OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 16 September 2010[1]

1. In the present infringement action the Commission requests the Court to hold that in awarding the Integrated Action Programmes ('IAPs'), an urban development measure in the region of Valencia, established by the LRAU[2] and its successor the LUV,[3] Spain has failed to fulfil its obligations in respect of public procurement Directives 93/37/EEC[4] and 2004/18/EC.[5]

2. This action enables the Court to consider once again the treatment of urban development measures within the scope of the public procurement rules, as well as to further clarify the meaning of 'pecuniary interest' and 'concessions' in the public procurement directives in question.

3. The present infringement action has been the result of a large number of petitions to the European Parliament, complaining about various aspects of the LRAU including the geographical location of the development projects and their impact on the environment, the expropriation of land without fair compensation, and the obligation of landowners to pay for infrastructure works they did not want or need.[6] The Commission investigated the various objections and found that the only avenue that could be pursued was the public procurement one since the Commission either did not have the competence,[7] or

1 — Original language: English.

2 — Ley 6/1994, de 15 de noviembre, Reguladora de la Actividad Urbanística de la Comunidad Valenciana ('LRAU') (Law 6/1994 of 15 November, regulating development activities in the Valencian Community).

3 — The LRAU was repealed with effect from 1 February 2006 by Ley 16/2005, de 30 de diciembre, Urbanística Valenciana ('LUV') (Law 16/2005 of 30 December, Valencian development Law).

4 — 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) ('Directive 93/37'), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1) and Directive 2001/78/EC of the Commission of 13 September 2001 (OJ 2001 L 285, p. 1).

5 — Directive 93/37 was replaced with effect from 31 January 2006 by 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) ('Directive 2004/18').

6 — European Parliament Committee on Petitions, Notice to Members, 25 January 2007, CM\650375, PE341.524/REVII ('EP Report').

7 — For example in relation to the fairness of the expropriation or to the landowners' obligations to pay for infrastructures since this was within the Member States' competences under Article 295 EC (EP Report pages 7 and 14).

because the legal case was not strong. [8] Since the main grievances of the petitioners concerned issues other than compliance with the public procurement rules, [9] the Commission's present action and the outcome of the case will do little to console them.

I — Legal framework

A — *EU law* [10]

1. Directive 93/37

4. Directive 93/37 applies to public works contracts and concessions.

5. Public works contracts are defined as 'contracts for pecuniary interest concluded in writing between a contractor and a contracting authority…which have as their object either the execution, or both the execution and design of works related to one of the activities referred to in Annex II or a work … or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.' [11]

6. Public works concessions are defined as 'a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment.' [12]

7. Article 6(6) contains a general non-discrimination requirement.

8. Article 11 requires notices to be published in full in the *Official Journal of the European Communities* and in the TED data bank.

9. Article 12 concerns the time-limits for the receipt of tenders. It provides for a period of 52 days from the publication of the notice in cases where the open procedure is used.

8 — For example in relation to the environmental damage since the Commission considered that the Spanish authorities were carrying out environmental impact assessments for all general plans as required by Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) (EP Report pages 7 and 12 to 14).

9 — European Parliament Report entitled: 'On the alleged abuse of the Valencian Land Law known as the LRAU and its effect on European citizens' (Fourtou), A6-0382/2005, page 5, paragraph 'I' (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0382+0+DOC+PDF+V0//EN&language=EN).

10 — Since the present infringement action was made prior to the entry into force of the Treaty on the Functioning of the European Union (OJ 2008 C 115, p. 47), references to articles of the Treaty establishing the European Community (OJ 2002 C 325, p. 33) are retained throughout.

11 — Article 1(a) of Directive 93/37.

12 — Article 1(d) of Directive 93/37.

10. Chapter II of Title IV, that is, Articles 24 to 29, concerns the criteria for qualitative selection. Article 24 lists situations when a contractor may be excluded from participation in a contract, and includes things such as a contractor who is bankrupt or has been convicted of an offence concerning professional conduct. Articles 25 to 29 deal with evidence that may be asked of a contractor concerning his enrolment in the professional or trade register, financial standing, technical capability, as well as addressing the situation of Member States who have official lists of recognised contractors.

2. Directive 2004/18

11. Directive 2004/18 recast, amongst others, Directive 93/37. The former covers all public contracts, defined as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this directive.' [13]

12. Public works contracts are further defined as 'public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.' [14]

13. Public service contracts are further defined as 'public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.' [15]

14. A public works concession is further defined as 'a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.' [16]

15. A service concession is further defined as 'a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists

13 — Article 1(2)(a) of Directive 2004/18.

14 — Article 1(2)(b) of Directive 2004/18.

15 — Article 1(2)(d) of Directive 2004/18.

16 — Article 1(3) of Directive 2004/18.

either solely in the right to exploit the service or in this right together with payment', [17] and is excluded from the directive. [18]

16. Directive 2004/18 does not apply to public service contracts for the acquisition or rental by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon. [19]

17. Article 2 states that in awarding contracts contracting authorities shall treat economic operators equally and non-discriminatorily, and shall act in a transparent way.

18. Article 6 relates to the confidentiality of technical and trade secrets as well as other confidential aspects of tenders, and requires the contracting authority not to disclose information forwarded to it by economic operators which they have designated as confidential.

19. Article 24 states that contracting authorities shall indicate in the contract notice whether or not they authorise variants and that they shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

20. Article 30 is about cases justifying use of the negotiated procedure with prior publication of a contract notice. It outlines the way in which such negotiated procedures shall be conducted.

21. Article 31(4)(a) deals with cases justifying use of the negotiated procedure without publication of a contract notice and more specifically, in case additional works or services not included in the project initially considered are required, the way in which this must be carried out.

