JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

20 May 2010 *

In Case T-258/06,

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents,

applicant,

supported by

French Republic, represented initially by G. de Bergues, subsequently by G. de Bergues and J.-C. Gracia, and finally by G. de Bergues and J.-S. Pilczer, acting as Agents,

by

Republic of Austria, represented by M. Fruhmann, C. Pesendorfer and C. Mayr, acting as Agents,

* Language of the case: German.

by

Republic of Poland, represented initially by E. Ośniecka-Tamecka, subsequently by T. Nowakowski, subsequently by M. Dowgielewicz, subsequently by M. Dowgielewicz, K. Rokicka and K. Zawisza, and finally by M. Szpunar, acting as Agents,

by

Kingdom of the Netherlands, represented initially by H. Sevenster, subsequently by C. Wissels and M. de Grave, and finally by C. Wissels, M. de Grave and Y. de Vries, acting as Agents,

by

European Parliament, represented by U. Rösslein and J. Rodrigues, acting as Agents,

by

Hellenic Republic, represented by D. Tsagkaraki and M. Tassopoulou, acting as Agents,

and by

United Kingdom of Great Britain and Northern Ireland, represented initially by Z. Bryanston-Cross, and subsequently by L. Seeboruth, acting as Agents,

interveners,

v

European Commission, represented by X. Lewis and B. Schima, acting as Agents,

defendant,

ACTION for the annulment of the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2),

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek and V.M. Ciucă (Rapporteur), Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2009,

gives the following

Judgment

Background to the dispute

1 On 23 June 2006, the European Commission (formerly the Commission of the European Communities) adopted an interpretative communication on the 'Community law applicable to contract awards not or not fully subject to the provisions of the "Public Procurement" Directives' ('the Communication'). As regards the award of public procurement contracts, the European Community had adopted, in 2004, 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 (OJ 2004 L 134, p. 1) and 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 (OJ 2004 L 134, p. 114), which laid down detailed rules governing competitive tendering procedures (collectively, 'the Public Procurement Directives').

2 However, some contracts are not covered, or are covered only in part, by those directives. The Communication states that it concerns contracts whose value is below the thresholds for application of the Public Procurement Directives ('below-threshold contracts'), as well as contracts for the services listed in Annex II B to Directive 2004/18 and Annex XVII B to Directive 2004/17, whose value is above those thresholds ('II B contracts').

3 In addition, the Communication states that the case-law of the Court of Justice shows that the internal market rules apply also to contracts which fall outside the scope of the Public Procurement Directives. In the Communication, the Commission sheds light on its understanding of the case-law of the Court and suggests a number of 'best practices' in order to help Member States reap the full benefit of the internal market. However, the Communication states that it does not create any new legislative rules.

4 The Communication summarises the basic standards applicable to the award of public contracts, which are derived directly from the rules of the EC Treaty as interpreted by the Court of Justice.

5 Thus the Communication distinguishes between, on the one hand, public contracts with no relevance for the internal market, to which the standards derived from the EC Treaty do not apply and, on the other, contracts having a sufficient connection with the functioning of the internal market, which must comply with those standards. The relevance of each public contract for the internal market must be assessed on a case-by-case basis by the contracting authorities. If, on examination, it is clear that a public contract is relevant to the internal market, the award of that contract must be conducted in accordance with the basic standards established by Community law.

6 Section 2 of the Communication deals with the basic standards for the award of contracts relevant to the internal market. In that section, the Commission — referring to the case-law of the Court of Justice as the basis for its statements — speaks of the obligation of transparency which consists in ensuring a degree of advertising sufficient to enable the market to be opened up to competition. In Section 2.1.1 of the Communication, the Commission infers from this that the requirements laid down by the case-law of the Court can be met only through the publication of a sufficiently accessible advertisement prior to the award of the contract. Furthermore, in Section 2.1.2 of the Communication, a number of specific means of publication are recommended as being adequate and commonly used. In this connection, the Commission refers to the internet, national official journals, national journals specialising in the publication of public procurement notices, newspapers with national or regional coverage or specialist publications, local publications and the *Official Journal of the European Union*/Tenders Electronic Daily (TED) (available on the internet through the European public procurement data-base, www.TED.europa.eu).

7 As regards the award of public contracts, Section 2.2 of the Communication states that this must be 'in line with the rules and principles of the EC Treaty', which specifically entails compliance with the principles of non-discrimination and transparency. In practice, the best means of achieving a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of the procedures to be reviewed are said to be: 'a non-discriminatory description' of the subject-matter of the contract; equal access for economic operators from all Member States; mutual recognition of diplomas, certificates and other evidence of formal qualifications; appropriate time-limits; and a transparent and objective approach.

8 Lastly, Section 2.3 of the Communication emphasises the importance of judicial protection, that is to say, the possibility that the impartiality of the procedure can be reviewed by the courts.

Procedure

9 By application lodged at the Registry of the Court on 12 September 2006, the Federal Republic of Germany brought the present action.

10 On 19 December 2006, the French Republic applied for leave to intervene in support of the forms of order sought by the Federal Republic of Germany. By order of 9 March 2007, the President of the First Chamber of the Court granted leave to intervene. On 14 June 2007, the French Republic submitted its statement in intervention.

11 On 5 January 2007, the Republic of Austria applied for leave to intervene in support of the forms of order sought by the Federal Republic of Germany. By order of 9 March 2007, the President of the First Chamber of the Court granted leave to intervene. On 14 June 2007, the Republic of Austria submitted its statement in intervention.

12 On 10 January 2007, the Republic of Poland applied for leave to intervene in support of the forms of order sought by the Federal Republic of Germany. By order of 9 March 2007, the President of the First Chamber of the Court granted leave to intervene. On 12 June 2007, the Republic of Poland submitted its statement in intervention.

13 On 18 January 2007, the Kingdom of the Netherlands applied for leave to intervene in support of the forms of order sought by the Federal Republic of Germany. By order of 9 March 2007, the President of the First Chamber of the Court granted leave to intervene. On 13 June 2007, the Kingdom of the Netherlands submitted its statement in intervention.

14 On 22 January 2007, the European Parliament applied for leave to intervene in support of the forms of order sought by the Federal Republic of Germany. By order of

9 March 2007, the President of the First Chamber of the Court granted leave to intervene. On 13 June 2007, the European Parliament submitted its statement in intervention.

15 On 27 March 2007, the Hellenic Republic applied for leave to intervene in support of the forms of order sought by the Federal Republic of Germany. By order of 14 May 2007, the President of the First Chamber of the Court granted leave to intervene and authorised the Hellenic Republic to submit its observations during the oral procedure, in accordance with Article 116(6) of the Rules of Procedure of the Court.

16 On 13 August 2007, the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in support of the forms of order sought by the Federal Republic of Germany. By order of 8 October 2007, the President of the First Chamber of the Court granted leave to intervene and authorised the United Kingdom of Great Britain and Northern Ireland to submit its observations during the oral procedure, in accordance with Article 116(6) of the Rules of Procedure of the Court.

17 On 18 September 2007, the Commission submitted its observations on the statements in intervention of the French Republic, the Republic of Austria, the Republic of Poland, the Kingdom of the Netherlands and the European Parliament. The Federal Republic of Germany did not submit observations on the statements in intervention.

18 Following a change in the composition of the Chambers of the Court with effect from 25 September 2007, the Judge-Rapporteur was attached to the Fifth Chamber, to which the present case was accordingly allocated.

19 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. At the hearing on 29 April 2009, the parties presented oral argument and replied to the questions put to them by the Court. The United Kingdom of Great Britain and Northern Ireland did not attend the hearing.

Forms of order sought

20 The Federal Republic of Germany claims that the Court should:

— annul the Communication;

— order the Commission to pay the costs.

21 The French Republic, the Republic of Austria and the Kingdom of the Netherlands claim that the Court should:

— annul the Communication;

— order the Commission to pay the costs.

22 The European Parliament and the Republic of Poland claim that the Court should annul the Communication.

23 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the Federal Republic of Germany to pay the costs.

Admissibility

A — *Preliminary observations*

24 Although the Commission raises no formal objection of inadmissibility, it challenges the admissibility of the action on the ground that the Communication does not constitute an actionable measure for the purposes of annulment proceedings. The Communication is an interpretative communication and thus a measure which, because of its form, belongs in the same category as recommendations and opinions, that is to say, measures which are not binding under the EC Treaty. In consequence, the choice of that legal form automatically suggests that the measure was not intended to produce binding legal effects. The Commission explains that the aim of an interpretative communication is to explain the rights and obligations flowing from provisions of Community law, account being taken, where appropriate, of the case-law of the Court

of Justice. It follows that, by its very nature, an interpretative communication is not a measure which produces binding legal effects vis-à-vis third parties and is amenable to an action for annulment. The Commission also contends that the wording of the Communication shows that it was not intended to lay down legally binding rules: on the contrary, it is clear from the terms in which it is framed that the Communication either reproduces the case-law of the Court or sets out, by way of non-binding recommendations, inferences which it draws from that case-law.

25 It should be borne in mind that, according to consistent case-law, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see Case C-57/95 *France* v *Commission* [1997] ECR I-1627, paragraph 7 and the case-law cited).

26 The present case concerns a communication which was adopted by the Commission and published in its entirety in the C Series of the Official Journal. As the documents before the Court show, the aim of that measure is to make known the Commission's general approach as regards the application, in cases where the award of a contract is not subject, or not subject in full, to the Public Procurement Directives, of the set of basic rules for the award of public contracts, which flow directly from the rules and principles of the EC Treaty and, in particular, from the principles of non-discrimination and transparency.

27 Accordingly, in order to determine whether the Communication is designed to produce legal effects which are new as compared with those entailed by the application of the fundamental principles of the EC Treaty, it is necessary to consider its content (see, to that effect, Case C-366/88 *France* v *Commission* [1990] ECR I-3571, paragraph 11; Case C-303/90 *France* v *Commission* [1991] ECR I-5315, paragraph 10; and Case C-57/95 *France* v *Commission*, paragraph 25 above, paragraph 9).

