

Case C-324/98

Telaustria Verlags GmbH

and

Telefonadress GmbH

v

Telekom Austria AG, formerly Post & Telekom Austria AG

(Reference for a preliminary ruling  
from the Bundesvergabeamt (Austria))

(Public service contracts — Directive 92/50/EEC —  
Public service contracts in the telecommunications sector —  
Directive 93/38/EEC — Public service concession)

Opinion of Advocate General Fennelly delivered on 18 May 2000 . . . . I-10747  
Judgment of the Court (Sixth Chamber), 7 December 2000 . . . . I-10770

Summary of the Judgment

*Approximation of laws — Public procurement procedures of entities operating in the water, energy, transport and telecommunications sectors — Directive 93/38 — Scope — Contract for pecuniary interest concluded in writing between a contracting authority and a private undertaking for the provision of public telecommunication services — Included — Consideration consisting in an exploitation right — Excluded — Obligations of the contracting entities  
(Council Directive 93/38)*

Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories).

However, although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

Notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38,

the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

(see paras 58, 60-63, and operative parts 1-4)