22. Article 48(2) lists evidence that may be provided in order to indicate the economic operator's technical abilities.

23. Article 53 states that the criteria on which the contracting authorities shall base the award of public contracts shall be either that which is the most economically advantageous from the point of view of the contracting

17 — Article 1(4) of Directive 2004/18.

18 — Article 17 of Directive 2004/18. Article 17 is without prejudice to Article 3 dealing with special or exclusive rights to carry out a public service activity. However, Article 3 is not relevant for the purposes of the present case.

19 — Article 16(a) of Directive 2004/18.

authority (which can involve various criteria linked to the subject-matter of the contract in question such as environmental characteristics, quality, price and cost-effectiveness, amongst other things), or that with the lowest price. It also refers to the obligation on the contracting authority to specify, if possible, the relative weighting attached to each criterion to determine the most economically advantageous tender, or the criteria in descending order of importance.

B — *National law*

1. State legislation

24. In Spain, public procurement belongs to the legislative competence of the State. The State competence also covers expropriation and the right to ownership. On the other hand, planning and land-use belong to the regional legislative remit, within the framework provided by the Constitution and the State law. [20] The LRAU and the LUV have been issued on the basis of the regional competences to regulate the planning, use and development of land.

25. The Spanish Constitution recognises the right to private property and inheritance limited, however, by their social function in accordance with laws. [21] According to it: all persons are entitled to appropriate housing; the public powers contribute to the creation of the necessary conditions for the exercise of this right through adequate regulation of the use of land in the general interest so as to prevent speculation; the community shall benefit from the increase in the value of land following the urban development measures adopted by the public authorities. [22]

26. The Spanish State legislation on planning and land-use has undergone several changes after the adoption of the LRAU, the present legislative framework being incorporated in the TRLS. [23] It is useful to explain certain basic principles of this legislation that were also included in the preceding legislative acts applicable during the pre-litigation period.

27. According to the TRLS, land planning and urban development are non-commercial public services aimed at organising the use of land in accordance with the general interest

20 — Article 148(1) of the Spanish Constitution of 1978.

21 — Article 33 of the Spanish Constitution of 1978.

22 — Article 47 of the Spanish Constitution of 1978.

23 — Real Decreto Legislativo 2/2008 por el que se aprueba el texto refundido de la ley del suelo ('TRLS') BOE No 154, 26 June 2008 (Royal Legislative Decree 2/2008 approving the consolidated text of the Land Use Law).

and fixing the rights and obligations relating to ownership with regard to the objectives ascribed for the use of land. The categorisation of these objectives for each piece of land does not entail a right to compensation unless expressly provided by law. The planning and land-use legislation must ensure that the public authorities regulate and control the land development during its various phases from occupation, through building of infrastructures and building and construction activities, to use by any public or private person. In addition, the community must benefit from the increase of value generated by measures adopted by public authorities. [24]

28. Private parties, landowners and others may, within the framework of free enterprise, execute works relating to urban development when they are not executed by the competent authority. The authorisation to execute such works must be subject to public competitive award procedures that enable the local community to benefit in an appropriate manner as a result of the increase in value generated by the urban development. [25]

29. Actions promoting urban development may require:(1) the free transfer of the areas reserved for streets, green spaces and other communal areas as well as, with certain limits corresponding to building opportunities created by the action, territories reserved for public purposes to the local authority; (2) the financing and execution of all the works relating to the urban development in accordance with the action and to build up the necessary infrastructures; and (3) the transfer of the infrastructures and work, together with the accompanying territories, to the competent authority. [26]

24 — Article 3 TRLS.

25 — Article 6(a) TRLS.

2. Regional legislation

(a) Definition of the IAP

30. According to the LRAU and the LUV, urban development [27] in the autonomous region of Valencia can take place according to

26 — Article 16 TRLS.

27 — This entails a General Land Use Plan (Plan General de Ordenacion Urbana) which categorises the entire municipal territory into three types of land: existing urban land, land to be developed in the future and non-developable land or rural area. See Muñoz Gielen, D., and Korthals Altes, W., 'Lessons from Valencia: Separating infrastructure provision from land ownership', Town and Planning Review 2007, Vol. 78(1), at page 61 to 62. Urban development entails the transfer from the second to the first category. Urbanisation (urbanización), involves planning, land readjustment, engineering and infrastructure provision. (Muñoz Gielen, D., and Korthals Altes, cited ibid., at page 62).

the isolated action regime (in cases of a single piece of land) or integrated action regime (in cases of two or more pieces of land when there is a need to link the building land to a network of services). [28]

31. Integrated actions are always public, [29] and can be carried out directly or indirectly. The local authority which wishes to develop the land in question by integrated action can choose which of those procedures to engage. [30] If it chooses the direct management procedure the works and investments are financed through public funds [31] and managed by the contracting authority. [32] If it decides on the indirect management procedure the local authority chooses a developer, and the landowners must compensate the developer for the costs of development, proportionally to the land they contribute to the project.

(b) IAP procedure

32. One of the ways of carrying out an integrated action is by engaging the IAP procedure. [33] In both the case of the LRAU and the LUV the IAP procedure consists of four steps: initiative, selection, land readjustment and infrastructure provision. [34]

33. The engagement of the IAP procedure can be initiated by the local authority or at anyone's request, whether they own the land concerned or not. [35] A detailed development plan must be approved by the local authority. [36] The IAP entails a definitive choice between the land-use alternatives for the area enabled by the plan in force.

34. Under the LRAU, the IAP procedure is engaged when a request is made to make public a technical alternative for an IAP. [37] This document identifies the area to be developed, indicates the detailed or structural plans to be implemented by the IAP and includes a proposal for land use and its integration to the surrounding areas. [38] The local authority can either reject the demand, or make the information public by publishing it in the regional

28 — Article 6(2) LRAU; Articles 14 and 15 LUV.