28 It must therefore be determined whether the Communication merely fleshes out the provisions applicable to contracts which are not subject, or not subject in full, to the Public Procurement Directives and concerning the free movement of goods, the freedom of establishment, the freedom to provide services, the principles of non-discrimination and equal treatment, the principle of proportionality and the rules on transparency and mutual recognition, or whether it lays down obligations which are specific or new as compared with those provisions, principles and rules (see, to that effect, Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 14, and Case C-57/95 *France* v *Commission*, paragraph 25 above, paragraph 13).

29 Accordingly, the mere fact that, as the Commission contends, an interpretative communication does not — by its form, its nature or its wording — purport to be a measure intended to produce legal effects is not enough to support the conclusion that it does not produce binding legal effects.

30 The Federal Republic of Germany concedes, nevertheless, that there are Commission communications which have been published but are not binding. It submits, however, that, in the present case, the fact that the Communication has been published must not be overlooked in determining whether it has legal effects. Indeed, publication is a necessary condition for the existence of a legal rule and, like a legal rule, the Communication was intended to produce an external effect.

31 In that regard, as was pointed out above, if an examination of the content of the Communication discloses that it lays down specific or new obligations, the action must be held to be admissible, there being no need to determine whether the Communication was published. On the other hand, if no such obligations have been laid down, the mere fact that the Communication was published is not enough to support the conclusion that it constitutes an actionable measure for the purposes of annulment proceedings.

B — *The content of the Communication*

32 In support of its action, the Federal Republic of Germany — supported by the interveners — submits, in essence, that the Communication is a binding act since it contains new rules for the award of public contracts which go beyond the obligations under existing Community law and which produce legal effects for the Member States, from which it can be inferred that the Commission was not competent to adopt those rules.

33 In that regard, the Federal Republic of Germany and the interveners argue essentially that, first, the Communication lays down — especially in Section 2.1, which concerns below-threshold contracts and II B contracts — an obligation of prior (*ex ante*) publication of an advertisement, which is not envisaged by the fundamental principles of the EC Treaty as interpreted by the Court of Justice. Secondly, the Federal Republic of Germany argues that the obligations under Section 2.2 of the Communication go well beyond the obligations which flow from the interpretation by the Court of the fundamental principles of the EC Treaty. Thirdly, the Federal Republic of Germany has reservations regarding the simple transposition of the derogations provided for in the Public Procurement Directives in relation to the award of contracts under a privately negotiated procedure to contracts which fall outside the scope of the Public Procurement Directives, as referred to in Section 2.1.4 of the Communication. Lastly, the Federal Republic of Germany claims that Section 1.3 of the Communication, which contemplates the opening of infringement proceedings under Article 226 EC for failure to comply with the Communication, produces legal effects. According to the Federal Republic of Germany and the interveners, these considerations all lead to the conclusion that the Communication is intended to produce legal effects.

1. *The first complaint, concerning the obligation of prior publication of an advertisement (Section 2.1.1 of the Communication)*

(a) Arguments of the parties

Federal Republic of Germany

34 The Federal Republic of Germany submits that the Communication, particularly Section 2.1.1 thereof, places Member States under a basic obligation to ensure that, in all cases where the award of a contract is planned, and thus also in the case of below-threshold contracts and II B contracts, an advertisement is published beforehand ('obligation of prior publication'). However, an obligation of prior publication, hence of ex ante transparency, cannot be inferred from the case-law of the Court of Justice on which the Communication is based. That means that no ex ante obligation flows from the fundamental principles of the EC Treaty or their interpretation by the Court.

35 On that point, the Federal Republic of Germany added in its oral pleadings that, despite the fact that a number of judgments of the Court of Justice delivered after the adoption of the Communication refer to an obligation of prior publication, that development in the case-law cannot provide the basis for such an obligation with retroactive effect.

36 According to the Federal Republic of Germany, the case-law of the Court of Justice on which the Communication is based — and, in particular, the judgments in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 ('*Telaustria*'), Case

C-231/03 *Coname* [2005] ECR I-7287 and Case C-458/03 *Parking Brixen* [2005] ECR I-8585 — applies only to service concessions, an area outside the scope of the Communication.

37 Furthermore, service concessions are different from below-threshold contracts because of the economic interest at stake, which normally exceeds the European thresholds and thus makes them more akin to the contracts covered by the Public Procurement Directives. Accordingly, even though an obligation of transparency may be appropriate for service concessions, the same is certainly not true of the contracts covered by the Communication. According to the Federal Republic of Germany, it is thus impossible to transpose the case-law on service concessions directly to below-threshold contracts.

38 Nor, the Federal Republic of Germany additionally submits, can the two other judicial decisions referred to in the Communication, which concern below-threshold contracts (the order in Case C-59/00 *Vestergaard* [2001] ECR I-9505; and Case C-264/03 *Commission* v *France* [2005] ECR I-8831), provide the basis for an obligation of prior publication. According to the Federal Republic of Germany, the Court of Justice did not rule in either of those decisions on any kind of obligation of transparency: it merely stated that the principle of non-discrimination was applicable in the case in point (order in *Vestergaard*, paragraphs 20 and 24; and *Commission* v *France*, paragraphs 32 and 33). The obligation of ex ante transparency has thus not been transposed to the contracts covered by the Communication.

39 In any event, the Federal Republic of Germany takes the view that, generally speaking, a very modest economic interest is at stake in below-threshold public contracts and that, accordingly, they do not adversely affect the fundamental freedoms concerned, since their effects on the latter would be rather uncertain and indirect (*Coname*, paragraph 36 above, paragraph 20). That finding is said to be supported by the Opinion

of Advocate General Sharpston in Case C-195/04 *Commission* v *Finland* [2007] ECR I-3353, points 83 and 85).

40 Furthermore, the Communication goes above and beyond the existing law governing II B contracts, because those contracts are generally of very specific local relevance and have little potential for cross-border transactions, which explains why the Community legislature makes them subject only to an obligation of transparency ex post, and not ex ante as is now required under the Communication.

41 In addition, according to the Federal Republic of Germany, the obligation of prior publication can be meaningful and effective only if publication takes place in a manner which serves the purpose of opening up the market. That would not be the case where no foreign tenderers, or only very few, were likely to have an interest in the contracts in question, such as the contracts covered by the Communication. In that regard, the Court of Justice pointed out in *Coname*, paragraph 36 above, that there are contracts in respect of which the effects on the fundamental principles of the EC Treaty are too uncertain and too indirect to warrant the conclusion that those principles may have been infringed. Section 1.3 of the Communication shows that the Commission is aware that the very modest economic interest at stake in some contracts means that, in the eyes of foreign undertakings, they are not very attractive, which in turn justifies the lack of any obligation of prior publication in those cases.

42 As it is, in fixing thresholds for the application of the Public Procurement Directives, the Community legislature expressly provided that, below those values, it would generally have to be assumed that the effects on the internal market were rather 'uncertain or indirect' and thus that foreign tenderers would have little interest. The Commission ought to respect that appraisal on the part of the legislature. The Federal Republic of Germany states that Advocate General Sharpston shares that view in her Opinion in *Commission* v *Finland*, paragraph 39 above (points 85 and 96). Further-

more, according to the Federal Republic of Germany, the contracting authorities cannot reasonably be required in each case to examine the relevance of a public contract for the internal market, as provided for in Section 1.3 of the Communication; rather, the contracting authorities should, on the contrary, be able to identify quickly the obligations of transparency that they must meet. At the hearing, the Federal Republic of Germany added that the specific and individual approach taken in Section 1.3 of the Communication is, in particular, at odds with the judgment in Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565, in which the Court of Justice approved an abstract and general definition of the relevance of a public contract for the internal market.

43 Nor can the contracting authorities be expected to examine in each case whether a II B contract or a below-threshold contract is relevant to the internal market. The principle of legal certainty requires that the national authorities be able to identify quickly which advertising obligations apply. The prescribed thresholds and the list of II B contracts meet the requirements of that principle.

44 The Federal Republic of Germany takes the view that the obligation of prior publication laid down in the Communication goes beyond the prohibition of discrimination during the procedure for the award of a contract (for example, by giving preference to a German tenderer over a foreign tenderer). That obligation places contracting authorities under a duty to take action in order to permit and to encourage cross-border tenders.

45 According to the Federal Republic of Germany, the degree of advertising regarded as necessary by the Communication comes close to the requirements laid down in the Public Procurement Directives and is time-consuming and costly. Basing its arguments on the Opinion of Advocate General Sharpston in *Commission* v *Finland*, paragraph 39 above, the Federal Republic of Germany is thus of the opinion that it is

for the Member States to determine how to comply in practice with the principle of transparency. Similarly, according to point 98 of Advocate General Sharpston's Opinion in *Commission* v *Finland*, what constitutes a sufficient degree of publicity for low value contracts is a matter for national law.

46 On that point, the Federal Republic of Germany explained at the hearing that it disputed, in particular, the notion that the contracting authorities are under an obligation, as laid down in the first paragraph of Section 2.1.2 of the Communication, to choose the most appropriate vehicle for advertising their contracts. By referring to each contracting authority, the Commission takes a specific and individual approach, which is absent from the case-law of the Court of Justice. The Federal Republic of Germany added in that regard that it did not dispute the examples of adequate means of publication listed in Section 2.1.2 of the Communication.

47 Thus, the Federal Republic of Germany maintains that, for the contracts covered by the Communication, there is indeed no general obligation of transparency under Community law. The obligation of prior publication laid down in the Communication therefore goes significantly beyond the requirements flowing from the interpretation by the Court of Justice of the fundamental principles of the EC Treaty

Interveners

48 According to the French Republic, it must be determined whether the Communication merely explains the rules and principles of the EC Treaty concerning the award of public contracts or whether it creates new obligations as compared with those rules and principles. As it is, the Communication adds to existing law.

49 In that regard, the French Republic submits, in particular, that in the order in *Vestergaard*, paragraph 38 above, the Court of Justice did not lay down any form of general obligation to ensure the adequate advertisement of below-threshold contracts: that order concerns the application of the principle of non-discrimination, not the obligation of transparency. The Court held, in paragraph 20 of the order in *Vestergaard*, that, although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless under an obligation to comply with the fundamental rules of the EC Treaty. The Court went on to infer from this that Article 28 EC precludes a contracting authority from including in the contract documents for a particular contract a clause requiring use to be made, for the performance of the contract, of a product of a specified make, without inserting the words 'or equivalent' in that clause (order in *Vestergaard*, paragraph 24).

