# JUDGMENT OF THE COURT (Third Chamber)

6 April 2006 *

In Case C-428/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 October 2004,

**Commission of the European Communities,** represented by N. Yerrell and H. Kreppel, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Republic of Austria,** represented by C. Pesendorfer, acting as Agent,

defendant,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, S. von Bahr, A. Borg Barthet and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2005,

gives the following

## Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that,

— by failing to adopt, notwithstanding the expiry of the period prescribed, the Law on the Rules governing Teachers in the Länder (the Landeslehrer-Dienstrechtsgesetz, BGBl. I, 69/2004; 'the LDG'), the Law on Public Servants', Sickness and Accident Insurance Schemes (Beamten-, Kranken- und Unfallversicherungsge-

setz, BGBl. 200/1967; 'the B-KUVG') and the Law on General Social Security Schemes (the Allgemeines Sozialversicherungsgesetz; 'the ASVG'), which purport to transpose into Austrian law Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p.1) ('the Directive'), or, in the event that those laws have since been adopted, by failing to notify them to the Commission;

— by failing to transpose, or to transpose in full, into Austrian law Article 2(1), in respect of compulsory education teachers in the Tyrol, and Articles 7(3), 8(2), 11(2), 12(4) and 13(2)(a) and (b) of the Directive,

the Republic of Austria has failed to fulfil its obligations under those provisions and under Article 18 of that directive.

**Relevant provisions**

*Community legislation*

2 Under Article 2(1) of the Directive:

'This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).'

3 Article 7 of the Directive, entitled 'Protective and preventive services', provides:

'1. Without prejudice to the obligations referred to in Articles 5 and 6, the employer shall designate one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and/or establishment.

...

3. If such protective and preventive measures cannot be organised for lack of competent personnel in the undertaking and/or establishment, the employer shall enlist competent external services or persons.

...

7. Member States may define, in the light of the nature of the activities and size of the undertakings, the categories of undertakings in which the employer, provided he is competent, may himself take responsibility for the measures referred to in paragraph 1.

...'

4 Article 8(1) and (2) of the Directive read as follows:

'1. The employer shall:

— take the necessary measures for first aid, fire-fighting and evacuation of workers, adapted to the nature of the activities and the size of the undertaking and/or establishment and taking into account other persons present,

— arrange any necessary contacts with external services, particularly as regards first aid, emergency medical care, rescue work and fire-fighting.

2. Pursuant to paragraph 1, the employer shall, inter alia, for first aid, fire-fighting and the evacuation of workers, designate the workers required to implement such measures.

The number of such workers, their training and the equipment available to them shall be adequate, taking account of the size and/or specific hazards of the undertaking and/or establishment.'

5 Under Article 10 of the Directive:

'1. The employer shall take appropriate measures so that workers and/or their representatives in the undertaking and/or establishment receive, in accordance with national laws and/or practices which may take account, inter alia, of the size of the undertaking and/or establishment, all the necessary information concerning:

(a) the safety and health risks and protective and preventive measures and activities in respect of both the undertaking and/or establishment in general and each type of workstation and/or job;

(b) the measures taken pursuant to Article 8(2).

2. The employer shall take appropriate measures so that employers of workers from any outside undertakings and/or establishments engaged in work in his undertaking and/or establishment receive, in accordance with national laws and/or practices, adequate information concerning the points referred to in paragraph 1(a) and (b) which is to be provided to the workers in question.

3. The employer shall take appropriate measures so that workers with specific functions in protecting the safety and health of workers, or workers' representatives

with specific responsibility for the safety and health of workers shall have access, to carry out their functions and in accordance with national laws and/or practices, to:

(a) the risk assessment and protective measures referred to in Article 9(1)(a) and (b);

(b) the list and reports referred to in Article 9(1)(c) and (d);

(c) the information yielded by protective and preventive measures, inspection agencies and bodies responsible for safety and health.'

6 Article 11(2) of the Directive provides:

'Workers or workers' representatives with specific responsibility for the safety and health of workers shall take part in a balanced way, in accordance with national laws and/or practices, or shall be consulted in advance and in good time by the employer with regard to:

...

(b) the designation of workers referred to in Articles 7(1) and 8(2) and the activities referred to in Article 7(1);

(c) the information referred to in Articles 9(1) and 10;

(d) the enlistment, where appropriate, of the competent services or persons outside the undertaking and/or establishment, as referred to in Article 7(3);

...'

7 Under Article 13 of the Directive:

'1. It shall be the responsibility of each worker to take care as far as possible of his own safety and health and that of other persons affected by his acts or omissions at work in accordance with his training and the instructions given by his employer.

2. To this end, workers must in particular, in accordance with their training and the instructions given by their employer:

(a) make correct use of machinery, apparatus, tools, dangerous substances, transport equipment and other means of production;

(b) make correct use of the personal protective equipment supplied to them and, after use, return it to its proper place;

...'

8 Under Article 18(1) of the Directive, the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply therewith by 31 December 1992 and to inform the Commission thereof forthwith.

*National legislation*

9 The Directive was transposed into Austrian law by, inter alia, the Federal Law on Safety and Health at Work (Bundesgesetz über Sicherheit und Gesundheitsschutz bei der Arbeit (ArbeitnehmerInnenschutzgesetz), in the version published in BGBl. I, 159/2001 ('the ASchG').