29 — Article 7(2) LRAU; Article 3 LUV and Article 117(4) LUV.

30 — Article 7(2) LRAU; Art 130(3) LUV.

31 — The landowners bear the economic responsibility in the form of special development taxes in these cases too.

32 — Article 7 LRAU; Article 117(4) LUV.

33 — Article 12 LRAU lists various urban development plans. The IAP is listed at Article 12(g) LRAU.

34 — Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 67.

35 — Article 44 LRAU; Articles 118 and 130 LUV.

36 — Article 29 LRAU, Article 151 LUV.

37 — Articles 45(1) and 32 LRAU.

38 — Article 125(2) LUV corresponding to Article 32 LRAU. A list of subjects that must be included in the technical offer is in Article 126 LUV.

official journals, [39] with or without observations. [40] During the public consultations anyone can make observations or submit alternative technical offers. At this time financial offers can also be made. [41] The financial offers determine the legal, economic and financial conditions of the IAP. [42] The local authority then approves an IAP by choosing a technical offer and a financial offer (though not necessarily from the same person). [43] Under the LRAU there is also a simplified procedure where the approval by the local authority of the first technical offer presented by the initiator of the IAP is not necessary, formalisation before a notary being the only requirement in such a case. [44]

35. Under the LUV, the IAP is initiated by a person submitting any of the documents listed in the LUV. [45] Those documents become part of the specifications concerning the award of the IAP, [46] upon which subsequent tenders are judged. [47] When the documents are submitted the contracting authority decides whether it will opt for the direct or the indirect management procedure. [48] The choice of an indirect management procedure entails the approval of the specifications in the documents as submitted, [49] either implicitly [50] or explicitly, and the process for the awarding of the IAP begins with the publication of a notice in the Official Journal of the EU as well as in the regional official journals. [51] If the IAP modifies the structural development, the approval of the IAP by the contracting authority is conditional upon the definitive approval by the regional government. [52]

(c) The aims of the IAP

36. The aim of the IAP is to identify the scope of the integrated action by defining the works to be carried out, the deadlines, and the technical and economic base for the management of the action. [53] Its aim is to develop two or

39 — Any general information journal edited in the region of Valencia as well as the *Diario Oficial de la Generalidad Valenciana* (Official Journal of the Valencia Community).

40 — Article 45(2) LRAU.

41 — Article 46 LRAU.

42 — Article 125(3) LUV corresponding to Article 32 LRAU. A list of subjects that must be included in the financial offer is in Article 127 LUV. The financial offer determines, for example, the development costs, the coefficient determining the proportion between land before development and how much building rights the landowners will receive, as well as the modes of financing the IAP.

43 — Article 47(1) LRAU.

44 — Article 48 LRAU.

45 — Article 130 LUV. The documents that must be submitted are listed in Article 131(2) LUV.

46 — Article 131(2) LUV.

47 — Article 135 LUV.

48 — Article 130(3) LUV.

49 — Art 131(2) LUV.

50 — By administrative silence: Article 130(5) LUV.

51 — Article 132(2) LUV.

52 — Article 137(5) LUV.

53 — Article 29(2) LRAU; Article 117 LUV.

more parcels by transforming them into developed land and attaching them to existing service networks. [54]

37. According to both the LRAU and the LUV the IAP *must* achieve the following: [55]

— attachment of the new (developed) lots to a network of infrastructures, communications and existing public services;

— construction of new infrastructures and public spaces;

— complete development of the space and the carrying out of necessary complementary public works;

— the obtaining of land for the purposes of the IAP;

— the obtaining of a right to develop;

— obtaining the costs necessary to see the IAP through.

54 — Article 6(3) LRAU; Article 14 LUV.

55 — Article 30 LRAU; Article 124(1) LUV.

38. In addition to these obligations, the regional legislation outlines the following which *may* also be achieved through the IAP: [56]

— contribution for the benefit of the local authority [57]

— carrying out other works

— construction of social housing.

(d) Division of powers pursuant to the IAP

39. The local authority controls and oversees the IAP procedure. It is responsible for choosing a developer in indirect action cases, [58] as well for approving the IAP and suggesting modifications if necessary. [59] At the end of the IAP the works pass to the local authority three months after being formally offered to the local council without receiving a reply, or from the date when they are open to the public. [60] After receipt the local authority assumes

56 — Article 30(2) LRAU; Article 124(2) LUV.

57 — According to Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 67, this may include the construction of public buildings (e.g. swimming pools and sports installations). These costs cannot be included in the urbanisation costs, and they must be paid out of the developer's profit margins.

58 — Article 47 LRAU.

59 — Article 47 LRAU; Article 137 LUV.

60 — Article 188(2) LUV.

the maintenance obligations. The contracting authority may agree to receive a monetary payment instead of the land corresponding to their entitled development profit of 10%. [61]

40. The developer is the local authority in direct action cases, but is chosen by the local authority through public tender in indirect action cases. He is defined in the regional legislation as the public agent responsible for the development and execution of the IAP. [62]

41. The developer is responsible for writing technical documents as required by the specifications, and developing and managing the re-allotment of the land, [63] as well as choosing a sub-contractor to carry out the works. [64] The developer is the person whose financial offer has been approved as a result of the IAP procedure, and he is responsible for implementing the technical offer which has been approved, which might not necessarily have been his own. Under the LUV the developer is obliged to sub-contract in accordance with public procurement rules the execution of public works entailed by the IAP unless the thresholds are not exceeded, if there is only one landowner or, in the case of several landowners, they unanimously agree with the developer that he can himself execute the works. The developer is paid by receiving from the landowners a part of the developed land and/or cash payments. [65]

42. The landowner can choose between expropriation and participation in the IAP. If he chooses expropriation he will receive a price on the basis of the original value of the land concerned. [66] In such a situation the local authority will be responsible for the expropriation and the developer obliged to pay the compensation. [67] If he chooses to participate he will be obliged to pay a proportion of the costs of development either by giving the developer a portion of his land, or by paying him directly in money. [68] In return he receives developed land.