50 Nor is any such general obligation to ensure adequate publicity for below-threshold contracts apparent from the judgment in *Commission* v *France*, paragraph 38 above. In paragraph 32 of that judgment, the Court of Justice held that, although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless under an obligation to comply with the fundamental rules of the EC Treaty and the principle of non-discrimination, particularly on grounds of nationality. According to the Court, however, the only consequence was that the French provision at issue in the case before it was an obstacle to the freedom to provide services for the purposes of Article 49 EC, in that it led the task of delegated project contracting to be reserved for an exhaustive list of legal persons under French law (*Commission* v *France*, paragraph 68).

51 In addition, the French Republic submits that, even though the Court of Justice referred in *Telaustria*, paragraph 36 above, to an obligation to advertise adequately, it did so because the concession at issue was of a very high economic value. That conclusion is confirmed by *Coname*, paragraph 36 above, which concerns, on the contrary, concessions of very modest economic interest.

52 In any event, the French Republic argues that, if it were to be held that an obligation to advertise adequately flows from the case-law of the Court of Justice, such an obligation could not take the form of an obligation of prior publication as provided for under Section 2.1.1 of the Communication.

53 Moreover, the French Republic maintains that the Opinions of Advocate General Sharpston in *Commission* v *Finland*, paragraph 39 above, and Advocate General Fennelly in *Telaustria*, paragraph 36 above (ECR I-10747), show that the obligation of transparency does not involve an obligation to advertise, as required under Section 2.1.2 of the Communication.

54 As regards II B contracts, the French Republic maintains that the Council's decision not to make them subject to an obligation of prior publication is explained by recitals 18 and 19 in the preamble to Directive 2004/18. According to those recitals, II B contracts should not be subject in full to the directive — that is to say, they should not be subject to the obligation of prior publication, in particular — but they should be subject to monitoring, by means of a mechanism that should enable interested parties to have access to the relevant information.

55 The French Republic thus submits that, in Directive 2004/18, the Council clearly had the intention, as regards advertising, of making II B contracts subject to a special and comprehensive set of rules amounting to a simplified award system.

56 The Republic of Austria also submits that the Communication is a measure which produces legal effects because it introduces a general obligation to advertise ex ante which flows neither from the EC Treaty nor from the case-law of the Court of Justice.

57 In that regard, the Republic of Austria adds to the arguments submitted by the Federal Republic of Germany that the Opinions of Advocate General Stix-Hackl in Case

C-507/03 *Commission* v *Ireland* [2007] ECR I-9777 and Advocate General Sharpston in *Commission* v *Finland*, paragraph 39 above, show that the legal situation is vague and the subject of much debate as regards the application of the obligation of transparency to the award of public contracts which are not subject to the Public Procurement Directives, or only in part. While Advocate General Stix-Hackl reached the conclusion that the award of non-priority service contracts required publication of a notice, at least as a rule, Advocate General Sharpston rejected the idea that there was a general obligation of transparency ex ante for below-threshold contracts. At the time when the Communication was adopted, the Court of Justice had not yet proceeded to judgment in those two cases. Consequently, where the Commission, in its Communication, imposes an obligation of prior publication for all awards of contracts of that kind (that is to say, for non-priority services and contracts of modest economic interest), it created new legal effects.

58 At the hearing, the Republic of Austria submitted that the obligations imposed on the contracting authorities under Sections 1.3 and 2.1.2 of the Communication are contrary to the judgment in *SECAP*, paragraph 42 above, because the Communication does not take into account, in accordance with paragraph 32 of that judgment, the administrative capacity of the contracting authority.

59 The Republic of Austria also maintains that the degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed, in accordance with *Telaustria*, paragraph 36 above, does not necessarily imply an obligation of prior publication. Indeed, it is apparent from the current revision of the directives on review procedures concerning the award of public contracts (see document 2006/0066/COD, and the new Articles 2d to 2f of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) proposed in that document) that legal protection *ex post facto* — without prior publication of an advertisement for the contract — may also enable the impartiality of an award procedure to be reviewed effectively.

60 In addition, even though there is no perfect symmetry, in fact or in law, between public procurement law and State aid law, the Republic of Austria relies on the *de minimis* rule applicable in State aid law, according to which aid below certain thresholds is not liable to affect trade between Member States to an appreciable extent and does not distort or threaten to distort competition. According to the Republic of Austria, it does not appear absurd, in comparing the two areas of law, to assume that below-threshold contracts are not important enough for the internal market to justify an obligation of prior publication for the purposes of opening up competition. Indeed, aid benefits undertakings directly, whereas the thresholds applicable in public procurement relate to the value of the contract, the undertaking's profit (which, in this respect, is comparable to aid) representing no more than a small fraction of that value.

61 Lastly, the Republic of Austria relies on recital 19 of Directive 2004/18 which, it claims, implicitly suggests that the Community legislature did not consider it necessary that non-priority service contracts (II B contracts) allow access to all the possibilities for increased cross-frontier trade. The only possible justification for the difference in treatment is that those contracts, excluded from full application of the directive, are not regarded as sufficiently relevant to the internal market to warrant exploitation of the full potential for increased cross-border trade, which would make it necessary to impose a general obligation of prior publication of contract notices.

62 The Kingdom of the Netherlands submits that the Commission interprets Community law in a manner that goes beyond the case-law by creating a complete body of legal rules which imposes on Member States an obligation of ex ante transparency for all public contracts covered by the Communication, whereas the Court of Justice has not yet ruled on that question.

63 The Kingdom of the Netherlands also maintains, referring to the principle of legal certainty, that the question whether the Communication creates new obligations must be determined on the basis of the case-law as it stood at the time when the Communication was adopted. As it is, the subsequent case-law shows that the Communication manifestly anticipates developments in the case-law.

Commission

64 As regards the actual content of the Communication and the legislative elements referred to by the Federal Republic of Germany — essentially, the circumvention of the thresholds for application of the Public Procurement Directives and the obligation of prior publication — the Commission disputes the claim that those elements of the Communication entail the creation of new legal rules. They merely explain, in accordance with Article 211 EC, the provisions and principles of the EC Treaty as interpreted by the case-law of the Court of Justice.

65 The Commission contests the allegation put forward by the Federal Republic of Germany and the interveners to the effect that the Communication ignores the decision of the legislature to lay down provisions concerning advertising only in relation to contracts whose value reaches certain thresholds. In that regard, the Commission contends that, although the legislature did not consider it necessary to lay down detailed rules except in relation to contracts whose value is above the thresholds for application of the directives, it took the view that, below those thresholds, it was sufficient to apply the provisions and principles of the EC Treaty. By those directives, however, the legislature neither wished to — nor was able to — exclude the application of those provisions and principles of the EC Treaty to below-threshold contracts.

66 That emerges from the case-law of the Court of Justice, in particular from *Telaustria*, paragraph 36 above, and *Commission* v *France*, paragraph 38 above. According to the Commission, the Court held in *Telaustria* that contracting authorities concluding contracts outside the scope of the Public Procurement Directives are none the less under a duty to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on grounds of nationality, in particular (*Telaustria*, paragraph 60). That reasoning is supported by paragraph 33 of *Commission* v *France*. By the same token, the Court confirmed in *Coname*, paragraph 36 above, that contracts outside the scope of the directive concerned in that case, such as concession agreements, remained subject to the general rules of the EC Treaty. The European legislature took that case-law into account in recital 9 of Directive 2004/17 when it adopted the Public Procurement Directives.

67 According to the Commission, the Court of Justice also gives actual content to the obligation of transparency by confirming that undertakings established in another Member State must, before a contract is awarded, have access to appropriate information regarding that contract so that, if they so wish, they can express their interest in obtaining the contract (*Coname*, paragraph 36 above, paragraph 21).

(b) Findings of the Court

68 The Federal Republic of Germany and the interveners submit that Section 2.1.1 of the Communication introduces a basic obligation for all Member States to advertise all future contracts before they are awarded, which constitutes a new obligation as compared with the principles of the EC Treaty.

69 As regards the rules and principles of the EC Treaty (Section 1.1 of the Communication) applicable to the award of a public contract relevant to the internal market, Section 2.1 of the Communication lays down basic standards for advertising. Section 2.1.1. is entitled 'Obligation to ensure adequate advertising' and provides as follows:

'According to the [Court of Justice], the principles of equal treatment and of non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition.

The obligation of transparency requires that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining that contract.

The Commission is of the view that the practice of contacting a number of potential tenderers would not be sufficient in this respect, even if the contracting entity includes undertakings from other Member States or attempts to reach all potential suppliers. Such a selective approach cannot exclude discrimination against potential tenderers from other Member States, in particular new entrants to the market. The same applies to all forms of "passive" publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising.

Therefore, the only way that the requirements laid down by the [Court of Justice] can be met is by publication of a sufficiently accessible advertisement prior to the award of the contract. This advertisement should be published by the contracting entity in order to open the contract award to competition.'

70 The first two paragraphs of Section 2.1.1 of the Communication reproduce the case-law of the Court of Justice as set out in *Telaustria*, *Coname* and *Parking Brixen*, paragraph 36 above, and are not contested by the Federal Republic of Germany or by any of the interveners. Furthermore, the third paragraph of Section 2.1.1 of the Communication was not contested during the written procedure. In the last paragraph of Section 2.1.1, the Communication states that there is an obligation to ensure adequate publicity in the form of publication of a sufficiently accessible advertisement prior to the award of the contract.

71 The Federal Republic of Germany, supported by the interveners, submits in essence that Section 2.1.1 of the Communication creates, in relation to the public contracts covered by the Communication, an obligation of prior publication which is in no way apparent from the principles and the case-law of the Court of Justice referred to in the same section. It therefore constitutes a new obligation, which confers on the Communication the character of a measure producing binding legal effects, amenable to an action for annulment.

72 It is necessary, therefore, to determine whether the Communication merely explains that obligation on the Member States, which flows from the fundamental principles of the EC Treaty, or whether it creates new obligations, as the Federal Republic of Germany and the interveners claim.

73 In that regard, it should first be pointed out that the strict special procedures prescribed by the Community directives coordinating public procurement procedures

apply only to contracts whose value exceeds the threshold expressly laid down in each of those directives (order in *Vestergaard*, paragraph 38 above, paragraph 19; and *Commission* v *France*, paragraph 38 above, paragraph 33). Accordingly, the rules laid down in those directives do not apply to contracts with a value below the threshold set.

74 That does not mean, however, that below-threshold contracts are excluded from the scope of Community law (order in *Vestergaard*, paragraph 38 above, paragraph 19). The Court of Justice has consistently held, as regards the award of contracts which, on account of their value, are not subject to the procedures laid down in the Community legislation, that the contracting authorities are none the less under a duty to comply with the fundamental rules of the Treaty in general (order in *Vestergaard*, paragraph 20, and *Commission* v *France*, paragraph 38 above, paragraph 32) and the principle of non-discrimination on grounds of nationality, in particular (see, to that effect, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 29; *Telaustria* , paragraph 36 above, paragraph 62; *Coname*, paragraph 36 above, paragraph 16; *Parking Brixen*, paragraph 36 above, paragraph 46; and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 18).

75 Moreover, support for this is to be found in recital 9 of Directive 2004/17, which states that '[f]or public contracts the value of which is lower than that triggering the application of provisions of Community coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaties referred to above [namely, the principle of equal treatment, of which the principle of non-discrimination is merely a specific expression, the principle of mutual recognition, the principle of proportionality and the obligation of transparency] apply', and recitals 1 and 2 of Directive 2004/18, which speak of the application of those principles to the award of all contracts concluded in the Member States, for a value above or below the thresholds.

76 The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, as the Court of Justice has consistently held, a duty of transparency which enables the awarding authority to ensure that those principles are complied with (*Unitron Scandinavia and 3-S*, paragraph 74 above, paragraph 31; *Telaustria*, paragraph 36 above, paragraph 61; Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45; *Parking Brixen*, paragraph 36 above, paragraph 49; and *ANAV*, paragraph 74 above, paragraph 21). That obligation is attested to by recital 9 of Directive 2004/17 and recital 2 of Directive 2004/18. It follows that the Member States and their contracting authorities must comply with that obligation of transparency, as interpreted by the Court, in relation to the award of all public contracts.

77 The Court of Justice subsequently explained that the obligation of transparency incumbent upon 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 (*Telaustria*, paragraph 36 above, paragraph 62; *Parking Brixen*, paragraph 36 above, paragraph 49; and *ANAV*, paragraph 74 above, paragraph 21).

78 According to the Court of Justice, the obligation of transparency incumbent upon contracting authorities implies, in particular, an obligation to ensure that an undertaking located in the territory of a Member State other than that in question can have access to appropriate information regarding the public contract concerned before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that contract (see, to that effect, *Coname*, paragraph 36 above, paragraph 21).

79 It follows from that case-law that the obligation of transparency in terms of adequate advertising thus presupposes a form of advertising that takes place before the award of the public contract in question: in other words, prior publication of an advertisement. Consequently, and contrary to the arguments submitted by the Federal Republic of Germany and the interveners, the Communication, in referring to 'publication

of a sufficiently accessible advertisement prior to the award of the contract', did not create a new obligation for Member States, but merely referred to an existing obligation flowing from the provisions of Community law applicable to the public contracts covered by the Communication, as interpreted by the Community judicature.

80 That is confirmed, moreover, by the case-law of the Court of Justice subsequent to publication of the Communication, as the Federal Republic of Germany acknowledged at the hearing. In the first place, in accordance with the case-law of the Court, the obligations under primary law concerning equal treatment and transparency apply automatically to contracts — albeit outside the scope of the Public Procurement Directives — which are of certain cross-border interest (see, to that effect, as regards Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and concerning a contract with a value below the threshold of that directive, Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 33; as regards Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and concerning a II B contract, *Commission* v *Ireland*, paragraph 57 above, paragraphs 30, 31 and 32; and, as regards Directives 92/50 and 93/36, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraphs 66, 81 and 82). In the second place, according to the Court, ex post advertising cannot ensure adequate advertising within the meaning of the case-law in *Telaustria* and *Coname*, paragraph 36 above, which shows that the obligation of transparency flowing from the principles of the EC Treaty implies that the contract notice must be advertised prior to the award of the contract (*Commission* v *Ireland*, paragraphs 30 and 32).

81 The finding that the obligation of prior publication laid down in Section 2.1.1 of the Communication does not go beyond the fundamental principles of the EC Treaty as

interpreted by the Court of Justice cannot be called into question by the various arguments put forward by the Federal Republic of Germany and the interveners.

82 First, the Federal Republic of Germany submits in essence that *Telaustria*, *Coname* and *Parking Brixen*, paragraph 36 above, concern public contracts relating to service concessions which, while outside the scope of the Public Procurement Directives, are comparable, because of their value, to public contracts which are covered by those directives and that, consequently, the line of authority expounded in those judgments is not applicable to the public contracts covered by the Communication.

83 In that regard, it should be noted that, as is clear from the case-law on which the Federal Republic of Germany relies in support of its argument, the Court of Justice has held in relation to contracts for concessions that, even though the award of such a concession is not governed by any of the Public Procurement Directives, those contracts are still subject to the general rules of the EC Treaty (see, to that effect, *Coname*, paragraph 36 above, paragraph 16, confirmed in *Commission* v *France*, paragraph 38 above, paragraph 33). It should also be noted that, according to that case-law, the obligation of transparency flows directly from the general rules of the EC Treaty and, in particular, from the principles of equal treatment and non-discrimination (*Telaustria*, paragraph 36 above, paragraph 61, and *Parking Brixen*, paragraph 36 above, paragraph 49), and that the obligation of transparency itself implies an obligation of prior publication (see, to that effect, *Coname*, paragraph 21). By contrast, the fact that the contracts at issue in those judgments were, in terms of their importance, comparable to the public contracts to which the Public Procurement Directives apply, is not mentioned anywhere in those judgments in order to justify an obligation to advertise adequately and, specifically, before the contract is awarded. It follows that, contrary to the assertions made by the Federal Republic of Germany, that case-law can be transposed to the public contracts covered by the Communication, to which, as has already been pointed out, the principle of equal treatment and the corollary obligation of transparency also apply.

84 For the sake of completeness, it should be stated that this is borne out, moreover, by the case-law of the Court of Justice subsequent to publication of the Communication. In paragraph 33 of *Medipac-Kazantzidis*, paragraph 80 above, the Court referred — in relation to a public works contract — to consistent case-law according to which, even if the value of a contract for which a call for tenders has been launched does not attain the threshold for application of the Public Procurement Directives by which the Community legislature has regulated the field of public procurement and, accordingly, the contract in question does not fall within the scope of those directives, the contracting authorities awarding the contract are nevertheless under a duty to abide by the general principles of Community law, such as the principle of equal treatment and the corollary obligation of transparency. In that context, the Court cited, as consistent case-law, *Telaustria*, *Coname* and *Parking Brixen*, paragraph 36 above. The Court thus extended the approach taken in relation to procedures for the conclusion of contracts for public service concessions to the rules governing the award of below-threshold contracts (*Medipac-Kazantzidis*, paragraph 33).

85 Secondly, as regards the argument submitted by the Federal Republic of Germany, summarised in paragraph 38 above, that the order in *Vestergaard*, paragraph 38 above, and the judgment in *Commission* v *France*, paragraph 38 above, concern only the principle of non-discrimination and cannot therefore justify an obligation of prior publication, suffice it to note that the obligation of transparency — in particular, through adequate advertising — flows, according to the case-law set out in paragraph 76 above, precisely from the principle of equal treatment and non-discrimination on grounds of nationality. Given that those judicial decisions show that the basic rules of the EC Treaty are applicable to all public contracts, even if they are not covered by the Public Procurement Directives (order in *Vestergaard*, paragraph 19; and *Commission* v *France*, paragraphs 32 and 33), the Commission was right in referring to that order and to that judgment in the Communication.

86 Thirdly, the argument that, in laying down thresholds for the application of the Public Procurement Directives, the Community legislature expressly indicated that, below

those values, it had to be generally supposed that the effects on the internal market were rather 'uncertain and indirect', and from this inferred that foreign tenderers would not be interested, cannot succeed either.

87 It should be stated in that regard that it cannot be presumed, just because the value of a public contract is below the threshold for application of the Public Procurement Directives, that the effects of that contract on the internal market are of almost no significance. That view is contradicted by the case-law referred to in paragraphs 73 and 74 above, according to which such contracts are not excluded from the scope of Community law, because if any impact of those contracts on the internal market could be ruled out by definition, Community law would not apply.

88 Admittedly, as the Court of Justice acknowledges, it is entirely possible that, because of special circumstances — such as a very modest economic interest at stake — it could reasonably be maintained that an undertaking located in a Member State other than that of the contracting authority for a particular public contract would have no interest in that contract and that, consequently, the effects on the fundamental freedoms concerned should be regarded as too uncertain and too indirect to warrant the conclusion that they may have been infringed (see, to that effect, *Coname*, paragraph 36 above, paragraph 20 and the case-law cited). However, the conclusion that there cannot have been any breach of the fundamental freedoms can only be reached as a result of an evaluation of the individual circumstances of each case and cannot be based solely on the fact that the value of the contract in question does not exceed a certain threshold.

89 That is why Section 1.3 of the Communication provides as follows:

'It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located

in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance.

If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Community law.'

90 Fourthly, the Federal Republic of Germany nevertheless maintains that, by requiring the contracting authorities to evaluate in each case the relevance of a public contract to the internal market in order to determine, in particular, whether the obligation of prior publication, laid down in Section 2.1.1 of the Communication, is applicable, the Communication creates a new obligation and thus produces binding legal effects.