10 Paragraph 11 of the ASchG reads as follows:

'...

(5) The persons responsible for safety must be informed before the designation or removal of safety representatives, occupational physicians and persons in charge of first aid, fire-fighting and the evacuation of workers. Such designation or removal

must be the subject-matter of consultations with the persons responsible for safety unless workers' representative bodies have been set up or the appointment or removal is decided by the committee for the protection of workers.

(6) Where there is no workers' representative body, employers are required to:

1. consult the persons responsible for safety, when planning and introducing new technologies, concerning the effects on the safety and health of workers associated with the choice of equipment or substances, reform of working conditions and the impact of environmental factors at work;

2. involve the persons responsible for safety in choosing personal protective equipment and

3. involve the persons responsible for safety in researching and assessing risks and drawing up appropriate measures and in planning and organising training.

(7) Employers are required to:

1. ensure that the persons responsible for safety have access to documents concerning safety and the protection of health and to information and reports on accidents at work;

2. make the following documents available to the persons responsible for safety:

   (a) documents concerning the information referred to in Paragraph 3(2);

   (b) readings of levels of dangerous substances, noise and other measurements and studies concerning safety and the protection of health and

   (c) records relating to substances and noise;

3. inform immediately the persons responsible for safety of any excessive levels, the causes of those levels and measures taken to remedy them and

4. inform the persons responsible for safety concerning obligations, instructions and authorisations in relation to the protection of workers.

...'

11 Under Paragraph 12(7) of the ASchG, where no persons responsible for safety have been designated or workers' representative bodies set up, all workers must be informed of all the matters listed in Paragraph 11(7) of that law and have available to them all the documents cited in that provision.

12 Paragraph 13(2) of the ASchG provides that, where there are no persons responsible for safety designated or workers' representative bodies, all workers must be consulted and involved in all the matters listed in Paragraph 11(5) and (6) of that law.

13 Paragraph 15 of the ASchG provides that workers are required, in accordance with their training and the instructions given by their employer, to make correct use of tools and the personal protective equipment which is supplied to them and complies with that law.

14 Paragraph 25 of the ASchG provides that employers are to designate, where necessary, persons responsible for fire-fighting and the evacuation of workers. It also provides that an adequate number of workers must be able to use fire extinguishers.

15 Under Paragraph 26 of that law, where five or more workers are habitually employed in one place by an employer, an adequate number of persons responsible for first aid must be designated. That paragraph also provides that those persons must have sufficient training to administer first aid and that it is necessary to ensure that, during working hours, there is an adequate number of persons present in the undertaking capable of administering first aid with respect to the number of workers habitually present in that place.

16 Paragraph 73(1) of the ASchG reads as follows:

'Employers must designate safety representatives. That obligation may be met:

1. by employing safety representatives under contract (in-house safety representatives) or

2. by having recourse to external safety representatives or

3. by using the services of a safety centre.

...'

17 Under Paragraph 79(1) of the ASchG :

'Employers must designate occupational physicians. That obligation may be met:

1. by employing occupational physicians under contract (in-house occupational physicians) or

2. by having recourse to external occupational physicians or

3. by using the services of an accredited occupational health centre.

...'

18 Under Paragraph 10(3) of the Federal Law on the Safety and Health Protection of Servants employed in Federal Departments (Bundesgesetz über Sicherheit und Gesundheitsschutz der in Dienststellen des Bundes beschäftigten Bediensteten (Bundes-Bedienstetenschutzgesetz) in its version published in the BGBl. I, 131/2003 ('the B-BSG'), the designation of persons responsible for safety requires the agreement of the competent body on the representation of personnel pursuant to Paragraph 10 of the Federal Law on the Representation of Personnel (Bundes-Personalvertretungsgesetz, BGBl. 133/1967). Such a requirement also applies when a personnel representative carries out the duties of a person responsible for safety.

19 Paragraph 11 of the B-BSG reads as follows:

'...

(2) Persons responsible for safety are not bound by any instructions in the exercise of their tasks governed by federal law.

...

(4) The employer shall be required to consult the persons responsible for safety on all matters regarding safety and health protection.

(5) Persons responsible for safety must be informed before the designation or removal of safety representatives, occupational health centres and persons in charge of first aid, fire-fighting and the evacuation of workers. The designation or removal provided for must be the subject-matter of consultations with persons responsible for safety unless workers' representative bodies exist.

(6) The employer shall be required to:

1. ensure that the persons responsible for safety have access to documents concerning safety and health protection and to information and reports on accidents at work;

2. make the following documents available to the persons responsible for safety:

   (a) documents concerning the information listed in Paragraph 3(2);

   (b) readings of levels of dangerous substances, noise and other measurements and studies concerning safety and health protection, and

(c) records relating to substances and noise;

3. inform immediately the persons responsible for safety of any excessive levels, the causes for those levels and measures taken to remedy them and

4. inform the persons responsible for safety concerning obligations, instructions and authorisations in relation to the protection of workers.'

20 Paragraph 12(6) of the B-BSG provides that communication of information to each member of staff under points 1, 2, 4 and 5 of that paragraph may not take place when persons responsible for safety are appointed or there are staff representatives who have been informed as a consequence and the information provided to them is sufficient to ensure effective risk prevention. Paragraph 12(6) provides that account must be taken in that regard of the content and objective of information and of the existing risks and characteristics of the service.

21 In accordance with Paragraph 13(1) of the B-BSG, employers are required to consult employees on all matters regarding safety and health at work.

22 Under Paragraph 15(2) of the same law, employees are required, in accordance with their training and the instructions given by their superiors, to make correct use of tools and the personal protective equipment which is supplied to them and complies with that law.

23 Paragraph 25(4) of the B-BSG provides that employers must designate, where necessary, persons responsible for fire-fighting and the evacuation of workers. It also provides that an adequate number of workers must be able to use fire extinguishers.

24 Under Paragraph 26(3) of the B-BSG, where five or more workers are habitually employed in one place by the employer, an adequate number of persons responsible for first aid must be designated. Those persons must have sufficient training to administer first aid. It also provides for the need to ensure that, during working hours, there is an adequate number of persons present in the undertaking capable of administering first aid with respect to the number of workers habitually present in that place.

25 Paragraph 73 of the B-BSG provides:

'(1) Employers must designate safety representatives (work safety experts) for services falling within the competence of that federal law. That obligation may be met:

1. by employing safety representatives under contract (in-house safety representatives) or

2. by having recourse to external safety representatives or

3. by using, in accordance with Paragraph 75 of the [ASchG], the services of a safety centre which is on the current list of such centres drawn up by the Federal Ministry of Employment, Health and Social Affairs.

...'

26 Under Paragraph 76(1) of the B-BSG, employers are to arrange for a medical service provided by occupational physicians for the departments falling within that law. Under Paragraph 77(1) thereof, the occupational health centre has the task, first, of advising employers, employees, the persons responsible for safety and the competent workers' representative body on health protection, promotion of health in connection with working conditions, reform of working conditions adapted to workers and, secondly, of supporting employers in complying with their obligations in those areas.

27 Paragraph 41(1) of the Order of the Land of Vienna concerning Workplaces in the Agricultural and Forestry Sectors (Wiener Arbeitsstättenverordnung in der Land- und Forstwirtschaft, LGBl. of 3 July 2003, 27/2003 ('the Order of the Land of Vienna') provides that where five or more workers are habitually employed in one place at the same time by an employer, it must be ensured that a minimum number of persons are trained to administer first aid.

## Pre-litigation procedure

28 Following a first exchange of correspondence between the Austrian authorities and the Commission, legislation designed to transpose the Directive into national law was notified to the latter.

29 On 12 January 1998, the Commission sent a letter of formal notice to the Republic of Austria concerning the points of the Directive which, in its view, had not yet been transposed into national law. The Austrian authorities replied by letter of 15 April 1998.

30 In a second exchange of correspondence between those authorities and the Commission, the latter requested clarification and more information relating to the adoption of draft laws intended to transpose the Directive and the Republic of Austria notified it of various measures adopted in that regard.

31 On 19 December 2002, the Commission addressed a reasoned opinion to the Republic of Austria under Article 226 EEC, calling upon that Member State to adopt the measures necessary to ensure the correct transposition of the Directive into national law within a period of two months of notification of that opinion.

32 Following notification by the Austrian authorities of other measures implementing the Directive, the Commission took the view that the Republic of Austria had not adopted all the measures necessary to implement that directive and decided to bring the present action.

## The action

33 In its application, the Commission puts forward seven grounds for complaint in support of its action for failure to fulfil obligations. The first complaint alleges infringement of Article 18 of the Directive in so far as the Republic of Austria did

not adopt the measures necessary to comply with that directive within the period prescribed or, in any event, failed to communicate those measures.

34 The other complaints allege infringement of several specific provisions of the Directive. The Commission considers that the legislative measures notified to it do not implement the Directive or result in inadequate implementation of it. However, in its reply, the Commission withdrew the complaint relating to infringement of Article 12(4) of the Directive, so that there is no longer any need to examine it.

*The first complaint: infringement of Article 18(1) of the Directive*

Arguments of the parties

35 In its application, the Commission submitted that, by failing to adopt, within the period prescribed, the LDG, the B-KUVG and the ASVG to transpose the directive into national law, or, in any event, by failing to notify it of those measures, the Republic of Austria has failed to fulfil its obligations under Article 18(1) of the Directive. In its reply, the Commission stated that it withdrew that complaint so far as concerns the B-KUVG and the ASVG.

36 The Austrian Government submits that the Directive was fully transposed into national law. It refers, in particular, to the LDG, which was notified to the Commission on 10 September 2004.

Findings of the Court

37 It is common ground that, as regards a number of obligations arising from the Directive, the Republic of Austria complied with the Directive only when it adopted the LDG.

38 However, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, in particular, Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8, and Case C-510/04 *Commission* v *Belgium* [2005] not published in the ECR, paragraph 7).

39 In this case, since the period prescribed expired on 19 February 2003 and the LDG came into force on 1 September 2004 and was notified to the Commission on 10 September 2004, it must be declared that the Republic of Austria has failed to fulfil its obligations under Article 18(1) of the Directive. The first complaint is therefore well founded.

*The second complaint: infringement of Article 2(1) of the Directive*

Arguments of the parties

40 The Commission notes that the Directive, which concerns the introduction of measures to encourage improvements in the safety and health of workers at work,

applies to all sectors of activity, both public and private. However, Article 2(1) of that Directive has yet to be transposed in respect of teachers in public sector compulsory education schools in the Tyrol.