61 — Article 23 LUV.

62 — Article 29(6) LRAU; Article 119 LUV.

63 — This entails that the developer under the LUV divide the whole land that is to be developed and re-distribute it to the landowners and the municipality when the works are finished so that the landowners get developed land in the same ratio (compared to the other landowners) as the amount they contributed to the development, by giving land or land together with cash.

64 — Article 119 LUV.

65 — Article 71 LRAU.

66 — Article 29(9)C LRAU. Articles 28(2), 32 and 162(3) LUV.

67 — Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 68.

68 — Article 29(9)B LRAU; Article 162 LUV.

43. The landowner is obliged to pay the following costs, in proportion to the area of the land which he has given to the project: [69]

— costs of development works and indemnities in respect of necessary investment in order to achieve the IAP objectives;

— the developer's profit as a result of the IAP (capped at 10% under the LUV but not under the LRAU);

— the associated management costs.

II — Pre-litigation procedure

44. On 21 March 2005 the Commission sent Spain a letter of formal notice considering that various provisions of the LRAU relating to the attribution of IAPs were contrary to Directive 93/37. The Spanish authorities replied to that letter contesting that the IAP was a public contract within the meaning of the directive, and referring to the proposed adoption of the new law, the LUV.

45. On 15 December 2005, following an exchange of letters between the Commission and the Spanish authorities, and unsatisfied with Spain's replies, the Commission sent a reasoned opinion requesting that Spain take the necessary measures within three weeks, that is by 6 January 2006, to ensure that the LRAU complied with Directive 93/37.

46. The reasoned opinion stated that the awarding of IAPs in accordance with the LRAU was contrary to(1) Directive 93/37 'and particularly Articles 1, 11 to 13 (and in the alternative Articles 3 and 15), as well as Chapter 2 of Title IV'; (2) Directive 92/50 [70] 'and in particular Articles 1, 15 to 19 and Chapter II of Title VI'; and (3) 'Articles 43 to 55 of the Treaty and general principles as stated by the Court'.

47. On 26 January 2006 Spain replied that the LUV, entering into force on 1 February 2006, was to replace the LRAU.

48. On 10 April 2006 the Commission sent an additional letter of formal notice in view of the continued infringement and as a result of the expiration of the deadline for transposition of Directive 2004/18, following another exchange of letters.

69 — Article 67 LRAU; Article 168 LUV — development works and other works necessary; restoration of buildings; writing and management of technical projects; management costs; professional fees incurred for technical reports etc.

70 — 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).

49. On 12 October 2006 the Commission sent Spain an additional reasoned opinion, considering that the attribution of IAPs under (1) the LUV was contrary to Directive 2004/18 and 'certain general principles of EU law derived from the EC Treaty'; and (2) the LRAU (for the period 21 March 2005 to 31 January 2006) was contrary to Articles 2, 6, 24, 30, 31(4)(a), 36, 48(2) and 53 of Directive 2004/18 and 'the principle of equal treatment and non-discrimination, as derived from the EC Treaty and case-law of the Court, Articles 10 and 49 EC' and in the alternative Title III of Directive 2004/18, dealing with works concessions.

50. Not being satisfied with Spain's response to the additional reasoned opinion, the Commission decided to bring the present action where it asks the Court to declare that, (1) in awarding IAPs in accordance with the LRAU, Spain 'has failed to fulfil its obligations under [Directive 93/37] and particularly Articles 1, 6(6), 11, 12 and Chapter 2 of Title IV thereof (Articles 24 to 29)'; and (2) in awarding IAPs in accordance with the LUV (as implemented by Decree 67/2006 of the Region of Valencia of 12 May, establishing the Regulation of Town Planning and Management [71]), Spain 'has failed to fulfil its obligations under Articles 2, 6, 24, 30, 31(4)(a), 48(2) and 53(2) of Directive 2004/18'.

III — Scope of the case

51. During the pre-litigation proceedings as well as in its written pleadings before the Court the Commission has touched upon a lot of issues that are outside the scope of the infringement action as defined in the form of order sought. Therefore it is important to set out the exact ambit of the present infringement action.

52. Even though the Commission has not explicitly excluded direct management IAPs from the form of order sought, this infringement action must be interpreted as concerning only the indirect management IAP since the complaints it raises, which relate to the way that the developer is chosen, can only logically concern the indirect management

71 — It appears to me that the text of Decree 67/2006 is not included in the file.

procedure. [72] Therefore, the Court is required to analyse whether this relationship falls within the scope of the directives in question, and if so whether it breaches them.

53. If the award of the contract to the developer is not considered as falling within the scope of the directives in question the Court should not, in my opinion, analyse whether the indirect management IAP breaches the Treaty since the Commission has not asked the Court to declare the incompatibility of the IAP with the Treaty or with any general principles in particular. [73] While the Commission raised the potential incompatibility with the Treaty and the general principles as derived from the case-law of the Court in the reasoned opinions, it has not done so before the Court.

54. The Commission is of course permitted to restrict the ambit of its case before the Court. When that occurs, however, the Court cannot rule on issues that are outside the scope of the infringement action as set by the Commission. [74] The Court must observe the principle *ne eat iudex ultra petita partium*. A meticulous reading of the Commission's form of order sought is particularly important in the present infringement action since the pre-litigation procedure has been relatively long and complicated, the file is extensive and the pleadings of the parties cover a wider range of problems than those formulated in the form of order sought.

55. Since the Commission has only raised the issue of compatibility of the LRAU with Directive 93/37 and the LUV with Directive 2004/18, the compatibility of the LRAU with Directive 92/50 [75] is *ultra vires* in the present infringement action, as is the compatibility with the Treaty.