91 However, in relation to public contracts outside the scope of the Public Procurement Directives, the case-law of the Court of Justice already envisages an obligation for the contracting entity to carry out an evaluation, subject to review by the competent courts, of the particular features of the contract at issue in the light of the appropriateness of the detailed arrangements for putting it out to competitive tender (see, to that effect, *Parking Brixen*, paragraph 36 above, paragraphs 49 and 50). It cannot be claimed, therefore, that Section 1.3 of the Communication, read in conjunction with Section 2.1.1 thereof, creates a new obligation for Member States.

92 At the hearing, the Federal Republic of Germany and the Republic of Austria added in that connection that a specific evaluation, as provided for under Section 1.3 of the Communication, would conflict with *SECAP*, paragraph 42 above (paragraphs 30 to 32), which envisages an abstract and general definition of the relevance of a public contract for the internal market.

93 In that regard, it should be noted that paragraph 30 of *SECAP*, paragraph 42 above, bears out the conclusion reached in paragraph 91 above that, in principle, it is for the contracting authority concerned to assess, before defining the terms and conditions of the contract notice, whether there may be cross-border interest in a contract whose estimated value is below the threshold laid down by the Community legislation, it being understood that that assessment is open to review by the courts.

94 Furthermore, it should be noted that there is no conflict between the Communication — in particular, Section 1.3 thereof — and *SECAP*, paragraph 42 above. Indeed, the Communication does not rule out the possibility that legislation might establish, at national or local level, objective criteria indicating that there is certain cross-border interest, as envisaged in paragraph 31 of the judgment in *SECAP*. The contracting authorities applying such national legislation are none the less under a duty to comply with the fundamental rules of the EC Treaty in general and the principle of non-discrimination on grounds of nationality, in particular (*SECAP*, paragraph 29).

95 As regards paragraph 32 of the judgment in *SECAP*, paragraph 42 above, it must be held that this does not conflict with Sections 1.3 and 2.1.2 of the Communication, either. That paragraph concerns the automatic exclusion of certain tenders — even where there is certain cross-border interest — on account of the fact that they are abnormally low. Accordingly, it applies to a phase in the procedure for the award of a public contract other than that of deciding whether the contract is potentially of interest to economic operators located in other Member States, as required under Section 1.3 of the Communication, or of choosing the most appropriate advertising medium, as required under Section 2.1.2 of the Communication. In any event, it should be emphasised that those sections of the Communication do not preclude the taking into account of the administrative capacity of the contracting entity and, in consequence, they cannot create a new obligation for Member States or their contracting authorities.

96 Fifthly, contrary to the assertions made by the Federal Republic of Germany (see paragraph 46 above), Section 2.1.2 of the Communication — according to which '[t]he

contracting entities are responsible for deciding the most appropriate medium for advertising their contracts' — is not irreconcilable with the establishment, by national legislation, of general criteria to govern that choice, subject to the specification that those criteria must not be used in such a way as to undermine compliance with the basic rules of the EC Treaty and, in particular, with the principle of non-discrimination on grounds of nationality. As was pointed out in paragraph 91 above, it is for the awarding authority to carry out an evaluation, subject to review by the competent courts, of the appropriateness of the detailed arrangements for putting the public contract in question out to competitive tender, in the light of the particular features of that contract. According to the case-law of the Court of Justice, the Communication leaves it up to the contracting authorities to decide what constitutes adequate advertising in terms of extent and form (see, to that effect, *Parking Brixen*, paragraph 36 above, paragraphs 49 and 50). The Communication is therefore correct in stating, in Section 2.1.2, that '[t]he contracting entities are responsible for deciding the most appropriate medium for advertising their contracts'. Accordingly, the Communication does not create a new legal obligation for the contracting authorities.

97 Furthermore, in response to the arguments of the Republic of Austria, based on a comparison of the thresholds for application of the Public Procurement Directives with the *de minimis* rule applicable to State aid, suffice it to note that it in no way follows from those directives that the thresholds in question are based on considerations similar to those which justify the *de minimis* rule in the field of State aid.

98 Sixthly, as regards the French Republic's argument that Section 2.1.2 of the Communication introduces an obligation of publication, that is to say, an obligation to use written media to advertise the contracts concerned, it should be pointed out that this is based on a false premiss. It is not stated anywhere in the Communication that there is an obligation to use written media to ensure that the public contracts concerned are advertised. In the first place, the first paragraph of Section 2.1.3 of the Communication refers to the case-law to the effect that the obligation of transparency does not necessarily imply an obligation to organise a formal call for tenders (*Coname*,

paragraph 36 above, paragraph 21). In the second place, the third paragraph of Section 2.1.2 provides as follows:

'Adequate and commonly used means of publication include:

— Internet ...'

As, moreover, the Federal Republic of Germany and the other interveners acknowledge, that is in no way an exhaustive list of the various forms of adequate advertising: it is merely a list of examples.

99 Seventhly, as regards the argument of the Federal Republic of Germany and the French Republic that the displacing, by the obligation of transparency introduced by the Communication, of the practice of contacting a number of potential tenderers, even if the contracting authority approaches undertakings from other Member States and attempts to reach all potential suppliers (third paragraph of Section 2.1.1 of the Communication), is an element which creates specific obligations as compared with the principles of the EC Treaty, it must be emphasised that this concerns a part of the Communication which goes wholly unchallenged in the application and in the statements in intervention. In that regard, it should be pointed out that, although Article 48(2) of the Rules of Procedure of the Court permits, in certain circumstances, the introduction of new pleas in law in the course of proceedings, that provision cannot in any circumstances be interpreted as authorising applicants to bring new claims before the Court and thereby to modify the subject-matter of the proceedings (see Case T-3/99 *Banatrading* v *Council* [2001] ECR II-2123, paragraph 28 and the case-law cited). It follows that the argument in question is not admissible, since it seeks to expand the subject-matter of the proceedings by including a part of the Communication that was not mentioned in the application.

100 In any event, it should be noted that the Communication does not rule out that practice in a manner that is absolute and final. As laid down in Sections 2.2.2 and 2.1.3 of the Communication, the contracting authorities may limit, to an appropriate level, the number of applicants invited to submit an offer. However, the Communication requires, in that regard, compliance with the principle of non-discrimination and the obligation of transparency (Section 2.2.2 of the Communication), to ensure that there is adequate competition. Moreover, it must be held that, in order for it to be possible to review the impartiality of the award procedures, the obligation of transparency demands that the contracting authority must actively divulge information, just as it must ensure the appropriateness of the detailed arrangements for putting the contract out to competitive tender (*Parking Brixen*, paragraph 36 above, paragraph 50). Accordingly, the content of the third paragraph of Section 2.1.1 of the Communication, as contested by the Federal Republic of Germany and the French Republic, does not create specific obligations.

2. *The second complaint, concerning the specification of the various obligations relating to advertising (Section 2.2 of the Communication)*

(a) Arguments of the parties

Federal Republic of Germany

101 The Federal Republic of Germany submits that the obligations arising under Section 2.2 of the Communication go significantly beyond the obligations which flow

from the interpretation by the Court of Justice of the fundamental principles of the EC Treaty. According to the Federal Republic of Germany, the Commission first decided, in Section 2.2 of the Communication, that the award of contracts had to be in conformity with the fundamental principles of the EC Treaty, so as to afford fair conditions of competition to all tenderers interested in the contract, and went on to infer from that obligation a certain number of specific requirements concerning the advertising of the intention to award a contract.

102 The Federal Republic of Germany submits, in particular, that, under Section 2.2 of the Communication, the Member States must describe the subject-matter of the contract in such a way that it may be understood in the same way by all potential tenderers, while guaranteeing equal access to economic operators in other Member States. Furthermore, if they require tenderers to submit written documents, the authorities must also accept documents drawn up in other Member States. The time-limits granted must be sufficiently generous to enable tenderers from other Member States to comply with them. Lastly, the procedure must be transparent for all participants. That list of rules is rounded off with procedural requirements, to be fulfilled by Member States wishing to draw up a shortlist of applicants invited to submit a tender for the contract concerned (Section 2.2.2 of the Communication), and the standards applicable to the contract award decision (Section 2.2.3 of the Communication).

103 Whereas the obligation, laid down in the first indent of the list of lines of conduct set out in Section 2.2.1 of the Communication, to provide a non-discriminatory description of the subject-matter of the contract may arguably flow from the case-law laid down by the Court of Justice in the order in *Vestergaard*, paragraph 38 above (paragraph 24), the other obligations set out in Section 2.2.1 of the Communication presuppose compliance with specific instructions which do not originate in Community law proper. That is confirmed by the Commission's claim that the above principles are of such a kind as to ensure, in practice, compliance with the fundamental principles of the EC Treaty (Section 1.2 of the Communication). Accordingly, what is set out is not a description of the case-law of the Court of Justice, but rather new rules for the award of contracts. The Federal Republic of Germany thus contests, essentially,

the various lines of conduct listed in Section 2.2.1 of the Communication, which — it claims — create new obligations.

Interveners

104 As regards the specific obligations regarding advertising laid down in Section 2.2 of the Communication, the Republic of Austria submits that some of the matters addressed in that section — such as the requirement that time-limits be sufficiently generous and concerning the number of applicants shortlisted — for the purposes of the award of contracts which are not subject, or not subject in full, to the Public Procurement Directives, are also designed to create new and binding legal effects. However, those obligations cannot be inferred from the case-law of the Court of Justice.

105 The European Parliament agrees with the conclusions reached by the Federal Republic of Germany in relation to Section 2.2 of the Communication, but insists on several additional points, thus reinforcing the argument submitted by the Federal Republic of Germany. According to the European Parliament, the Commission lays down, in that section, detailed rules on the content of calls for tenders, and the related time-limits, the possibility of a pre-selection procedure, and judicial protection.

106 The Republic of Poland submits that, when describing the modalities for advertising and the content of announcements, and even when laying down rules concerning procedural time-limits in relation to public procurement, the Commission does not refer to a single judgment of the Court of Justice in support of its position. The Commission maintains that the aim of the Communication is to interpret the case-law of the Court on these points. Thus, the content of the Communication does not bear out the Commission's statement that the Communication summarises the case-law.

