of the Directive on privacy and electronic communications.

<sup>(9)</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

<sup>(10)</sup> Articles 3 to 7 of Directive 2004/17/EC no longer include telecommunications as a relevant activity; see also Articles 13, 57 and 68 of Directive 2004/18/EC.

In view of the above, the Commission is publishing, for the purposes of information, the following list of telecommunications services regarded as excluded from the scope of Directive 93/38/EEC by virtue of Article 8 thereof. The list provides an update of the aforementioned communication according to developments in the conditions of effective competition in the telecommunications markets in question.

The effect of the applicability of Article 8(1) is that purchases for the provision of telecommunications services within all 15 Member States will no longer be subject to the detailed provisions of that Directive.

The categorisation of the services has been done to facilitate the task of analysing competition and to help industry understand the practical impact of telecommunications liberalisation on the application of procurement rules. Taken together, the Commission considers that these categories cover all of the telecommunications services referred to in Article 1(14) and (15) of Directive 93/38/EEC and comply with the terminology used in Art. 1(4)(c)(ii) of that Directive.

Categories of services exempted	Geographical areas concerned
Public fixed telephony	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)
Public mobile telephony	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)
Satellite services	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)
Transmission of data/value-added services (telephone cards, Internet, call-back connection)	All 15 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom)