OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 20 October 2005 [1]

1. The Commission has brought an action under Article 226 EC against the Republic of Austria, applying to the Court of Justice for a declaration that that State has incompletely and incorrectly transposed Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (hereinafter, 'the Directive'). [2]

2. Specifically, it criticises that State for failing to fulfil its obligations under Article 2, Article 7(3), Article 8(2), Articles 11(2)(c) and (d), Articles 13(2)(a) and (b) and Article 18 of that Directive.

I — The Directive

3. The protection of integrity at work is a social objective, as is clear from Article 31(1) of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000, [3] which establishes the right of every worker to 'working conditions which respect his or her health, safety and dignity'. [4] Yet it is also an inescapable economic factor which, because it affects production costs, must be subject to comparable conditions in all the Member States. [5]

4. In that connection, the Directive lays down the legal framework for the

1 — Original language: Spanish.

2 — OJ 1989 L 183, p. 1. Article 17 has been amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1), although that fact does not affect these proceedings.

3 — OJ 2000 C 364, p. 1.

4 — So states also Article II-91(1) of the Treaty Establishing a Constitution for Europe (OJ 2004 C 310, p. 1).

5 — Reducing the rate of accidents and illness by bearing the cost of introducing the appropriate health and safety techniques adversely affects undertakings in countries whose legislation affords higher levels of protection.

Community model of risk prevention and, in addition, paves the way for the adoption of other directives addressing, in particular, the areas listed in the annex to the Directive. [6]

5. One of the most striking aspects is its scope, which is universal given that, according to Article 2(1), the rules regulate 'all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.)', except, according to Article 2(2), where 'characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services', inevitably prevent their application, in which case steps must be taken to ensure the safety and health of workers, in keeping with the purpose of the Directive.

6. Another notable feature is its precise definition of obligations and liabilities, with a distinction between those of employers and those of employees. [7]

7. As regards employers, the Directive creates some general obligations (Article 6) and a number of specific duties (Articles 7 to 12), which include the following:

— Under Article 7, the employer must designate 'one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and/or establishment' (Article 7(1)), so that 'if such protective and preventive measures cannot be organised ... in the undertaking and/or establishment, the employer shall enlist competent external services or persons' (Article 7(3)).

— As regards 'first aid, fire-fighting and the evacuation of workers', Article 8 requires the employer to take the

6 — '— Work places — Work equipment — Personal protective equipment — Work with visual display units — Handling of heavy loads involving risk of back injury — Temporary or mobile work sites — Fisheries and agriculture.'

7 — In the view of Lozano Lares, F., 'El marco jurídico comunitario de la seguridad y de la salud laboral', in Cruz Villalón J., and Pérez del Río, T., (eds.), *Una aproximación al derecho social comunitario*, Tecnos, Madrid, 2000, p. 85, although the Directive is addressed to the Member States, it targets employers and workers, who are, respectively, the parties liable for and the beneficiaries of the prevention of occupational risks.

necessary measures 'adapted to the nature of the activities and the size of the undertaking and/or establishment and taking into account other persons present', and to 'arrange any necessary contacts with external services' (Article 8(1)) and, pursuant to that duty, to 'designate the workers required to implement' those emergency measures (Article 8(2)).

— Article 11 refers to worker consultation and participation, and states in Article 11(2) that '[w]orkers or workers' representatives with specific responsibility for the safety and health of workers shall take part in a balanced way, in accordance with national laws and/or practices, or shall be consulted in advance and in good time by the employer with regard to:

...

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

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

...'.

8. To facilitate those tasks, the employee has a general duty of cooperation given that, according to Article 13(1), he is bound 'to take care as far as possible of his own safety and health and that of other persons affected by his acts or omissions at work in accordance with his training and the

8 — Article 7(1) imposes a duty to choose the person to be responsible for protection and occupational risk prevention activities, and Article 8(2), likewise cited, the person to implement first aid, fire-fighting and evacuation measures.

9 — Article 9, under the heading 'Various obligations on employers', requires them to: '(a) be in possession of an assessment of the risks to safety and health at work, including those facing groups of workers exposed to particular risks; (b) decide on the protective measures to be taken and, if necessary, the protective equipment to be used; (c) keep a list of occupational accidents resulting in a worker being unfit for work for more than three working days; (d) draw up, for the responsible authorities and in accordance with national laws and/or practices, reports on occupational accidents suffered by his workers'.

10 — Article 10 contains various provisions on 'Worker information' relating to health and safety risks, the protection or prevention measures and activities for the undertaking, establishment, work station or job, and the rules relating to first aid, fire-fighting and evacuation (Article 10(1)), which apply also to the workers of outside undertakings or establishments (Article 10(2)), and defines the provisions relating to persons with specific functions in those areas (Article 10(3)).

instructions given by his employer'. That requirement is set out in detail in Article 13 (2) according to which workers 'must in particular ... :

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

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

...'.

9. In order to monitor compliance with the Directive, Article 18 provides that the Member States must bring into force 'the laws, regulations and administrative provisions necessary' for its compliance, and inform the Commission thereof immediately (Article 18(1)) and communicate to the Commission the texts of the provisions of national law which they have adopted in the field covered by the Directive (Article 18(2)).

II — The relevant national legislation

10. The Directive has been transposed into Austrian law by means of various provisions.[11] Of particular relevance are the Bundesgesetz über Sicherheit und Gesundheitsschutz bei der Arbeit (Arbeitnehmer-Innenschutzgesetz — ASchG [Federal Law on Safety and Health at Work]) (hereinafter 'the ASchG')[12] and the Bundesgesetz über Sicherheit und Gesundheitsschutz der in Dienststellen des Bundesbeschäftigten Bediensteten (Bundesbedientstetenschutzgesetz (Federal Law on the Safety and Health Protection of Servants Employed in Federal Departments)) (hereinafter 'the B-BSG'),[13] since they serve as points of reference for examining several of the allegations of failure to fulfil obligations in these proceedings, although I may, in the course of analysing them, set out the applicable national legislation in greater detail.

11 — The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the practical implementation of the provisions of the Health and Safety at Work Directives 89/391 (Framework), 89/654 (Workplaces), 89/655 (Work Equipment), 89/656 (Personal Protective Equipment), 90/269 (Manual Handling of Loads) and 90/270 (Display Screen Equipment) of 5 February 2004 [COM(2004) 62 final], cites 48 instruments notified by Austria in relation to the first of those Directives (pp. 56 to 60).

12 — The Law amends previous legislation such as the Law on General Social Security Arrangements, the Law on the Adaptation of Employment Contracts, the 1975 Mines Law, the Law on the Social Security of Persons Engaged in Agriculture, the Employment Promotion Law, the 1977 Unemployment Insurance Law and the Law on the Employment of Foreign Workers (BGBl. No 450/1994), and has undergone subsequent reforms.

13 — That Law, in turn, amends the 1979 Law on the Status of Public Sector Employees, the 1948 Law on Contractual Agents, the Law on the Magistrates Service, the Federal Law on Workers' Representation, the 1979 Maternity Protection Law and the Federal Law on Health and Safety at Work (BGBl. I No 70/1999), likewise subsequently amended.

11. The ASchG makes employers responsible for appointing safety representatives and occupational physicians, and in both instances allows three options: to engage them in-house, to have recourse to external agents or to use the services of a specific centre (Article 73(1) and Article 79(1)). In addition, they must select the persons responsible for fire-fighting and the evacuation of workers (Article 25(4)) and, if there are five or more employees in a single place, those who are to administer first aid (Article 26(3)). Notice must be given of the designation and removal of those persons to the persons responsible for safety — if neither the workers' representative bodies nor the health and safety committee participate, they must be consulted — (Article 11(5)).

12. The AschG distinguishes between the persons responsible for safety and safety representatives in that the presence of the former is not a requisite in all undertakings,[14] as regards their functions[15] and as regards the employers' obligations in relation to each. The employer must allow the persons responsible for safety access to documents relating to safety, health protection and accidents at work, and to any concerning dangerous substances or noise, amongst others, and must notify them of any deterioration, the measures undertaken to correct it and, in general, any duties, rules and authorisations in the field (Article 11(7)).[16] If there is no works committee, the employer's duties are greater, since he must consult those persons about any consequences which the equipment or substances used, working conditions and environmental factors may have for health and safety, and must also ensure that they participate in the selection of personal protective equipment. Lastly, the employer must involve them in detecting and assessing the risks, in adopting the appropriate measures and in the planning and organisation of training (Article 11(6)).

13. Workers must apply the health and safety measures in accordance with their training and the instructions given by the employer (Article 15(1)). In particular, they must behave in the appropriate manner in order to avoid risks, and must make correct use of work tools and individual protective equipment (Article 15(2)).

14 — As a rule, only if there are more than 50 employees (Paragraph 10(2)(4) of the ASchG).

15 — The tasks of safety representatives are set out in Paragraph 76 of the ASchG.

16 — If there are no persons responsible for safety or workers' representative bodies, all workers must be informed of the matters listed and must have access to the documents in question (Article 12(7)).