56. It should also be noted that the wording of the first plea relating to the LRAU and Directive 93/37 is open-ended, whereas the list in the second plea relating to the LUV and Directive 2004/18 is exhaustive. Therefore,

72 — The Court can infer that a particular form of order is sought from the wording of the application. See Case 8/56 *ALMA* v *High Authority* [1957 and 1958] ECR 95, at 99 and 100; Case 80/63 *Degreef* v *Commission* [1964] ECR 391, at 408.

73 — Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995.

74 — The Court is bound by the subject matter of the case as stated in the application (Case 232/78 *Commission* v *France* [1979] ECR 1-2729, paragraph 3). The Court must be able to define the subject-matter of the action precisely on the basis of the application (Case 168/78 *Commission* v *France* [1980] ECR I-347, paragraphs 17 to 25; Case 270/83 *Commission* v *France* [1986] ECR 273, paragraphs 7 to 10).

75 — Cited in footnote 70.

as to the second plea, the Court can examine the alleged infringement only in relation to the articles of Directive 2004/18 expressly mentioned.

59. Furthermore, according to settled case-law, the question of whether a Member State has failed to fulfil its obligations must be determined by reference to the situation persisting in the Member State at the end of the period laid down in the reasoned opinion. [77] The adoption of laws, regulations or administrative provisions after the date on which that period expired cannot usually be taken into account.

IV — Admissibility

57. Spain submits that the first claim is inadmissible for two main reasons: (1) the fact that the Commission started infringement proceedings when it knew that Directive 93/37 was about to expire and be replaced by Directive 2004/18, which had already been published at the time that the formal letter was sent. Since the regional law was repealed two years before the action was brought, there is no interest in pursuing the analysis; and (2) that the Commission had over ten years to bring the infringement proceedings and it chose to do it just before the expiration of Directive 93/37.

60. It is therefore with regard to the legislation in force on 6 January 2006, the date on which the period prescribed in the reasoned opinion of 15 December 2005 expired, that it must be decided whether Spain committed the infringement alleged in this complaint. At that date both the LRAU and Directive 93/37 were in force, even if they were to expire soon after. [78]

58. These complaints can be dismissed quite briefly. It is settled case-law that the Commission does not need to have a specific interest in bringing an infringement action, and it can choose to bring that action at any time it deems appropriate. [76]

61. In its defence Spain raises another interesting point, however: that of the abnormally short three-week deadline over the Christmas

76 — Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 29 and case-law cited; Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 16.

77 — Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9; Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 32.

78 — Directive 2004/18 was adopted on 31 March 2004. Its implementation period ended on 31 January 2006, and Directive 93/37 was repealed on the same date. The LUV, adopted by the regional parliament of Valencia on 22 December 2005, entered into force on 31 January 2006 as well.

period within which it was required to reply to the first reasoned opinion. [79]

62. However, the time-limit set by the Commission in its reasoned opinion must be reasonable. [80] The reasonableness must be decided on a case-by-case basis, taking into account all the circumstances. [81] Shorter periods may sometimes be allowed where there is an urgent need to remedy the breach. The Commission in the present infringement action has established no such urgency.

63. The period of three weeks [82] does not seem to me to be a reasonable time period. The Commission cannot have expected Spain to adapt the LRAU to Directive 93/37 in that time, or to stop awarding new IAPs pursuant to the LRAU, which would have been required in order to comply with the reasoned opinion. Indeed, it seems to me, that the only plausible explanation for the Commission to set such a short time-limit for compliance was because it knew that both directive 93/37 and the LRAU were about to expire, and it wanted to catch them within the scope of the infringement action.

64. The Court's case-law states that very short deadlines may be justified in particular situations, such as when the Member State concerned has knowledge of the Commission's complaints well in advance of the procedure in question. [83] In the present infringement action Spain had known of the Commission's position for almost nine months, since the formal letter was sent on 21 March 2005.

65. In any case, the short deadline does not seem to have had any negative consequences for Spain. They sent their reply to the reasoned opinion on 26 January 2006, and even though this was later than the date stated in the reasoned opinion, the Commission took their defence into account. Spain also had the opportunity of submitting additional observations in a letter of 17 March 2006. In the absence of negative consequences the case-law of the Court considers such cases admissible, even if the deadlines are not considered reasonable. [84]

79 — According to the copy of the LUV included in the file, the LUV was meant to enter into force on 12 January 2006. The file does not contain information on when and why that date was postponed to 31 January 2006.

80 — Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 14.

81 — *Commission* v *Belgium*, ibid., paragraph 14.

82 — It is also interesting to note that until February 2005 the Commission's Manual of Procedures (an internal Commissio document) stated that during holiday periods, including Christmas, any deadline set should be extended by one month. It appears that this unofficial rule was erased from a subsequent Manual of Procedures that was adopted in February 2005. See Eberhard and Riedl in Mayer (ed.), *Kommentar zu EU- und EG-Vertrag*, EGV Article 226, paragraphs 42 and 52.

83 — *Commission* v *Belgium*, cited in footnote 80, paragraph 14.

84 — Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraphs 12 and 13.

66. Therefore, the case must be held to be fully admissible.

V — Do the relevant directives on public procurement apply to IAPs?

A — *Land-use agreements and public procurement*

67. Before analysing the legal classification of IAPs under Directive 2004/18 it is important to note their specific nature as public-private partnerships whose purpose is to enable the public authority to carry out its obligations in an efficient way. They do so by encouraging private development with the corresponding obligation to provide public infrastructures while doing so. [85]

68. Land-use and urban planning belong mainly to the competence of the Member States. In the Member States planning and zoning, land-use and urban development are usually public prerogatives. However, landowners, real property investors and building enterprises may often have an interest in developing areas that have not undergone a detailed planning process, in order to be able to exploit potential building rights pertaining to the land. In such cases the public authorities may also benefit since they do not have to commit their own scarce capital and administrative resources. This situation has lead to the development of various forms of cooperative arrangements ('land-use agreements') between the local government and private economic operators.

