EXPLANATORY NOTE – UTILITIES DIRECTIVE

DEFINITION OF EXCLUSIVE OR SPECIAL RIGHTS[1]

1. The current Utilities Directive, Directive 93/38/EEC, and the new Utilities Directive, 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[2], apply to contracting authorities and public undertakings on two conditions, namely that the entity concerned carries on one of the activities referred to in the Directive and that the contract is awarded in respect of the pursuit of that activity. In the case of private undertakings, they fall within the scope only subject to the supplementary condition that they carry on the activity in question on the basis of exclusive or special rights within the meaning of the Directive. Hence the importance of this concept in determining the scope.

2. Article 2(3) of Directive 93/38/EEC defines the concept of exclusive or special rights as rights deriving from authorisations granted by a competent authority of the Member State concerned, by law, regulation or administrative action, having as their result the reservation for one or more entities of the exploitation of an activity. It is further provided that, "A contracting entity shall be considered to enjoy special or exclusive rights in particular where:

   (a) for the purpose of constructing the networks or the facilities referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway;

   (b) in the case of paragraph 2(a), the entity supplies with drinking water, electricity, gas or heat a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned".

3. In its Judgment of 12 December 1996, the Court of Justice[3] stated that it followed from Article 2 of Directive 94/46[4], which amends the definitions given by

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[1] This document corresponds to Document CC/2004/33 of 18.6.2004

[2] OJ L 134 of 30.4.2004, p. 1.

[3] The Queen v. Secretary of State for Trade and Industry, ex parte British Telecommunications plc, Case C-302/94, ECR 1996 I-8417.

[4] Commission Directive 94/46/EEC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268 of 19 October 1994, p. 15.

Directive 90/388[5] and repeated in Article 2(1) and (2) of Directive 90/387[6], and from the factual context in which Directives 90/387, 90/388 and 92/44[7] were adopted and their objectives, "that the exclusive or special rights in question must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide or operate telecommunications networks or to provide telecommunications services in the same geographical area under substantially equivalent conditions".

The Court of Justice added that exclusive or special rights for the provision of a public telecommunications network and, where applicable, public telecommunications services within the meaning of Article 2 of Directive 90/387 cannot be characterised by the possibility for the authorised telecommunications organisations to enjoy certain prerogatives, in particular the right to acquire land compulsorily, to enter land for exploratory purposes and to acquire land by agreement or to place network equipment in, over or under the public highway and to place apparatus on private land with the consent of the persons having an interest in that land, which consent can be dispensed with by the Court, inasmuch as such rights, "which are merely intended to facilitate the provision of networks by the operators concerned and are or may be conferred upon all those operators, do not give their holders any substantial advantage over their potential competitors".

It is true that the Judgment interprets the concept of "special or exclusive rights" only with regard to the Telecommunications Directives concerned, and this interpretation cannot be applied to the definition of such rights in other Directives if their text clearly shows that the Community legislator explicitly intended to give this concept a different scope, or where the legislative context of the definition is different. This is precisely the case with Directive 93/38/EEC. In the first place, the provisions of the current Article 2(3)(a) and (b) show clearly that the definition covers situations which, for the purposes of the Telecommunications Directives interpreted by the Court of Justice, do not amount to special or exclusive rights.

[5] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192 of 24 July 1990, p. 10.

[6] Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192 of 24 July 1990, p. 1.

[7] Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, OJ L 165 of 19 June 1992, p. 27.

It was, however, detrimental to have one and the same concept defined in two such different ways in Community legislation on the internal market in the broad sense. The definition was consequently amended in the new Utilities Directive.