41 The Austrian Government submits that Article 2(1) was transposed for the entire federal territory by the LDG and that that provision is, therefore, applicable to those teachers.

Findings of the Court

42 As stated in paragraph 39 of this judgment regarding the first complaint put forward in the action, the LDG was not adopted within the period set in the reasoned opinion of 19 December 2003.

43 Accordingly, it must be concluded that the second complaint is well founded.

*The third complaint: infringement of Article 7(3) of the Directive*

Arguments of the parties

44 Under Article 7(1) of the Directive, the employer is to designate one or more workers to carry out activities related to protection against and prevention of

occupational risks if he has personnel qualified to carry out those tasks. The Commission claims that Article 7(3), which provides that the employer is to enlist competent external services or persons, applies only if the employer does not have competent personnel to perform such activities within the undertaking and/or establishment.

45 However, Paragraphs 73(1) and 79(1) of the ASchG allow employers to entrust activities related to protection and prevention to either competent internal or external services. So far as concerns Federal employees, Paragraph 73 of the B-BSG also allows the employer to entrust safety and prevention tasks to either its own representatives or external experts, or to a safety centre. Paragraph 76 of that law provides for exclusive recourse to occupational health centres for the provision of medical care.

46 The Commission takes the view that, by leaving employers free to choose between internal or external safety agents to provide services related to the prevention of occupational risks, the Austrian legislation does not correctly transpose Article 7(3) of the Directive.

47 The Austrian Government submits that the question whether the resources of the undertaking or establishment are sufficient to take care of those matters internally depends not only on the size and nature of the undertaking, but also on considerations of company law and the law relating to the exercise of manual trade, commerce and industry professions in addition to employment law and social law factors. Above all, account must also be taken of the existing structure of Austrian undertakings and the fact that 96.7% of those employ less than 50 employees. Since undertakings in Austria essentially comprise small and medium-sized undertakings, it is fairly rare to call on in-house services in relation to the prevention of

occupational risks. In those circumstances, the employer is given freedom of choice in covering the exceptional cases in which, on account of particular circumstances, the undertaking has sufficient competent internal services to entrust prevention tasks to persons chosen within that undertaking. The provisions of the ASchG referred to by the Commission are therefore compatible with Article 7(3) of the Directive.

48 As regards federal employees, the Austrian Government maintains that the fact that the Federal State, as an employer, accords priority to the internal prevention of risks is apparent from Paragraph 73(1) of the B-BSG, under which prevention services may be provided by competent internal services in federal bodies having the necessary skilled personnel. However, on the date on which that law was adopted, the Federal State did not have personnel with the necessary skills and, for federal bodies, the services of external occupational health centres were enlisted to take care of public employees.

Findings of the Court

49 Article 7(1) of the Directive imposes a principal obligation on the employer, which is to designate one or more workers to carry out activities related to the protection and prevention of occupational risks. Article 7(3) provides for the obligation to enlist competent external persons or services (Case C-49/00 *Commission* v *Italy* [2001] ECR I-8575, paragraph 23). However, as the Court has already held, that obligation is merely subsidiary to that laid down in Article 7(1), since it arises only 'if such protective and preventive measures cannot be organised for lack of competent personnel in the undertaking and/or establishment' (see Case C-441/01 *Commission* v *Netherlands* [2003] ECR I-5463, paragraph 20).

50 Article 7 of the Directive therefore places the obligations imposed on employers in an order of precedence (see *Commission* v *Netherlands*, cited above, paragraph 21).

51 That interpretation is supported by the wording of Article 11(2) of the Directive, which refers, in (b), to the designation of workers provided for in Article 7(1) of that directive and, in (d), to the enlistment, provided for in Article 7(3), of competent external services while adding, in respect of the latter reference only, the phrase 'where appropriate' (see *Commission* v *Netherlands*, cited above, paragraph 22).

52 In order to ensure full applicability of the Directive in a clear and precise manner, its transposition into the national law of the Member States must reflect the order of precedence laid down in Article 7 of the Directive (see *Commission* v *Netherlands*, cited above, paragraph 23).

53 As the Court has also held, since the aim of the Directive is to promote the balanced participation of employers and workers in activities related to protection against and prevention of occupational risks, it is therefore by giving precedence to the organisation of such activities within the undertaking that the effectiveness of the Directive can be ensured to the greatest possible extent. Allowing employers to choose between the organisation of such activities within the undertaking or the enlistment of competent external services does not contribute to ensuring the effectiveness of the Directive but constitutes a failure to fulfil the obligation to ensure its full applicability (see *Commission* v *Netherlands*, cited above, paragraphs 54 and 55).

54 It follows that, by allowing employers to choose between entrusting activities related to protection against and prevention of occupational risks to either competent

internal or external services, the Austrian legislation does not comply with the order of precedence of the obligations which are imposed on employers under Article 7(1) and (3) of the Directive, in such a way that that legislation is not compatible with those provisions. The third complaint is therefore well founded.