Commission

107 The Commission rejects the arguments put forward by the Federal Republic of Germany and the interveners regarding the criteria laid down in Section 2.2.1 of the Communication. For the Commission, the principle of equal access for economic operators from all Member States and mutual recognition of diplomas, certificates and other evidence of formal qualifications, the requirement of appropriate time-limits and the requirement of a transparent and objective approach constitute principles flowing from the EC Treaty. They are not in any way new rules on procurement, but merely reflect the transposition of general rules of Community law to the field of public procurement.

(b) Findings of the Court

108 Section 2.2 of the Communication is entitled 'Contract award'.

109 In that regard, Section 2.2.1 of the Communication provides:

'Principles

The [Court of Justice] stated in the *Telaustria* judgment that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of

advertising sufficient to enable the market to be opened up to competition and the impartiality of the procedures to be reviewed. The guarantee of a fair and impartial procedure is the necessary corollary of the obligation to ensure a transparent advertising.

It follows that the award has to be in line with the rules and principles of the EC Treaty so as to afford fair conditions of competition to all economic operators interested in the contract. This can be best achieved in practice through:

— Non-discriminatory description of the subject-matter of the contract

The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words "or equivalent". In any case, it would be preferable to use more general descriptions of performance or functions.

— Equal access for economic operators from all Member States

Contracting entities should not impose conditions causing direct or indirect discrimination against potential tenderers in other Member States, such as the

requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting entity.

— Mutual recognition of diplomas, certificates and other evidence of formal qualifications

If applicants or tenderers are required to submit certificates, diplomas or other forms of written evidence, documents from other Member States offering an equivalent level of guarantee have to be accepted in accordance with the principle of mutual recognition of diplomas, certificates and other evidence of formal qualifications.

— Appropriate time-limits

Time-limits for expression of interest and for submission of offers should be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer.

— Transparent and objective approach

All participants must be able to know the applicable rules in advance and must have the certainty that these rules apply to everybody in the same way.'

Preliminary remarks

110 By way of a preliminary remark, it should be noted that the line of argument put forward by the Federal Republic of Germany is based on the premiss that contracts covered by the Communication are not subject to any general obligation of transparency flowing from Community law. It must be held, however, that — as was stated above (see paragraphs 68 to 100) — that is a false premiss.

111 Next, it should be pointed out that Section 2.2.1 of the Communication is intended to ensure compliance with the obligation to advertise, referred to in Section 2.1 of the Communication, and to make sure that the award of public contracts is in conformity with the rules and principles laid down in the EC Treaty. To that end, the Communication relies on the case-law of the Court of Justice, according to which the procedure for awarding a public contract must comply at every stage — particularly at the stage of selecting the candidates within the framework of a restricted procedure — both with the principle of the equal treatment of potential tenderers and with the obligation of transparency, so as to afford equality of opportunity for all in formulating the terms of their applications to take part or their tenders (see, to that effect, as regards the stage of comparing tenders, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 54, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 93).

112 It should also be pointed out that, according to the case-law of the Court of Justice, the principle of equal treatment, of which Articles 43 EC and 49 EC of the Treaty reflect specific instances, prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, through the application of other criteria of differentiation, bring about the same outcome in practice (Case 22/80 *Boussac Saint-Frères* [1980] ECR 3427, paragraph 7, and Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8), so that public contracts in the various Member States are open to all undertakings in the Community. Lastly, the Court has upheld the principle of equal treatment of tenderers (Case C-243/89 *Commission* v *Denmark*

[1993] ECR I-3353, paragraph 23, and *Commission* v *Belgium*, paragraph 111 above, paragraph 51). It is necessary, therefore, to analyse the various lines of conduct listed in Section 2.2.1 of the Communication in the light of the above.

Section 2.2.1 of the Communication

— The first indent of Section 2.2.1 of the Communication

113 The first indent of Section 2.2.1 of the Communication requires a non-discriminatory description of the subject-matter of the contract. It must be held, as the Federal Republic of Germany itself concedes, that that requirement is apparent from the order in *Vestergaard*, paragraph 38 above. In respect of the award of a public contract, that aim flows from the principle of equal treatment, of which the fundamental freedoms embody specific instances. That is why, in its case-law, the Court of Justice held that the lawfulness of a clause in the contract documents for a contract whose value was below the threshold set in Directive 93/37, and which therefore fell outside the scope of that directive, had to be assessed by reference to the fundamental rules of the EC Treaty, which include the principle of the free movement of goods, provided for in Article 28 EC (order in *Vestergaard*, paragraph 21).

114 In relation to the explanation given in the first indent of Section 2.2.1. of the Communication, it should be noted that, according to the case-law on public supply contracts, failure to add the words 'or equivalent' after the designation in the contract

documents of a particular product may not only deter economic operators using systems similar to that product from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 28 EC, by reserving the contract exclusively to tenderers intending to use the product specifically indicated (Case 45/87 *Commission* v *Ireland* [1988] ECR 4929, paragraph 22; Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-157, paragraph 27; and the order in *Vestergaard*, paragraph 38 above, paragraph 24).

115 Accordingly, the content of the first indent of Section 2.2.1 of the Communication corresponds to the interpretation, by the Court of Justice, of the basic principles of the EC Treaty.

— The second indent of Section 2.2.1 of the Communication

116 As regards the second indent of Section 2.2.1 of the Communication, urging equal access for economic operators from all Member States, that aim, which is designed to ensure that traders, of whatever origin, have equal access to contracts put out to tender, derives from compliance with the principles of freedom of establishment, freedom to provide services and free competition (see, in that regard, the Opinion of Advocate General Léger in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, point 47, referred to in the Opinion of Advocate General Mischo in Case C-237/99 *Commission* v *France* [2001] ECR I-939, point 49) and, in particular, with the principle of equal treatment (see paragraph 112 above) as expressed in the prohibition of discrimination on grounds of nationality laid down in Article 12 EC.

117 It is self-evident that the principle of non-discrimination precludes a contracting authority from imposing a condition which gives rise to direct or indirect discrimination, as provided in the second indent of Section 2.2.1 of the Communication. According to the case-law of the Court of Justice, the general conditions of the contract documents must comply with all the relevant provisions of Community law and, in particular, with the prohibitions flowing from the principles laid down in the EC Treaty in relation to the right of establishment and the freedom to provide services, and to the principle of non-discrimination on grounds of nationality (see, to that effect, Joined Cases 27/86 to 29/86 *CEI and Bellini* [1987] ECR 3347, paragraph 15, and Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 29 and 30).

118 Accordingly, the principle of equal treatment of tenderers covers the content of the first and second indents of Section 2.2.1 of the Communication.

— The third indent of Section 2.2.1 of the Communication

119 The third indent of Section 2.2.1 of the Communication introduces the principle of mutual recognition, which makes it possible for the free movement of goods and services to be ensured without there being any need to harmonise the national legislation of the Member States (Case 120/78 *Rewe-Zentral* [1979] ECR 649). In that regard, the authorities of a Member State are required to take into consideration all of the diplomas, certificates and other evidence of formal qualifications of the person concerned, as well as the relevant experience of that person, by comparing the specialised knowledge and abilities thus attested and that experience with the knowledge and qualifications required under the national legislation (see, by analogy, in particular as regards access to the professions, Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraphs 16, 19 and 20; Case C-319/92 *Haim* [1994] ECR I-425, para-

graphs 27 and 28; Case C-238/98 *Hocsman* [2000] ECR I-6623, paragraph 23; and Case C-31/00 *Dreessen* [2002] ECR I-663, paragraph 24).

120 The Court of Justice has emphasised that that line of authority is merely the expression in judicial decisions of a principle inherent in the fundamental freedoms of the EC Treaty; that the legal authority of that principle cannot be diminished through the adoption of directives on mutual recognition of diplomas (*Hocsman*, paragraph 119 above, paragraphs 24 and 31, and *Dreessen*, paragraph 119 above, paragraph 25); and that, in consequence, Member States must comply with their obligations regarding mutual recognition as they flow from the Court's interpretation of Articles 43 EC and 47 EC (see, by analogy, particularly as regards access to the professions, *Dreessen*, paragraph 27 and the case-law cited). In that regard, the Court has held that mutual recognition must enable the national authorities to assure themselves, on an objective basis, that the foreign diploma certifies that the holder has knowledge and qualifications which, if not identical, are at least equivalent to those attested by the national diploma (see, to that effect, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 13).

121 It follows that the aim pursued by the third indent of Section 2.2.1 of the Communication does not create new obligations for Member States.

— The fourth indent of Section 2.2.1 of the Communication

122 As regards the requirement of appropriate time-limits to enable undertakings from other Member States to make a meaningful assessment and prepare their tender, it should be borne in mind that the contracting authorities must comply with the principle of the freedom to provide services and the principle of non-discrimination, which seek to protect the interests of traders established in a Member State who wish

to tender goods or services to contracting authorities established in another Member State (Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; judgment of 1 February 2001 in *Commission* v *France*, paragraph 116 above, paragraph 41; *HI*, paragraph 76 above, paragraph 43; and *Universale-Bau and Others*, paragraph 111 above, paragraph 51). Their aim is to avoid the danger of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (see, to that effect, *Universale-Bau and Others*, paragraph 52 and the case-law cited)

123 Consequently, the aim of the fourth indent of Section 2.2.1 of the Communication, which seeks to prevent a contracting authority from excluding, through the time-limits granted to tenderers, the participation of an economic operator established in another Member State, flows from the principles of the EC Treaty, which means that this part of the Communication does not introduce a new obligation either.

— The fifth indent of Section 2.2.1 of the Communication

124 As regards the content of the fifth indent of Section 2.2.1 of the Communication, as the Court of Justice has stated, the requirement of compliance with the principles of equal treatment of tenderers and transparency is intended precisely to inform all potential tenderers, before the preparation of their tenders, of the award criteria to be satisfied by these tenders and the relative importance of those criteria (as regards Article 27(2) of 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 1990 L 297, p. 1), which is worded in terms almost identical to those of Article 30(2) of Directive 93/37, see *Commission* v *Belgium*, paragraph 111

above, paragraphs 88 and 89, and *Universale-Bau and Others*, paragraph 111 above, paragraph 99). Thus, the fifth indent of Section 2.2.1 of the Communication aims to afford all tenderers equality of opportunity in formulating the terms of their applications to participate or of their tenders, in accordance with the case-law of the Court.