14. The B-BSG, for its part, is similar in content. The difference lies in its scope, since it relates to federal public sector employees. [17]

III — Pre-litigation procedure

15. The Directive had to be transposed into Austrian law by 1 January 1994, the date on which the Agreement on the European Economic Area came into force. [18]

16. Following the Republic of Austria's accession to the European Communities, the competent authorities notified the transposition measures to the Commission which, after examining them, sought information and various clarifications in order to ascertain whether there had been a full and correct transposition.

17. The Commission was not satisfied, and it therefore sent Austria a letter of formal notice on 12 January 1998, setting out the provisions which, in its view, had still to be implemented.

18. Following correspondence, the Commission, on 19 December 2002, issued a reasoned opinion, to which the Republic of Austria replied by letter of 20 February 2003, with a supplementary letter of 11 September 2003, whilst continuing to notify various measures adopted.

19. Since it was not persuaded that the Directive had been correctly transposed in the State alleged to have failed to fulfil its obligations, the Commission applied to the Court of Justice, seeking a declaration under Article 226 EC that it had failed to fulfil Treaty obligations.

IV — The proceedings before the Court of Justice

20. The application was received in the registry of this Court on 6 October 2004 and the defence on 18 November 2004.

21. The original application also put forward a plea that Article 12(4) of the Directive was not correctly transposed, which the Commission withdrew in its reply, as a result of the clarifications provided by the Austrian Government.

17 — For instance, Paragraphs 11, 15, 25, 26 and 73 of the ASchG are identical to the same paragraphs of the B-BSG.

18 — OJ 1994 L 1, p. 3.

22. Following that reply, the Republic of Austria considered it unnecessary to lodge a rejoinder, and the written stage of proceedings was therefore concluded. As no party requested an oral debate, the case was therefore ready for this Opinion to be drawn up.

V — Analysis of the grounds of failure to fulfil Treaty obligations

23. The action alleges two failures to fulfil obligations under the Directive, the second of which encompasses five different breaches.

A — *First plea in law*

24. The Commission seeks a declaration that the Republic of Austria infringed Article 18 of the Directive in that it failed, within the prescribed period, to adopt the Landeslehrer-Dienstrechtsgesetz (General Rules applying to Teachers in the *Länder*) (hereinafter 'the LDG'), intended to transpose that Community provision, or that, in any event, it failed to communicate its adoption within the time-limit. [19]

25. The defendant State accepts the latter allegation and states that receipt of the notice of publication of the LDG [20] was acknowledged on 10 September 2004.

26. In that respect, it is sufficient to recall that it is settled case-law that the failure to fulfil obligations must be determined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes. [21]

27. In the present case, the alleged infringement must be held to be proven, since the entry into force of the LDG was notified out of time. [22]

B — *Second plea in law*

28. Under this head claim, the Commission contends that five breaches have occurred in

19 — The application made the same complaint in relation to the Beamten-, Kranken- und Unfallversicherungsgesetz (Law on Sickness and Accident Insurance Schemes for Civil Servants) and the Allgemeines Sozialversicherungsgesetz (Law on General Sickness Insurance Schemes) but, in the reply, the Commission stated that it would not maintain the complaint in that regard.

20 — BGBl. I No 69/2004.

21 — Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13; Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraph 17; Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 23, amongst many others.

22 — The reasoned opinion, of 19 December 2002, gave a period of two months in which to implement the Directive, whereas the LDG was notified, as has just been stated, on 10 September 2004.

the transposition of the Directive into Austrian law, which must be examined individually.

1. The transposition of Article 2(1)

29. The issue raised here is the exclusion of teachers in öffentlichen Pflichtschulen (compulsory education State schools) registered in the Tirol from the universal scope of the Directive, which includes all activities, in both the public and private sectors.

30. There is a clear breach of Article 2(1) of the Directive because certain schoolteachers are excluded from its scope.

31. According to the defendant Republic, the LGD has subsequently removed the obstacle which prevented those workers from being covered by the legislation in question.

32. That fact does not excuse the infringement since, as indicated in the analysis of the first plea, the national law was adopted after expiry of the period prescribed in the reasoned opinion.

2. The transposition of Article 7(3)

33. According to Article 7(3), if the undertaking lacks the capacity to organise occupational risk protection and prevention activities, it must have recourse to external services.

34. The Commission is of the view that the subparagraph in question, in conjunction with Article 7(1), which requires the employer to designate one or more workers to be specifically responsible for those tasks, implies that the employer must only enlist external services if its own are insufficient.

35. The Austrian legislation, in contrast, offers three alternatives for selecting the safety representatives and occupational physicians: to use in-house employees, to contract the service externally or to use a specialist centre (Paragraph 73(1) and Paragraph 79(1) of the ASchG and, in analogous terms, Paragraph 73(1) and Paragraph 76(1) of the B-BSG).