*The fourth complaint: infringement of Article 8(2) of the Directive*

Arguments of the parties

55 The Commission claims that Article 8(2) of the Directive, under which the employer is to designate the workers required to implement measures for first aid, fire-fighting and the evacuation of workers, is unconditional and does not allow any exception for small undertakings as regards the designation of those workers. Unlike Article 8(1), which takes into consideration the nature of the activities and the size of the undertaking and/or establishment and pursuant to which those factors are decisive in the adoption of the necessary measures, the first subparagraph of Article 8(2) imposing on employers the obligation to designate workers does not contain any reference to those factors.

56 The Commission submits that Article 8(2) of the Directive is not correctly or fully transposed either in the ASchG or the B-BSG, or in the Order of the Land of Vienna, on account of the fact that that national legislation provides for exceptions for small undertakings in breach of that provision of the Directive.

57 The Austrian Government submits that the reference in Article 8(2) of the Directive to Article 8(1) relates to the types of measures necessary for first aid, fire-fighting and evacuation of workers, adapted to the nature of the activities and the size of the undertaking. In its opinion, it follows that Article 8(2) does not provide that the employer must, in all cases, designate workers responsible for first aid, fire-fighting and evacuation irrespective of the size of the undertaking and the nature of its activities. It should do that taking account of those factors. In those circumstances, the Austrian Government takes the view that the provisions of the ASchG, the B-BSG and the Order of the Land of Vienna are compatible with Article 8(2).

Findings of the Court

58 Article 8(1) of the Directive provides that the employer is to take the necessary measures for first aid, fire-fighting and evacuation of workers, adapted to the nature of the activities and the size of the undertaking and/or establishment and taking into account other persons present.

59 Under the first subparagraph of Article 8(2), the employer is, inter alia, to designate the workers required to implement those measures pursuant to paragraph (1).

60 Unlike the interpretation supported by the Austrian Government, the reference in the first subparagraph of Article 8(2) of the Directive to Article 8(1) thereof does not

mean that the employer's obligation of designation is subject to the nature of the activities and the size of the undertaking and/or establishment.

61 Such a restriction on the obligation of designation is not apparent from the wording of the first subparagraph of Article 8(2) of the Directive, which does not refer to any exception or restriction based on the nature of the activities or the size of the undertaking and/or establishment.

62 Such a restriction would, moreover, run counter to the objective of the Directive which, as is evident from the title itself, is to seek to ensure the introduction of measures to encourage improvements in the safety and health of workers at work, and would unjustifiably reduce its scope since, under Article 2(1) thereof, it applies to all sectors of activity, both public and private, subject solely to the derogations for which it expressly provides. That restriction would mean that the obligation of designation laid down in the first subparagraph of Article 8(2) would apply only to large undertakings and establishments or to those carrying on certain activities, without the provision of clear and objective criteria to identify them.

63 The aim of the Directive is not only to improve the protection of workers against accidents at work and the prevention of occupational risks; it is also intended to introduce specific measures to organise that protection and prevention. It thus states a number of means regarded by the Community legislature as being suitable to facilitate achievement of the set purpose (*Commission* v *Netherlands*, cited above,

paragraph 38). If the latter had intended to limit the scope of the first subparagraph of Article 8(2) of the Directive by providing, in respect of undertakings of a given size or carrying on certain activities, for a restriction on the obligation of designation of workers responsible for the activities in question, it would have stated so expressly.

64 It is true that it is possible to take into consideration the scale or the size of the undertaking and/or establishment, as well as the nature of the activities carried on in it, in order to delineate the factors covered by the requirements in the first subparagraph of Article 8(2) of the Directive, but not so as to exclude without more the designation of workers responsible for activities related to the protection and prevention in question.

65 The second subparagraph of Article 8(2) of the Directive expressly provides that the number of the workers designated under the first subparagraph of that provision, their training and the equipment available to them is to be adequate, taking account of the size and/or specific hazards of the undertaking and/or establishment. Accordingly, although those factors may be chosen to decide upon the training and number of the workers designated and the equipment available to them, they may not be taken into consideration to determine whether there is an obligation of designation pursuant to the first subparagraph.

66 The first subparagraph of Article 8(2) therefore provides for a mandatory measure concerning first aid, fire-fighting and the evacuation of workers, namely, the designation of persons responsible, which is regarded as necessary, irrespective of the nature of the activities and the size of the undertaking and/or establishment. Although it is clear that small and medium undertakings have their own

characteristics and specific needs which may influence the necessary measures to be adopted in accordance with Article 8(1) of the Directive, those specific features do not affect the intrinsic level of risk in the undertaking and it cannot be inferred from them that the obligation of designation of workers required to implement the measures in question is not applicable to such undertakings. The tasks which those workers are required to carry out concern events which may occur in workplaces, irrespective of the size of the undertaking and/or establishment.

67 It must therefore be concluded that, by not providing, in all cases, that the employer is under an obligation to designate workers responsible for first aid, fire-fighting and the evacuation of workers, irrespective of the size of the undertaking and/or establishment and the nature of the activities carried on in them, the Austrian legislation is incompatible with the first subparagraph of Article 8(2) of the Directive and, accordingly, the fourth complaint is well founded.

*The fifth complaint: infringement of Article 11(2) of the Directive*

68 The Commission states that Article 11(2) of the Directive is fully transposed into Austrian law, except for the obligation of participation and consultation referred to in point (c) of that provision with regard to the information referred to in Article 10(1)(a), (2) and (3)(c) of the Directive. As regards Article 11(2)(d) of that directive, it takes the view that Austrian law makes no provision for an obligation of participation and consultation in the event of the enlistment of competent external services provided under Article 7(3) of the Directive.