125 In the light of the above, it must be held that the lines of conduct for achieving fair conditions of competition, as listed in the various indents of Section 2.2.1 of the Communication, help to ensure compliance, during the procedure for award of a contract, with the principle of equal treatment of potential tenderers and the obligation of transparency, as well as with the freedom to provide services, in accordance with the case-law of the Court of Justice (*Commission* v *Belgium*, paragraph 111 above, paragraph 54, and *Universale-Bau and Others*, paragraph 111 above, paragraph 93) and, in consequence, do not create new obligations.

Section 2.2.2 of the Communication

126 Section 2.2.2 of the Communication provides as follows:

'Limit on the number of applicants invited to submit an offer

Contracting entities may take measures to limit the number of applicants to an appropriate level, provided this is done in a transparent and non-discriminatory manner. They can, for instance, apply objective factors such as the experience of the applicants in the sector concerned, the size and infrastructure of their business, their technical and professional abilities or other factors. They may even opt for drawing

lots, either exclusively or in combination with other selection criteria. In any event, the number of applicants shortlisted shall take account of the need to ensure adequate competition.

Alternatively, contracting entities might consider qualification systems where a list of qualified operators is compiled by means of a sufficiently advertised, transparent and open procedure. Later, for the award of individual contracts falling within the scope of the system, the contracting entity may select the operators to be invited to submit an offer from the list of qualified operators on a non-discriminatory basis (e.g. by drawing in rotation from the list).'

127 Section 2.2.2 of the Communication concerns the restriction to an appropriate level of the number of applicants invited to submit an offer and, by way of example, states that contracting authorities may have recourse to certain measures and options, provided that they do so in a manner that is transparent and non-discriminatory and with the aim of ensuring adequate competition. That section of the Communication requires, in particular, application of objective criteria and a procedure which is sufficiently transparent, open and appropriately advertised.

128 In that regard, it must be held that those requirements are wholly consonant with the principles of the EC Treaty and the case-law of the Court of Justice. They flow, in particular, from the case-law of the Court to the effect that the procedure for awarding a public contract must — at every stage, particularly that of selecting the candidates in a restricted procedure — comply both with the principle of the equal treatment of potential tenderers and with the obligation of transparency, so as to afford equality of opportunity to all in formulating the terms of their applications to participate or

their tenders (see, to that effect, as regards the stage of comparing tenders, *Commission* v *Belgium*, paragraph 111 above, paragraph 54, and *Universale-Bau and Others*, paragraph 111 above, paragraph 93).

Section 2.2.3 of the Communication

129 Section 2.2.3 of the Communication is worded as follows:

'Contract award decision

It is important that the final decision awarding the contract complies with the procedural rules laid down at the outset and that the principles of non-discrimination and equal treatment are fully respected. This is particularly relevant to procedures providing for negotiation with shortlisted tenderers. Such negotiations should be organised in a way that gives all tenderers access to the same amount of information and excludes any unjustified advantages for a specific tenderer.'

130 Section 2.2.3 of the Communication provides that the final decision awarding the contract must comply with the principles of non-discrimination and equal treatment. Neither that aim, nor the content of that section, goes beyond the principles on which that section is based.

131 It follows from the above that the list of lines of conduct set out in Section 2.2 of the Communication concerning the award of a contract is designed to ensure, in accordance with the case-law of the Court of Justice, compliance with the principle of equal treatment of potential tenderers; the obligation of transparency; the principle of freedom to provide services (*Commission* v *Belgium*, paragraph 111 above, paragraph 54, and *Universale-Bau and Others*, paragraph 111 above, paragraph 93); and the principle of free competition (judgment of 1 February 2001 in *Commission* v *France*, paragraph 116 above, paragraph 49). Accordingly, it does not create new obligations amenable to an action for annulment.

3. *The third complaint, concerning derogations from the obligation of prior publication (Section 2.1.4 of the Communication)*

(a) Arguments of the parties

132 The Federal Republic of Germany maintains that, in Section 2.1.4 of the Communication, the Commission has created new legal obligations by transposing to below-threshold contracts the system of exceptions provided for in the Public Procurement Directives in respect of privately negotiated contracts, even though the exceptions provided for in the directives are conditional upon those thresholds being exceeded.

133 The Federal Republic of Germany also contests the argument of the Commission that, by extending the derogations provided for in the Public Procurement Directives, in respect of the obligation of prior publication, to public contracts which fall outside the scope of those directives, it is merely making a legitimate analogy, justifying that interpretation of the fundamental principles of the EC Treaty. According to the

Federal Republic of Germany, in order for that analogy to be legitimate, there would have had to be a legislative lacuna, which is not the position in the present case because, by adopting the thresholds, the legislature expressly decided not to apply those prior publication requirements to certain contracts.

134 The Federal Republic of Germany explained at the hearing that, in its view, the situations in respect of which derogations are provided for in Section 2.1.4 of the Communication are exhaustively listed and, accordingly, no other derogations are possible. The Communication thus reflects a conceptual approach to possible derogations which is very strict and exhaustive and, in so doing, runs counter to the consistent case-law of the Court of Justice on the fundamental freedoms, such as the possibility of justifying differential treatment by reference to objective circumstances. Thus, that part of the Communication, read in conjunction with Section 2.1.1 thereof, creates an absolute obligation of prior publication and excludes all other means of achieving transparency.

135 According to the Federal Republic of Germany, the wording of Section 2.1.4 of the Communication, especially that of the first sentence, clearly establishes a link with the derogations provided for in the Public Procurement Directives, and thus confines to those derogations the exceptions to the obligation of prior publication. Accordingly, other exceptions based on primary law are excluded by the Communication. That restrictive approach to derogations is contrary to *SECAP*, paragraph 42 above, which provides that other possibilities of derogation may be taken into consideration.

136 As regards the derogations from the obligation of prior publication provided for in Section 2.1.4 of the Communication, the European Parliament submits that the Commission extends to below-threshold contracts the derogations provided for in the Public Procurement Directives in respect of the procedure for privately negotiated contracts. This illustrates with particular clarity that, in the Communication, the Commission laid down autonomous rules on public procurement without taking into

account the fact that the conditions for the legitimacy of such an analogy — namely, an involuntary omission on the part of the legislature as regards contracts falling outside the scope of the Public Procurement Directives — are not in fact satisfied in the present case.

137 The Commission contends that the analogy proposed in the Communication, which consists in extending to below-threshold contracts the derogations from the obligation of prior publication provided for in the Public Procurement Directives, merely reflects the interpretation of the fundamental principles of the EC Treaty proposed by the Commission and does not create any legal rule. Furthermore, the Commission maintains that Section 2.1.4 of the Communication is not restrictive: on the contrary, it lists only the most important derogations in a non-exhaustive manner. By taking a position on the specific point of applying to contracts covered by the Communication the derogations from the obligation of prior publication provided for in the Public Procurement Directives, the Commission had no intention of taking the position that no other exception to the obligation of prior publication, reconcilable with the above principles, was permissible.

(b) Findings of the Court

138 According to its title, Section 2.1.4 of the Communication applies to '[p]rocedures without prior publication of an advertisement'. It provides as follows:

'The Public Procurement Directives contain specific derogations allowing, under certain conditions, procedures without prior publication of an advertisement. The most important cases concern situations of extreme urgency due to unforeseeable events and contracts which may, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, be executed only by one particular economic operator.

In the view of the Commission, the relevant derogations may be applied to the award of contracts not covered by the Directives. Therefore, contracting entities may award such contracts without publishing a prior advertising, provided they meet the conditions laid down in the Directives for one of the derogations.'

139 First, contrary to the assertions made by the Federal Republic of Germany, Section 2.1.4 of the Communication does not in any way exclude the possibility of other derogations from the obligation of prior publication. Moreover, as Sections 1.1 and 1.2 of the Communication state, Member States and their contracting authorities are under a duty to comply with the rules and principles laid down in the EC Treaty. Accordingly, in so far as those rules and those principles imply that there may be exceptions to the obligation of prior publication, such exceptions may, as a matter of law, be relied on by the Member States or by the contracting authorities in awarding a public contract covered by the Communication.

140 In that regard, it should be noted, in particular, that if the Member State or the contracting authority can rely on a provision of the EC Treaty providing for a general exemption from the application of primary law, such as Article 86(2) EC, or Articles 296 EC or 297 EC, or if one of the justificatory grounds expressly provided for in the Treaty applies (for example, public policy or public health, under Articles 46 EC and 55 EC, or official authority, under Articles 45 EC and 55 EC), or if the conditions for the application of a justificatory ground recognised by case-law are satisfied (see, for an overriding reason relating to the general interest, judgment of the Court of Justice of 27 October 2005 in Case C-158/03 *Commission* v *Spain*, paragraph 35 and the case-law cited), the principles of the EC Treaty are not affected. Consequently, in such cases, the obligation of prior publication laid down in the Communication and flowing from the principles of the EC Treaty does not apply to the award of a public contract.

141 In addition, it should be noted that Section 2.1.4 of the Communication aims only to make it possible for contracting authorities to rely on the derogations from the obligation of prior publication provided for in the Public Procurement Directives, in compliance with the conditions laid down in those directives for so doing, and

to do so even though those directives do not apply to the contracts covered by the Communication. As Advocate General Jacobs stated in his Opinion in Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, points 46 to 49, where a derogation from the Public Procurement Directives is expressly authorised, if the conditions for that derogation are satisfied and a negotiated procedure without prior publication of an invitation to tender is thus justified, there can be no obligation to advertise. Accordingly, the principles which flow from the EC Treaty cannot impose a requirement of prior publicity where the directives expressly provide for a derogation, or that derogation would be nugatory (see, also, to that effect, Opinion of Advocate General Stix Hackl in *Coname*, paragraph 36 above, point 93).