69. The aim of land-use agreements is to enable building activities to be carried out in a specified area. In such an agreement the local authorities give guarantees regarding the use of public prerogatives concerning planning (such as promising to define building rights in a certain way), in exchange for commitments by the economic operators in question. In other words, the adoption of a detailed plan with certain specified contents as to the amount, location and planned usage of building rights

85 — On how private initiatives can help provide cost-efficient public services see: Bovis, C., *EC Public Procurement: Case Law and Regulation*, OUP, 2006 (reprint 2009), Chapter 10: 'Public Procurement and Public-Private Partnerships'. On details of how private initiatives have helped the stagnation in the development process in Valencia see Muñoz Gielen and Korthals Altes, cited in footnote 27.

is exchanged [86] for a commitment to finance and execute the infrastructures contained in the detailed plan and, possibly, also buildings needed for public purposes such as public services or social housing.

70. The IAP is an example of a land-use agreement. The problem that arises in relation to it, however, is that its logic is based on a relationship where the initiative comes from a private person. [87] The purpose of the LRAU and the LUV has been to overcome the stagnation in urbanisation (and thus the stagnation in constructing public infrastructures which accompany such projects in Spain) by putting the emphasis on private initiative in the form of the developer's activity, which is distinct both from land ownership and public administrative activity. Hence, the IAPs constitute essentially a system for the selection of a land-use development alternative [88] as well as a developer to implement it in the most efficient way.

71. The effect of this in the public procurement sphere, and especially in relation to the execution of the related public works, however, as the Commission points out, is that such a system is inherently discriminatory due to the privileged position of the private initiator compared to subsequent tenderers. [89]

72. This is why the IAP system is very difficult to fit into the frame of public procurement rules.

73. In considering what fits the public procurement frame the Court's case-law to date has adopted a relatively broad, public

86 — However, in many legal systems the building rights are not understood as being created by the planning decisions of public authorities but they somehow pre-exist as property rights of the landowners of non-developed land even if they can't be exercised before adoption of a detailed plan. This seems to be the point of departure of the Spanish law as well. (Muñoz Gielen and Korthals Altes, cited in footnote 27, at pages 61 to 62). Legally it is also often the case that the possible content of a detailed plan is subject to a public law framework, which legally restricts the local government's possibilities to commit itself to the adoption of a certain plan in exchange for commitments by a private undertaking.

87 — Even though technically both the local authority and the private person can initiate an IAP, the reason for the model adopted in the LRAU in the 1990s, which emphasises the central role of the developer was to increase private initiatives in urbanisation projects. For more information on this see Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 65.

88 — Spain has explained that the selection of an IAP initiative may entail, for example, a choice between building a shopping mall or a housing area.

89 — However, the LUV has introduced a distinction between the developer and the constructor of public works by obliging him, with some exceptions, to appoint a constructor in accordance with the EU public procurement rules.

procurement-friendly approach. [90] This has given rise to a debate as to whether land-use agreements are or should be classified as public contracts or more precisely as public works contracts as they often involve, directly or indirectly, the execution of public works by the developer or the landowners. [91] Especially problematic has been the question of pecuniary interest, more precisely, whether the attribution of new building rights by the public authority can be considered as financial consideration in exchange for the infrastructures the developer is obliged to build for the public authority. [92]

74. Recently, however, in *Helmut Müller*, [93] the Court declined to follow the functional interpretation proposed by the Commission in that case, which might have subjected a considerable part of the powers and activities traditionally reserved for local authorities in the field of planning and construction law, to the public works provisions. The Court stated that the purpose of the public procurement rules was to apply the rules of EU law to the award of contracts concluded on behalf of the State, regional or local authorities and other bodies governed by public law entities. [94] It is not the purpose of the mere exercise of urban planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority as required by Directive 2004/18. [95]

75. The notion of a public works contract is an autonomous and objective concept of EU law. [96] However, in my opinion the Court should exercise a certain restraint if a broad interpretation of an EU law concept seems to lead, in practice, to an instrument of national law loosing its *raison d'être* or a detailed EU legislative act becoming applicable

90 — Case C-399/98 *La Scala* [2001] ECR I- 5409, further applied in Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraphs 70 to 75; Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraphs 56 to 58; and Case C-220/05 *Auroux* [2007] ECR I-385.

91 — On the debate see Hakkola, Esa: Hankintalainsäädäntö ja maankäyttösopimukset, 'Public procurement legislation and land-use agreements', Lakimies 5/2007 pages 723 to 745, and Paradissis, J., 'Planning agreements and EC public procurement law', *Journal of Planning & Environment Law*, 2003, pages 666 to 677.

92 — Hakkola, Esa, ibid., page 741; Paradissis, ibid., pages 669 to 672.

93 — Case C-451/08 *Helmut Müller* [2010] ECR I-2673.

94 — Cited ibid., paragraph 46.

95 — Cited ibid., paragraph 57.

96 — The Court has applied the public procurement directives in question to various planning schemes when they have been held to fulfil the objective requirements of the Directive (*La Scala*, cited in footnote 90, *Auroux*, cited in footnote 90, Case C-264/03 *Commission* v *France* , cited in footnote 90). The previous case-law has considered that the aims pursued by the authorities are irrelevant (*La Scala*, cited in footnote 90; *Commission* v *Italy*, cited in footnote 90, paragraph 70) focusing instead on whether the criteria for the existence of the public contract are fulfilled.

to phenomena that have not been considered by the EU legislature during the legislative process.