36. A discussion along the same lines arose in relation to a similar Dutch provision in Case C-441/01 *Commission* v *Netherlands*, [23] in which the Court of Justice criticised the national provision for failing to reflect the 'subsidiary nature of the enlistment by undertakings of external competent services to carry out activities related to protection against and prevention of occupational risks within those undertakings' (operative part). [24]

37. The Court of Justice, following my Opinion in the case, confirmed that Article 7 of the Directive establishes an order of precedence between the obligations of employers (paragraphs 21 and 30): [25] the fundamental duty is to designate one or more workers to be responsible for the tasks in question; the subsidiary obligation is to enlist outside skills only if the undertaking's own are insufficient (paragraph 53). The national law must expressly reflect that precedence (paragraph 23), because it is an organisational measure intended to favour the participation of employees in their own safety (paragraph 40). To allow the employer the option to do so would jeopardise the full application (paragraph 23) and effectiveness of the Community rule (paragraphs 54 and 55).

38. Those considerations are applicable by analogy to these proceedings, since the philosophy behind the Directive rests on the principle that protection against occupational risks starts in the workplace.

39. The reasoning, furthermore, is not undermined by the arguments advanced in the defence, pointing out that a large number of undertakings do not have the internal capability to provide the services in question and that those which do are the exception, [26] since that contention overlooks the fact that Article 7 does not require all workplaces to have a dedicated organisation for health and safety activities but rather, given the likelihood that many of the companies affected will lack the ability to provide the service themselves, requires that they do so, where they are able, entirely or partially, in conjunction with external services, as permitted by Article 7(6).

23 — Case C-441/01 [2003] ECR I-5463.

24 — Case C-49/00 *Commission* v *Italy* [2001] ECR I-8575 has also interpreted Article 7 of the Directive as meaning that the employer cannot be given discretion to decide whether to call upon external protection services when the company's internal capabilities are insufficient (paragraphs 19 to 32).

25 — As I stated in paragraph 17 of that Opinion, 'there are good reasons behind the fact that Article 7 gives precedence to the performance of the tasks related to protection and prevention by employees wherever possible. First, employees have inside knowledge of the undertaking, they practise its work methods, they understand the hazards associated with the specific business activity it carries out, they are aware of the background, they can identify potential risks, and they are located permanently at the undertaking's premises. Second, it is the employees who have the greatest interest in efficient performance of the activities, since their physical safety and that of their colleagues is at stake. In addition, there is an increased chance that organising the activities concerned internally will lead to awareness, on the part of all staff, of the importance of carrying out such work, and that any inconvenience which may arise will not be deemed to be the result of obligations imposed from outside the undertaking'.

26 — According to the defendant State, 96.7% of Austrian undertakings have less than 50 employees.

40. By ignoring the hierarchy implicit in Article 7(1) and Article 7(3), the Austrian provisions have failed properly to transpose those provisions.

3. The transposition of Article 8(2)

41. Under Article 8(2), the employer must designate the workers responsible for implementing first aid, fire-fighting and evacuation measures.

42. The Commission considers the duty to be absolute, whilst the defendant State argues that the appointment can be dispensed with on the basis of the size of the undertaking (Paragraph 26 of the ASchG and of the B-BSG, in conjunction with Paragraphs 39 and 40 of the Arbeitsstättenverordnung (Order relating to Workplaces)) (hereinafter 'the AStV') [27] and of the Bundes-Arbeitsstättenverordnung (Order relating to Federal Workplaces) [28] or of the advisability of making an appointment (Paragraphs 25 of the ASchG and of the B-BSG in conjunction with Paragraph 43 of the AStV). [29]

43. Austria justifies its legislation, arguing that, just as Article 8(1) requires the adoption of 'the necessary measures' in relation to the matters referred to, adapted to the size of the undertaking and the nature of the activities, Article 8(2) is subject to those same factors.

44. That thesis is untenable for several reasons:

— First, the Directive, according to Article 1, seeks to introduce measures to encourage improvements in the safety

27 — BGBl. II No 368/1998.

28 — BGBl. II No 352/2002.