142 It follows that, far from creating new obligations for Member States, Section 2.1.4 of the Communication is rather favourable to the Member States, in that it allows them, in cases where the conditions for the Communication to apply are met, not to comply with the obligation of prior publication.

143 As regards the argument submitted by the Federal Republic of Germany on the basis of *SECAP*, paragraph 42 above (see above, paragraph 135), it must be held that that argument is based on a false premiss, since Section 2.1.4 of the Communication does not exclude the possibility of other derogations.

4. *The fourth complaint, concerning infringement proceedings (Section 1.3 of the Communication)*

(a) Arguments of the parties

144 The Federal Republic of Germany, supported by the interveners, submits lastly that the Commission's statement in Section 1.3 of the Communication, to the effect that it

would commence infringement proceedings in the event of non-compliance with the procedure laid down, shows that the Communication is intended to create obligations for Member States. That is confirmed by infringement proceedings No 2005/4043 brought against the Federal Republic of Germany in respect of the award of a II B contract which had not been advertised beforehand: the Communication is relied upon in those proceedings as if it were an additional legal basis. Furthermore, the Commission has already brought infringement proceedings against a number of Member States in order to ensure the application of the principles subsequently set out in the Communication to contracts which fall outside the scope of the Public Procurement Directives. In that regard, the Federal Republic of Germany refers to the cases which gave rise to the judgments in *Commission* v *Finland*, paragraph 39 above, and *Commission* v *Ireland*, paragraph 57 above. Consequently, the Communication's production of legal effects arises from Section 1.3 of the Communication, and its link with infringement proceedings.

145 In addition, according to the Federal Republic of Germany, the effects of the Communication as a result of Section 1.3 are not only informative in nature, but also dictate rules of conduct and thus are legal. That was acknowledged by the Commission, according to which the Communication has the effect of establishing a line of conduct. Thus, the Communication acquires binding effect through the Commission's declared intention of basing its practice regarding infringement procedures on the Communication.

146 Furthermore, as regards Section 1.3 of the Communication, the European Parliament argues that the Commission, as author of the Communication, occupies at the same time the position of central executive organ of the Community and that of guardian of the Treaties. Thus, the contracting authorities of the Member States are compelled to act in compliance with the Communication in order to avoid an action for failure to fulfil obligations, for the purposes of which the Commission would rely on the rules laid down in its own Communication.

147 The Republic of Poland adds that it is only to be expected that the guidelines set out in the Communication will be used as a point of reference by the auditors of the Commission when checking the procedures for the award of public contracts co-financed

by the budget of the European Union and including structural measures. If ever those procedures departed from the guidelines set out in the Communication, the auditors would be inclined to hold that expenses could not qualify for reimbursement from Community resources. In that way, and notwithstanding the claim made at the beginning of the Communication, the recommendations made therein would be applied 'in the manner of law'. In view of the importance for Poland of financial aid from the European Union budget, such an approach on the part of the auditors would be enough to ensure that the recommendations were regarded as binding.

148 Contrary to the argument of the Federal Republic of Germany, which attributes legal effects to Section 1.3 of the Communication, the Commission contends that the possible effect of the Communication on the Commission's practice regarding infringement proceedings does not create legal effects vis-à-vis third parties, but only has consequences for the Commission itself. The Commission is not competent to determine, through its practice in infringement proceedings, which obligations are incumbent upon the Member States. Not until matters come before the Court of Justice, in the context of infringement proceedings, can the scope of the rights and obligations of the Member States be determined in a manner that is legally binding.

(b) Findings of the Court

149 The last paragraph of Section 1.3 of the Communication provides:

'When the Commission becomes aware of a potential violation of the basic standards for the award of public contracts not covered by the Public Procurement Directives, it will assess the Internal Market relevance of the contract in question in the light of the individual circumstances of each case. Infringement proceedings under Article [226

EC] will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market.'

150 In that regard, it should be noted that it is entirely possible for the Commission to open infringement proceedings under Article 226 EC in respect of a Member State in a situation in which that State does not ensure compliance with the obligations which, as a result of the rules and principles laid down in the EC Treaty, are incumbent upon the contracting authorities of the Member States when they award public contracts. Consequently, contrary to the assertions made by the Federal Republic of Germany, the sole fact that Section 1.3 of the Communication mentions the possibility that infringement proceedings might be initiated in no way proves that the Communication creates new obligations for Member States in relation to public procurement and that, accordingly, it is a measure which produces binding legal effects.

151 Even though it is true that Section 1.3 of the Communication may suggest to a Member State that it runs the risk of infringement proceedings if it does not comply with its obligations under primary Community law as reiterated in the Communication, that is a mere consequence of fact and not a binding legal effect (see, to that effect, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 19, and Case C-301/03 *Italy* v *Commission* [2005] ECR I-10217, paragraph 30).

152 The argument put forward by the Federal Republic of Germany is all the more ineffective since the initiation of infringement proceedings pursuant to Article 226 EC does not constitute an act which has binding or compulsory effects. In that context, the part of the procedure which takes place before proceedings are brought before the Court of Justice constitutes an administrative stage intended to give the Member State an opportunity to comply with its obligations, since the Commission does not make its view known by means of an opinion until after it has given the Member State a chance to submit its observations. According to the case-law of the Court, no

measure taken by the Commission during the pre-litigation procedure has any binding force (Case 48/65 *Lütticke and Others* v *Commission* [1966] ECR 27, 39).

153 Furthermore, according to the system embodied in Articles 226 EC to 228 EC, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court of Justice (see, to that effect, Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraphs 15 and 16, and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 45). It follows that, contrary to the line of argument put forward by the Federal Republic of Germany, only a judgment of the Court of Justice is capable of have binding effect in the matter.

154 Consequently, it is necessary to reject the argument of the Federal Republic of Germany and the interveners that binding effect arises from the mere fact that infringement proceedings may be opened in the event of non-compliance with the procedure laid down in the Communication.

155 That conclusion is not called into question by the argument submitted by the Federal Republic of Germany on the basis of point 6 of the Opinion of Advocate General Tesauro in Case C-325/91 *France* v *Commission*, paragraph 28 above, which — it is claimed — advocates open acknowledgement that the mere threat of the initiation of infringement proceedings produces binding legal effects.

156 However, by contrast with the present case, the Commission never questioned, during the entire procedure that gave rise to the judgment in Case C-325/91 *France* v *Commission*, paragraph 28 above, the binding force of the measure at issue. Proceeding from that premiss, Advocate General Tesauro took the opening of infringement proceedings to be a further reason for proposing that the Court of Justice refrain from declaring the action inadmissible, but examine its content (Opinion of Advocate

General Tesauro in *France* v *Commission*, point 6). Furthermore, it should be borne in mind that the Court did not, in that judgment, espouse the line of reasoning followed by Advocate General Tesauro, which forms the basis for the argument put forward by the Federal Republic of Germany.

157 In the light of the considerations set out in paragraphs 150 to 153 above, the argument of the Federal Republic of Germany, the Kingdom of the Netherlands and the Republic of Poland, by which it is claimed that the Commission has set restrictions upon itself through the Communication, must also be rejected as ineffective, if nothing else. Furthermore, it is clear from the wording of Section 1.3 of the Communication that the Commission does not plan to open infringement proceedings every time it becomes aware of a case of failure to fulfil an obligation but, rather, that the Commission will open infringement proceedings in the light of the circumstances of each individual case, letting itself be guided by the two most important criteria, the seriousness of the infringement and the repercussions which the infringement might have on the internal market.

158 Lastly, as regards the argument put forward by the Federal Republic of Germany to the effect that the Commission refers to the Communication as if it were a legislative act and has already brought infringement proceedings on a number of occasions in order to enforce application of the principles laid down in the Communication, it must be held that this argument cannot be accepted.

159 As regards infringement proceedings No 2005/4043, relied upon by the Federal Republic of Germany, it should be noted that the Commission indeed refers to the Communication in paragraph 7 of the reasoned opinion. However, contrary to the assertions made by the Federal Republic of Germany, the Communication is not referred to in that document as a legal basis, but at the end of that paragraph as a simple reference in brackets. The operative part of the reasoned opinion is based on Articles 43 EC and 49 EC, as well as on the principles of equal treatment, non-discrimination and transparency.

160 The same is true of the two cases, relied upon by the Federal Republic of Germany, which gave rise to the judgments in *Commission* v *Finland*, paragraph 39 above, and *Commission* v *Ireland*, paragraph 57 above. In that regard, it should be noted that, in the case which gave rise to the judgment in *Commission* v *Finland*, the Court of Justice declared the action brought by the Commission to be inadmissible, because by basing the action on certain fundamental rules laid down in the EC Treaty and, in particular, on the principle of non-discrimination, which entails the obligation of transparency, the Commission had not put forward sufficient evidence to enable the Court to assess the precise scope of the infringement of Community law imputed to the Member State (*Commission* v *Finland*, paragraph 32). As regards the case which gave rise to the judgment in *Commission* v *Ireland*, it must be held that it is apparent from that judgment — as was acknowledged by the Federal Republic of Germany at the hearing — that ex post advertising does not guarantee adequate advertising and that the judgment confirms that there is an obligation of prior publication.

161 As regards the argument put forward by the Republic of Poland that the Communication may have the effect of alerting Member States to the fact that they run the risk of Community financing being refused for certain expenditure incurred, it must be held that, once again, this is a mere consequence of fact and not a binding legal effect of the Communication (see paragraph 151 above).

162 It follows from all the above considerations that the Communication does not contain new rules for the award of public contracts which go beyond the obligations under Community law as it currently stands. In those circumstances, it is not possible to regard the Communication as producing binding legal effects liable to affect the legal situation of the Federal Republic of Germany and the interveners, and the action must therefore be dismissed as inadmissible.

Costs

163 Under Article 87(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. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the Commission's costs in accordance with the form of order sought by the Commission.

164 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. In the present case, the interveners in support of the forms of order sought by the Federal Republic of Germany must bear their own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the Federal Republic of Germany to bear its own costs and to pay those incurred by the European Commission;**

3. Orders the French Republic, the Republic of Austria, the Republic of Poland, the Kingdom of the Netherlands, the European Parliament, the Hellenic Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 20 May 2010.

[Signatures]

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