4. The new Utilities Directive therefore introduces a new definition in Article 2(3) and interpretive elements in recital 25. These provisions are, respectively, as follows:

> "3. For the purposes of this Directive, special or exclusive rights mean rights which arise from a grant made by the competent authorities of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 3 to 7 to one or more entities, and which substantially affects the ability of other undertakings to carry out such activity on the same territory under substantially equivalent conditions.
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> (25) There has to be an appropriate definition of the concept of special and exclusive rights. The consequence of the definition is that the fact that, for the purpose of constructing the networks or the port or airport facilities, an entity may take advantage of a procedure for the expropriation of property, or for its bearing a right of way, or may place network equipment on, under or over the public highway shall not in itself constitute exclusive or special rights within the meaning of this Directive. Nor does the fact that an entity supplies drinking water, electricity, gas or heat to a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned constitute in itself an exclusive or special right within the meaning of this Directive. Similarly, rights granted by a Member State in whatever form, including by means of concession contracts, to a limited number of undertakings on the basis of objective, proportional and non-discriminatory criteria offering any interested party fulfilling them the possibility of enjoying such rights could not be considered to be exclusive or special rights."

5. The consequences of these changes are many. Firstly, the effect of this change in the definition will be that contracting entities which fall within the scope of Directive 93/38/EEC *solely* because they are considered to benefit from exclusive or special rights under Article 2(3)(a) or (b) will no longer be subject to the new Directive[8]. It will therefore no longer be possible to conclude the existence of exclusive or special rights solely on the basis of the activity pursued[9] – it will be necessary to analyse on a case-by-case basis whether the entity in question does or

[8] See the new recital 25, which is explicit on this.

[9] Under the current Directive, it is in effect unthinkable in practice that an entity might for example distribute electricity without having at least the right to install its pylons on public land.

does not possess rights "which substantially affect[s] the ability of other undertakings to carry out such activity on the same territory under substantially equivalent conditions". Under the regime of the new Directive, the analysis cannot, however, stop there – it will also be necessary to examine *how* the entity obtained the rights in question.

6. In effect, if the entity has obtained rights – even exclusive rights – to carry on one of the activities referred to in the Directive on the basis of "objective, proportional and non-discriminatory criteria", such rights do not constitute exclusive or special rights within the meaning of the new Utilities Directive. It is, however, necessary that the procedure used to grant the rights in question should take place after adequate publicity has been guaranteed – in effect, without such publicity it cannot be guaranteed that the criteria effectively open up to any interested party which fulfils them the possibility of obtaining the right in question. Therefore, whatever the legal basis for opening up competition – an invitation to tender under the Public Procurement Directives[10], opening up to competition ("Telaustria") of a services concession[11] or of the award of a services contract relating to a I/II B or XVI/XVII B service[12], or a procedure for granting authorisation under sectoral legislation[13] – if it is conducted on the basis of objective, proportional and non-discriminatory criteria, the private entities operating on the basis of such rights are not to be regarded as contracting entities within the meaning of the new Utilities Directive.

7. Of course it is still possible for private entities to continue to have exclusive or special rights – even after the new definition applies. Firstly, private undertakings

[10] For example, an award procedure under the Services Directive, 92/50/EEC, or the current Utilities Directive for the award of a contract for the operation of a bus transport service in a specified city or an invitation to tender under the new classic Directive to grant a works concession for the construction and management of an aqueduct … .

[11] For example, for the management of a maritime port.

[12] For example, for the operation of a railway line.

[13] Examples which may be cited: granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas; authorisation or an invitation to tender for the construction of new electricity production installations in accordance with the provisions of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity; the granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service of authorisation in relation to a postal service which is not or may not be reserved, or a procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 90/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons.

may have received their rights without any opening up to competition[14] or public undertakings which were simply created to carry on one of the activities referred to by the Directive may change their status from that of public undertaking to that of private undertaking[15].

8. To conclude, the existence of exclusive or special rights within the meaning of the new Utilities Directive must be subjected to examination on a case-by-case basis.

[14] For example, if an affiliated undertaking receives a contract to carry on one of the activities referred to in the Directive on the basis of the "intra-group" exception provided for in Article 23 of the new Utilities Directive or it has received it under Article 13 of Directive 93/38/EEC.

[15] That is, an undertaking over which the contracting authorities cannot (or can no longer) exert a dominant influence within the meaning of Article 2(1)(b) of the new Utilities Directive (or Article 1(2) of Directive 93/38/EEC).