76. In the present infringement action a classification of the IAP as a public works contract would have the practical consequence of discouraging private initiatives in the field of planning and land development since, if considered to be within the scope of the public procurement directives, the IAP appears to be against the central aim of public procurement, namely the equal treatment of all participants. The only option left in planning law would then be the classical model where the public authorities draw up and adopt all documents relating to planning and land-use, finance and organise their execution and implementation directly and from the public purse.

77. Therefore, in considering whether this case raises any issues of public procurement, that is, in considering whether the present rules are covered by the directives in question, the Court should be careful not to overstretch the meaning of certain criteria within the public procurement directives for the sake of fitting the present arrangement within the scope of the public procurement rules. To do so would amount to a Procrustean solution. [97]

B — *The requirements for the application of the directives*

78. It is uncontested that in the present case the municipalities awarding the IAPs are contracting authorities, that the developers are economic operators and that a written contract is concluded between the two, within the meaning of Directives 93/37 and 2004/18. Furthermore the Commission's case only concerns IAPs above the relevant monetary thresholds set out in Directives 93/37 and 2004/18.

79. What is in dispute however, is whether the contract in question gives rise to pecuniary interest within the meaning of the relevant directives.

1. Is there pecuniary interest originating from the contracting authority?

80. Pecuniary interest has been given a wide meaning by the Court, in view of the aims of

97 — In Greek mythology Procrustes was a rogue smith and bandit from Attica who physically attacked people, stretching them, or cutting off their legs so as to make them fit an iron bed's size.

the public procurement directives, namely, the opening up of national procurement markets to competition and the avoidance of barriers to the exercise of fundamental freedoms recognised in the Treaty. [98]

81. Although pecuniary interest does not therefore just include money, [99] the question is whether such pecuniary interest has to come from the contracting authority itself, or whether it is sufficient that pecuniary interest exists independently of who provides it. The latter interpretation would imply that the public works contract provisions would be applicable also in the case where a private party finances and executes public works on his own land, in agreement with and authorised by the contracting authority without any corresponding economic benefit to itself, and without the contracting authority having any legal obligation as to their execution. [100]

82. In *La Scala* the Court considered that there was pecuniary interest in that case, even though it was the owner-developer of the land who had to bear the development costs, because the municipality had an obligation to execute the necessary infrastructure works.

83. In my view that case is distinguishable from the present case. By waiving the planning development fee that was usually chargeable in such situations, the contracting authority suffered economic detriment which is not the case in the present proceedings.

84. In *Parking Brixen* the Court was of the view that consideration had to be paid directly by the contracting authority to the service providers for the contract to amount to a public service contract. [101] The Court was thus of the opinion that the service in question (the management of a public car park) was not a public service contract because the remuneration did not come from the public authority concerned, but from sums paid by third parties for the use of the car park in question. [102]

98 — Recital 2, Directive 2004/18; Advocate General Kokott in *Auroux*, cited in footnote 90, point 57.

99 — This is what the Court's case-law has dealt with so far in relation to 'pecuniary interest'.

100 — This would be the case under Article 120(7) LUV which frees the developer from the obligation to have a tender procedure for the selection of the constructor of the public works included in the IAP where the land is owned only by a single person or where there is a unanimous agreement between the landowners and the developer.

101 — Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 39.

102 — Cited ibid., paragraph 40.

85. Recently, in *Helmut Muller,* Advocate General Mengozzi was of the opinion that the concept of pecuniary interest is based on the idea of an exchange of services between the contracting authority, which pays a price, and the contractor, who is required to execute a work or works. Thus, according to him, public contracts are clearly *mutually binding*. [103]

86. I agree with that view. In my opinion, for pecuniary interest to exist it is necessary that the contracting authority bears the economic detriment either positively in the form of a payment obligation towards the economic operator, or negatively as a loss of income or resources otherwise due.

87. Mere power of the contracting authority to require a third party to pay for the works or services cannot, contrary to the Commission's submissions, be sufficient since there is no mutually binding relationship in the nature of an exchange of performance with a tangible economic value between the contracting authority and the economic operators executing the works or services in question.

88. This is supported by the fact that one of the aims of the public procurement directives is to ensure that when contracting authorities spend money in public markets there is no distortion of competition. [104] It follows that where the contracting authority is not spending any public funds there is no danger of distorting competition within the meaning of Directives 93/37 and 2004/18. [105]

89. Thus, the pecuniary interest requirement implies that the contracting authority needs

103 — Advocate General Mengozzi in *Helmut Muller*, cited in footnote 93, point 77.

104 — This can be deduced from the general aim of preventing the distortion of competition in recital 2. See also Bovis, cited in footnote 85, pages 14 to 22.

105 — This situation is analogous to those where the EU State aid law provisions do not apply because of an absence of burden on public resources corresponding to the advantage created by the relevant national rules as the advantage is funded through private means. See for example: Joined Cases C-72/91 and C-73/91 *Slomann Neptun* [1993] ECR 887, paragraphs 19 and 21; C-379/98 *PresussenElektra* [2001] ECR 2099, paragraphs 59 to 61.

to use its own funds either directly or indirectly. [106] Direct financing will occur when the contracting authority uses public funds to pay for the works or services in question. Indirect financing will occur when the contracting authority suffers economic detriment as a result of the method of financing the works or services.

90. In the present infringement action it is the land developer that is responsible for financing the costs of the development in the indirect IAP procedure, but he is entitled to reimburse those from landowners. Thus it is the landowner who pays for the public works necessitated by the development.