Transposition of Article 11(2)(c) of the Directive

69 First of all, it should be borne in mind, as stated in paragraphs 49 to 53 of this judgment, that under Article 7(1) of the Directive the employer is to designate one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and/or establishment. Article 7(3) also provides for the obligation to enlist competent external services, which, however, is a secondary obligation in relation to the obligation stated in Article 7(1), since it only exists 'if such protective and preventive measures cannot be organised for lack of competent personnel in the undertaking and/or establishment'.

70 Under Article 11(2) of the Directive, workers or workers' representatives with specific responsibility for the safety and health of workers are to take part in a balanced way, in accordance with national laws and/or practices, or are to be consulted in advance and in good time by the employer with regard, inter alia, to:

— the information referred to in, inter alia, Article 10 of the Directive [Article 11 (2)(c)],

— the enlistment, where appropriate, of the competent services or persons outside the undertaking and/or establishment, as referred to in Article 7(3) [Article 11(2)(d)].

71 The obligation of participation and consultation referred to in Article 11(2)(c) of the Directive covers the following information, which is specified in Article 10 of the Directive:

— that which must be provided to workers and/or their representatives concerning the safety and health risks and protective and preventive measures and activities in respect of both the undertaking and/or establishment in general and each type of workstation and/or job [Article 10(1)(a)];

— that which must be provided by the employer to employers of workers from any outside undertakings and/or establishments engaged in work in the undertaking and/or establishment of the employer [Article 10(2)] and

— that to which workers or workers' representatives with specific functions in protecting the safety and health of workers must have access to carry out their functions, including the information yielded by protective and preventive measures, inspection agencies and bodies responsible for safety and health [Article 10(3)(c)].

72 It must, however, be stated that the Commission's complaint alleges infringement not of the obligation to provide information referred to in Article 10 of the Directive, but of the employers' obligation to consult workers or workers' representatives referred to in Article 11(2) of the Directive or to allow them to take part in obtaining that information. At issue is therefore the infringement of an obligation arising at an earlier stage than that at issue in Article 10.

73 As regards, first, the obligation of participation and consultation concerning the information referred to in Article 10(1)(a) of the Directive, the Austrian Government submits that, in accordance with, inter alia, the provisions of the Federal Law governing employment relationships and the labour structure of undertakings (Arbeitsverfassungsgesetz; 'the ArbVG'), the works committee must take part in the research on and assessment of risks and the determination of the measures to be adopted and that, in the absence of workers' representative bodies, that task is carried out by persons responsible for safety, in accordance with the relevant provisions of the ASchG. If neither of those two categories of persons is present in the undertaking and/or establishment, all the workers must be consulted and take part in the research on and assessment of risks and the determination of the measures to be adopted. The research on and assessment of risks and the determination of measures must be carried out with reference to the type of work station concerned, where that is necessary for reasons connected with the prevention of risks. According to the Austrian Government, those tasks presuppose the consultation and participation of workers so far as concerns information arising from activities related to protection and prevention of risks.

74 In that regard, the 11th and 12th recitals in the preamble to the Directive show that the objectives of the latter include a dialogue and balanced participation between employers and workers with a view to adopting the measures necessary for the protection of workers against accidents at work and occupational diseases (see *Commission* v *Netherlands*, cited above, paragraph 39). Article 11(2) of the Directive is a concrete expression of that objective.

75 As regards the measures adopted by the Republic of Austria to transpose Article 11(2)(c), it must be noted that the reference in the Austrian legislation, in turn, to the works committee, to the persons responsible for safety and to workers in general as having to take part in the research on and assessment of risks may mean, in a situation in which there is a workers' representative body such as the works

committee, that the workers responsible for activities related to protection and prevention, who are precisely those referred to in Article 7(1) of the Directive, do not take part in that research on information, as Article 11(2)(c) of the Directive requires.

76 Admittedly, Article 11(1) of the Directive provides for a general obligation on employers to consult workers and/or their representatives and to allow them to take part in discussions on all questions relating to safety and health at work. However, Article 11(2) refers to the participation and consultation of a particular group of workers, namely those with specific responsibility for the safety and health of workers.

77 However, it is not apparent from the relevant provisions of Austrian law that the persons who carry out activities related to the protection of safety and health of workers enjoy any specific, special position so far as concerns the consultation or balanced participation with regard to the information referred to in Article 10(1)(a) of the Directive, so that that limb of the Commission's complaint relating to Article 11(2)(c) must be regarded as well founded.

78 It must be added that, by providing, as the ArbVG does, that the research on and assessment of risks and the determination of measures to be adopted are carried out with reference to the type of work station concerned 'where that is necessary for reasons connected with the prevention of risks', that law lays down a condition which is incompatible with the wording of the obligation of participation and consultation following from Article 11(2)(c) of the Directive, read in conjunction with Article 10(1)(a) thereof.

79 As regards, secondly, the obligation of participation and consultation with regard to information to employers of workers from any outside undertakings and/or establishments referred to in Article 11(2)(c) of the Directive read in conjunction with Article 10(2) thereof, the Austrian Government takes the view that Paragraph 8(2)(1) of the ASchG implements that provision of the Directive.

