

**DIRECTIVE 93/38 CEE
PROGRESSIVE EXCLUSION OF THE UTILITIES
UNICE POSITION PAPER**

1. General

The water, energy, transport and telecommunications sectors were excluded from the scope of the first directives on public procurement due to the specific position and *modus operandi* of these sectors. A special regime, defined initially by directive 90/531 and superseded later by directive 93/38 (and its further amendments), was put in place for these sectors and has been in force since January 1993.

In the sectors concerned, this directive is applicable to public authorities or public undertakings or to any other entity operating on the basis of special or exclusive rights granted by a competent authority of a Member State.

But, from its first publication, the directive made provision for the competitive situation prevailing or soon to prevail in certain of the sectors or sub-sectors: for that reason, air transport services and shipping services were excluded from the scope of the directive, while a special article was introduced to address the case of the telecommunications sector due to be deregulated in the following years.

Dramatic changes have occurred over the past decade, and mainly :

- total deregulation of the telecommunications sector and emergence of the information society;
- incipient deregulation of other sectors or sub-sectors: electricity, gas, railways;
- implementation of the hydrocarbon directive (directive 94/44 EC);
- signature and entry into force of GPA;
- globalisation of the equipment and services market for most of the sectors;
- in certain cases, total or partial privatisation of the utilities concerned.

UNICE, the voice of business in Europe, considers that the rules and procedures of the directive have had a significant effect on the development of non-discriminatory and efficient procurement by operators in the special sectors. However these rules and procedures may create unnecessary burdens for European operators and their suppliers when the sectors are deregulated and open to competition, especially in relation to their non-EU competitors who are not subject to equivalent regulation. This

situation handicaps European undertakings operating on the world market. The European Union rules also oblige operators to disclose their intentions for R&D and innovation which is unacceptable in a competitive environment for advanced technologies, being detrimental to both purchasers and their suppliers.

Deregulation of a sector or sub-sector, with or without the privatisation of the operators reduces substantially the direct or indirect influence of public authorities on these operators and may reduce or abolish the special or exclusive rights they have been granted. In such conditions the reasons why the entities were subject to the provisions of the directive disappear, the operators no longer being public purchasing entities within the meaning of the directive.

For these reasons UNICE recommends that deregulation of a sector or sub-sector should result in the phasing-out of this sector or sub-sector from the scope of the directive. This procedure should be applied straight away for the telecommunications sector, totally deregulated since 1 January 1998, and relevant provisions should be identified and prescribed for application in other sectors once they are deregulated.

2. Case of the telecommunications sector

This question arose for the first time in respect of the telecommunications sector. At the end of the 1980s, when directive 90/531 was being prepared, a specific article (article 8) waived application of the directive for services in competition.

Article 8, conceived and written more than ten years ago at a time when it was anticipated that deregulation of the telecommunications sector would be progressive and limited to certain services, is difficult to apply in the present context where deregulation has taken place very quickly and has been extended to the full sector.

The Commission raised the question in its November 1996 green paper and in its March 1998 communication recently approved by the Council. There has been a debate of exceptional intensity with most of the concerned parties arguing in favour of phasing-out the whole sector from the scope of the directive. UNICE fully supports these views and urges the Commission to publish interpretative guidelines on how to apply article 8 of the directive and to exclude the telecommunications sector from the directive. These guidelines should consider that the possibility of competition is sufficient to impose non-discriminatory and effective procurement.

3. Other sectors

As deregulation progresses in other sectors, a competitive environment will progressively be introduced and will require the further exemption of these sectors from the scope of the directive. UNICE believes that article 8 of the directive should be modified once the telecommunications sector is excluded from the directive, so as to be applicable to any sector or sub-sector where deregulation has created an effective competitive environment.

UNICE recommends that, ideally, the new article 8 should be applicable to sectors or sub-sectors at the level of the EU. A differentiated approach may be necessary for short transition periods where markets are opening up at different speeds.

Consequently, it is important to identify the proper provisions to be placed in a revised article 8 to allow exemption from the rules of the sectors of energy (electricity, gas, oil, etc.), transport (and mainly railways), and water when operating in a competitive environment. UNICE proposes that the following

principle forms the basis for the future article 8. *When certain sectors or sub-sectors of activity subject to the directive as a consequence of its articles 2 and 3 are operating in competition due to changes in their technical, economic or regulatory environment, they should be exempted from application of the rules and procedures specified by this directive. As an example, this could be the case when a Community act applicable on the territory of the EU has been transposed in the national legislation of the Member States, has come into force, and creates a competitive environment for the activity under consideration. In other cases, an assessment could be made on the basis of a common set of criteria defined at EU level and checked for each and every country.*

4. Implication of GPA

The GPA signed at Marrakesh in 1994 and in force since January 1996 opens the market of several of the above mentioned sectors or of certain of their sub-sectors to third-party countries which have signed the Agreement.

The Commission may face difficulties in restricting the scope of activities covered by the directive progressively as proposed above due to the commitments of the EU under GPA. Therefore UNICE also supports the exclusion of utilities operating under conditions of effective competition from the scope of GPA. Procurement by utilities operating in deregulated sectors is not similar to government procurement, and there is no reason why certain deregulated sectors should be exempt from application of the directive while others are not due only to the fact that they are subject to the rules and procedures of GPA.