106 — In Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 20, the Court stated that use of public resources is not a factor that determines whether or not there is a public contract for the purposes of Articles 8 and 11 of Directive 92/50, cited in footnote 70. In that case the public authority (City of Munich) was awarded a public service contract from another contracting authority, and the issue was whether it had been legal for the city to entrust in advance a private undertaking with the responsibility for a service stemming from the first mentioned contract without invitation to tender under the directive in question. In that context there was clearly an economic exchange between the city and the private undertaking even if it was obviously financed with 'private' income of the city resulting from the award of public service contract to it. I don't think that the Court intended to declare that the notion of a pecuniary interest would not be an essential element of a public contract or that such pecuniary interest must not directly or indirectly originate from the resources of the contracting authority. The whole *ratio* of EU public procurement legislation is to create competitive, transparent and non-discriminatory conditions of economic exchanges between public authorities and undertakings, and not to regulate the economic relations between undertakings procuring goods or services from each other.

91. As a result of the requirement for pecuniary interest not being met in this infringement action, the only way that Directives 93/37 and 2004/18 can apply to the regional legislation is if it can be said to amount to a public works concession, since public service concessions are excluded from those directives. [107]

2. Is there a public works concession?

92. In the present infringement action there is a great debate as to whether the principal purpose of the IAP is a service or the execution of public works, as it is uncontested that

107 — Directive 93/37 only applies to works, and Article 17 of Directive 2004/18 excludes the application of that directive to services. Article 17 is without prejudice to Article 3 of the Directive 2004/18, but that article is not pertinent for the purposes of this case.

both elements are present. [108] We do not need to consider that question, however, since the present situation does not, in my view, amount to a public works concession, and the infringement action does not concern public service concessions.

93. A public works concession is a contract of the same type as a public works contract except for the fact that the consideration for the works consists either solely in the right to exploit the work or in this right together with payment. [109] In the present situation the developer (who is the *concessionaire* in this situation) does not have a right to exploit the resulting work.

94. In the IAP all the public works defined in the contract (that is the construction of roads and pavements, parking places, road signs, water, gas and electricity distribution networks, disposal of residual water, and the construction of green spaces including parks and trees) become the property of the contracting authority upon completion. [110] As such they may be used for free (streets, parks, public buildings) or against payments set by the contracting authority or the body that has been attributed the management and maintenance of the structures. The developers do not receive a right to exploit these public works because they do not have the possibility

108 — In this case the answer to the question on the principal purpose of the contract depends on whether emphasis is put on the structure of development costs or on the development gain generated by an IAP. According to the scattered information included in the file, the public works component is obviously much bigger than the service component in the development costs. However, Spain emphasises the character of IAPs as services relating to immovable property investment with reference to the fact that the public works are only incidental to the overall objective of an IAP which is to create building plots for private building activities. Hence, economically the IAP has to generate for the landowners economic opportunities whose value exceeds the costs of public works and other development costs including the remuneration of the developer. In the two referred IAPs described in Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 69, the development costs per square meter of building rights were EUR 89 and EUR 54, and the market price of developed land per square meter of building rights was respectively EUR 512 and about EUR 500. This may support the claim that the economic and legal purpose of an IAP is that of a public service provided by the developer to the landowners, not execution of public works for the contracting authority.

109 — Article 1(3) of Directive 2004/18; Article 1(d) of Directive 93/37.

110 — According to Article 16 TRLS, the landowners are obliged to give to the competent authorities the land needed for roads, green spaces and other common areas, as well as between 5 and 15 per cent of their lands for public purposes. That article is implemented by Article 23 LUV specifying the obligation on landowners to cede for free land for public purposes as a part of development. (It should be recalled that the building plots the landowners get are not necessarily situated on the lands they owned before the IAP.) According to Article 180(2) LUV re-distribution (*reparcelacion forzosa)* entails transferring these areas to the local authority concerned. Article 188(2) LUV provides when the urbanisation works will be deemed to have been received by the administration and the cession of maintenance obligation of them. From all this it follows that if the IAPs were classified as public service contracts, they would be excluded from the scope of Directive 2004/18 as they concern acquisition of land and other immovable property.

of recovering the charges from the user of the structures in those cases. Instead they receive remuneration in cash or as plots of land from the landowners. However, receiving the plots of land cannot be said to be exploitation of the public works since the public works defined by an IAP consist of the construction of infrastructure as well as the necessary connections to existing networks. [111] These plots are their property. They can of course exploit them but they do so as owner and not as concessionaire.

95. Therefore, there is no right to exploit the works resulting from the IAP and the contract cannot amount to a works concession even if it were held that the principal aim of the contract is the execution of works.

96. If the principal purpose of the IAP were to be classified as a service, the question arises of whether the developer has the right to exploit his own service. [112] The answer to this question is not decisive in resolving the present infringement action, however, since if it were to amount to a service concession it would be outside the scope of the pertinent provisions of the directives mentioned in the form of order sought in the Commission's application.

97. However, even assuming that the ownership of land that the developer receives could be said to amount to a right to exploitation being granted (which is not my view), such a right is granted for an indefinite period and is thus contrary to the definition given to a concession by the Court in *Helmut Muller* and *Pressetext*. [113]

98. Therefore, in my view, Directives 93/37 and 2004/18 do not apply to the present situation, and thus the Commission's case should be dismissed.

111 — According to Article 11 LUV urban plots (*solares*) are plots which have been developed and have at least the following services: (i) access by one or more roads open to the public, (ii) supply of drinking water and electricity at a level sufficient to meet the expected demand, (iii) a sewage network, (iv) pedestrian access with paved and lit streets. In addition, urban plots must have been linked with the necessary infrastructure, to public utilities in the surrounding land.

112 — Spain submits that the IAP should be classified as a service concession where the developer gets the right to provide and exploit a public service.

113 — The Court has held that the granting of a concession for an indefinite period of time might impede competition over time and would thus be contrary to the central aim of the public procurement rules. See Case C-454/06 *Pressetext* [2008] ECR I-4401, paragraph 74; *Helmut Muller*, cited in footnote 93, paragraph 79.

VI — Conclusion

99. I propose that the action be dismissed and the Commission be condemned to pay the costs.