80 Paragraph 8(2)(1) of the ASchG provides that, where workers who are not contractually bound to the employer in charge of a workplace, namely external workers, work there, that employer is required, where necessary, to see to it that those workers are informed about the risks existing in that workplace and are trained accordingly.

81 It must, however, be stated that such a provision transposes not the prior obligation of participation and consultation of persons responsible for the safety and health of workers in Article 11(2)(c) of the Directive, which is the obligation referred to by the Commission in its action, but the obligation of information provided for in Article 10(2) thereof. Further, it must in any event be observed that, according to the information available to the Court, Paragraph 8(2)(1) of the ASchG provides that the employer in charge of the workplace must see to it that external workers are informed of safety and health risks. However, Article 10(2) of the Directive requires that adequate information concerning such risks be provided not to those workers but to their employers. Accordingly, even if that provision of the ASchG is deemed to transpose both the prior obligation of participation and consultation referred to in Article 11(2)(c) of the Directive and the general obligation of information referred to in Article 10(2) thereof, it appears inadequate to transpose correctly those two obligations.

82 It must therefore be concluded that that limb of the Commission's complaint concerning Article 11(2)(c) of the Directive is also well founded.

83 As regards, thirdly, the obligation of participation and consultation with regard to the information referred to in Article 10(3)(c) of the Directive, the Austrian Government submits that the relevant provisions of the Law of 1993 on Works Inspection (Arbeitsinspektionsgesetz 1993, BGBl. 27/1993) and of the ASchG, which are listed in paragraphs 60 and 61 of the Opinion of the Advocate General, meet that obligation.

84 The Commission, for its part, submits that the obligation of participation and consultation stated by those national provisions is not laid down for the information referred to in Article 10(3)(c) of the Directive, and adds in its reply that the rules invoked by the Austrian Government lay down only general obligations of information and documentation and that there is no sufficiently precise description of the information expressly referred to in Article 11(2)(c) of the Directive.

85 In that respect, although the relevant provisions of Austrian law provide for the communication of the information referred to in Article 10(3)(c) of the Directive, they do not comply with the prior and separate obligation of participation and consultation of workers with specific responsibility for the safety and health of workers, as referred to in Article 11(2)(c), the provision which is the subject-matter of the Commission's complaint.

86 As may be seen in paragraphs 76 to 78 of this judgment, the Austrian legislation refers to general obligations of information or consultation of various persons or bodies representing workers or persons responsible under national law for security matters but does not provide for the participation of the particular group of workers with specific responsibility for the prevention of occupational risks and the safety and health of workers, in accordance with Articles 7(1) and 11(2) of the Directive.

87 In the absence of provisions of Austrian law relating to the participation and consultation of workers with specific responsibility, as required by Article 11(2)(c) of the Directive, it must be concluded that that limb of the Commission's complaint is also well founded.

Transposition of Article 11(2)(d) of the Directive

88 So far as concerns the obligation of participation and consultation of workers with specific responsibility for the safety and health of workers, laid down in Article 11(2)(d) of the Directive, the Commission maintains that there is no such obligation with regard to enlistment of competent external services under Austrian law.

89 The Austrian Government contends that, in accordance with the relevant provisions of the ASchG, the persons responsible for safety must be informed in advance and must be called on to give their opinion on the appointment and removal of safety representatives, occupational physicians and persons responsible for first aid, fire-fighting and evacuation, except where there is a workers' representative body which may make the relevant decisions or where those matters are handled within the Safety and Hygiene Committee. Similar provisions exist in the B-BSG as regards the public sector.

90 It must be stated that the Austrian Government is confusing in that respect the obligations arising from Article 11(2)(b) of the Directive, which refers to workers designated within the undertaking and/or establishment to carry out certain

activities in accordance with Articles 7(1) and 8(2) of the Directive, and the separate obligation arising from Article 11(2)(d) concerning cases in which employers enlist, under Article 7(3) of the Directive, competent external services. The legislation relied on by the Austrian Government in this case merely transposes the first obligation in Article 11(2)(b) of the Directive, and does not relate to that laid down in Article 11(2)(d), which is separate.

91 Accordingly, by failing to provide in its legislation for an obligation of participation and consultation of workers with specific responsibility for the safety and health of workers, when competent persons or services outside the undertaking and/or establishment are enlisted, the Republic of Austria has failed to fulfil its obligations under Article 11(2)(d) of the Directive.

92 It must therefore be concluded that the fifth complaint, alleging infringement of Article 11(2)(c) and (d) of the Directive, is well founded.

*The sixth complaint: infringement of Article 13(2)(a) and (b) of the Directive*

93 The Commission refers in that connection to the obligation on workers to make correct use of, first, machinery, apparatus, tools, dangerous substances, transport equipment and other means of production (Article 13(2)(a) of the Directive) and,

secondly, the personal protective equipment supplied to those workers and, after use, to return it to its proper place (Article 13(2)(b)).

Arguments of the parties

94 So far as concerns the first limb of the complaint, the Commission claims that the term 'tools' used in the ASchG and the B-BSG covers all the items listed in Article 13(2)(a) of the Directive, but does not cover dangerous substances. In its view, a general reference to the rules and to administrative instructions which are not specifically defined, such as those in Paragraph 15 of the ASchG and the B-BSG, does not suffice to ensure adequate transposition of Article 13(2)(a) of the Directive.

95 As to Article 13(2)(b) of the Directive, the Commission submits that, although the correct use of personal protective equipment is regulated, that is not the case in respect of the obligation to return that equipment to its proper place after use. In its view, that obligation must be treated separately in the legislation intended to transpose that provision, so that workers have a clear, precise and detailed idea of their obligations.

96 The Austrian Government, having cited Paragraph 15 of the ASchG, states that the rules on the protection of workers concerning the use of dangerous substances are provided above all in Title IV of the ASchG, in the Regulation on Maximum Levels of Substances and Carcinogenic Substances, in the Regulation for the Protection of

Workers against the Risks of Biological Substances, in the Regulation on the Protection of Federal Personnel against the Risks of Biological Substances and in Paragraphs 52 et seq. of the General Regulation on the Protection of Workers. Similar provisions have been adopted in the field of protection of Federal workers.

97 As regards the obligation on workers to return the personal protective equipment supplied to them to its proper place, the Austrian Government states that, for reasons of hygiene, the Austrian legislation provides that that equipment is for the personal use of one worker only. The use of certain personal protective equipment by several workers is only authorised where that equipment is worn only occasionally and must be cleaned and adequately disinfected after use.

Findings of the Court

98 As regards, first, the obligation on workers under Article 13(2)(a) of the Directive, it must be noted that in an action based on Article 226 EC it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27 and the case-law cited).

99 The transposition of a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision of national law and the general legal context may be

sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case C-58/02 *Commission* v *Spain* [2004] ECR I-621, paragraph 26 and Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 21).

100 The fact that Article 13(2)(a) of the Directive lists dangerous substances amongst other means of production does not preclude a distinction being made at national level between those different causes of occupational risk, in so far as the objective stated in Article 13(1) is attained. That provision states that each worker is to take care of his own safety and health and that of other persons affected by his acts or omissions at work.

101 As pointed out by the Advocate General in paragraph 81 of his Opinion, in this case the Commission has not proven the extent to which the Austrian legislation undermines such an objective, since it confines itself to stating that, if means of production and dangerous substances had been referred to together, workers would have a clearer idea of their obligations. However, such conjecture is not sufficient to establish that the alleged infringement has taken place.

102 Moreover, in response to the Austrian Government's list of the different regulations for the protection of workers concerning the use of dangerous substances in Austria, the Commission merely claims that a general reference to the rules and to administrative instructions does not suffice to ensure adequate transposition of Article 13(2)(a) of the Directive. It does not explain the reason why a worker is not clearly informed, by the legislation relied on by the Austrian Government, of the fact that he is required to make correct use of the dangerous substances with which he comes into contact in connection with his activities.

103 In those circumstances, it must be found that the Commission's sixth complaint, in so far as it concerns alleged infringement of Article 13(2)(a) of the Directive, is not well founded.

104 As regards, secondly, the alleged infringement of Article 13(2)(b) of the Directive concerning the obligation to make correct use of the personal protective equipment supplied to workers, and, after use, to return it to its proper place, the Austrian Government contends that that equipment is, for reasons of hygiene, for the personal use of one worker only and that returning it to its place is pointless since other workers cannot make use of it.

105 However, Article 13(2)(b) of the Directive makes a clear distinction between the obligation to make correct use of the equipment in question and the obligation to return it to its proper place after use. Although the choice made in the national legislation, for reasons of hygiene, of providing that equipment is for the personal use of each worker may facilitate compliance with the second obligation referred to in that provision, it does not, however, ensure that that equipment is returned correctly.

106 Moreover, the Austrian Government itself concedes that, in certain circumstances, the use of personal protective equipment by several workers is authorised, so that its arguments seeking to justify the absence of any reference to an obligation to return that equipment on the ground that it is for the personal use of each worker cannot be upheld either.

107 It must therefore be held that the Commission's sixth complaint alleging infringement of Article 13(2)(b) of the Directive is well founded.

108 In the light of all of the preceding considerations, it must be declared that:

by failing to adopt the LDG within the prescribed period, contrary to the requirements of Article 18(1) of the Directive, and by failing to implement, or to implement in full, Article 2(1), in respect of compulsory education teachers in the Tyrol, and Articles 7(3), 8(2), 11(2)(c) and (d) and 13(2)(b) of that directive, the Republic of Austria has failed to fulfil its obligations under those provisions of the Directive.

109 The remainder of the action must be dismissed.

**Costs**

110 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads.

111 In view of the fact that the Commission has been unsuccessful only as regards Article 13(2)(a) of the Directive, the Republic of Austria is required to bear its own costs and five sixths of the costs of the Commission.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, by failing to adopt, within the prescribed period, the Law on the Rules governing Teachers in the Länder (Landeslehrer-Dienstrechtsgesetz), contrary to the requirements of Article 18(1) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, and by failing to implement, or to implement in full, Article 2(1), in respect of compulsory education teachers in the Tyrol, and Articles 7(3), 8(2), 11(2)(c) and (d) and 13(2)(b) of that directive, the Republic of Austria has failed to fulfil its obligations under those provisions of the Directive;**

2. **Dismisses the remainder of the action;**

3. **Orders the Republic of Austria to bear its own costs and five sixths of the costs of the Commission of the European Communities.**

[Signatures]