29 — According to Paragraph 40 of the AStV, in workplaces with between 5 and 19 employees, at least one must have first aid training, those with between 20 and 29 require two, and so on. However, if less than five people are employed in the workplace, they do not require such training. At the same time, it emerges from Paragraph 43(1), read together with Paragraph 12(1) of the AstV, that it is only necessary to appoint a fire-fighting officer and, if applicable, a deputy, when it is considered appropriate in order to provide effective protection, on the basis of certain factors, such as the operations and working processes carried out, the nature or amount of the substances handled, the available installations or equipment, the characteristics of the environment and the maximum number of workers. The Wiener Arbeitsstättenverordnung in der Land- und Forstwirtschaft (Order of the Land of Vienna concerning workplaces in the Agricultural and Forestry Sectors) (Vienna LGBl. No 27/2003) contains identical rules, and only demands the designation of a person responsible for safety and, where applicable, a deputy, when advisable by reason of particular circumstances.

and health of workers at work (Article 1(1)), and includes a number of general principles (Article 1(2)), which do not affect national or Community provisions which are more favourable to that protection (Article 1(3)). The latter subparagraph presupposes that the only possible exceptions arise when a higher level of protection is imposed. Furthermore, according to Article 2, the rule applies to 'all' sectors of activity, with the sole exception of those which present certain inherent characteristics specific to public service activities, and the Directive cites, by way of example, the armed forces and the civil protection services.

Neither provision, therefore, permits derogations on the basis of the size of the business or the practicability of the Community requirements. Nor, accordingly, are there grounds for the exception advanced by the defendant State relating to the appointment of the persons responsible for the tasks in question.

— Second, a strict interpretation of Article 8(1) and Article 8(2) suggests that the former contains a general and indeterminate reference to the provisions which may be adopted, whilst the latter is in specific terms, as witness the expression 'inter alia' which it uses and the precise description of the aspects influenced by the size and potential risks of the workplace.

To uphold the arguments of the defendant State would run counter to the letter of the Article 8(2) and would contravene the spirit of the Directive, as its application would be limited to large premises or it would be subject to subjective value judgments.

— Third, although small and medium-sized undertakings have their own characteristics (informal organisational structures or high staff turnover, for example) and specific requirements, those circumstances have no effect on the intrinsic level of danger, and such undertakings therefore do not have a discretion to decide not to apply the obligation in question.

However, I have already pointed out that the size of the undertaking or the specific risks, whilst not creating an exception to the basic rule, do afford grounds for qualifying it since, by virtue of the second subparagraph of Article 8(2) itself, those factors determine the training and the number of workers responsible for the tasks in question, and the equipment to be supplied to them.

The size or volume of the undertaking and the nature of the work carried out can be used to determine the specific elements at play in the obligation under Article 8(2), but not to justify its exclusion. [30]

— Lastly, the obligation imposed must be to define who is responsible for calling an ambulance, the fire brigade or other emergency services or for using the first aid box or fire extinguisher, or to indicate the emergency exits, in response to situations liable to arise in small work environments.

45. It can be inferred from the foregoing considerations that, by restricting its scope, Austria is in breach of Article 8(2) of the Directive. [31]

4. The transposition of Article 11(2)(c) and Article 11(2)(d)

(a) The basis of the complaint

46. One of the Directive's most striking innovations lies in the fact that it seeks to ensure worker consultation on and participation in the tasks relating to health and safety at work. [32] Its recitals stress the importance of that involvement [33] and its content is set out in Article 11, which imposes an obligation of consultation and participation on employers, and distinguishes between the duties which concern employees and their representatives in general (Article 11(1)) and those which, in much greater detail, relate to the persons with specific health and safety functions (Article 11(2) to Article 11(2)(5)).

47. The existence of two groups of beneficiaries reflects the logic of the system

30 — In my Opinion in Case C-441/01 *Commission* v *Netherlands*, I stated that 'normally, the size of an undertaking influences whether or not there will be employees who are able to undertake activities related to the protection from and the prevention of occupational risks, but it must be pointed out that this is not always the case' (paragraph 26).

31 — A similar conclusion is implicit in the judgment in Case C-5/00 *Commission* v *Germany* [2002] ECR I-1305, which held that the power of the competent Federal Minister to relieve occupational physicians and safety specialists of the duty to issue reports on the assessment of working conditions was contrary to Article 9(1)(a) and Article 10(3)(a) of the Directive, 'inasmuch as undertakings employing 10 or fewer workers may thereby be absolved of the obligation to keep a risk assessment in documentary form' (paragraph 35). As Advocate General Geelhoed said in his Opinion in that case, 'the Directive in principle protects all workers irrespective of the size of the undertaking in which they are employed ... the objective of improving the actual conditions of work cannot be rendered subordinate to purely economic considerations such as a possibly disproportionate bureaucratic burden being placed on small undertakings' (paragraph 48).

32 — Montoya Melgar, A., Galiana Moreno, J.M., and Sempere Navarro, A.V., *Derecho Social Europeo*, Tecnos, Madrid, 1994, p. 109.

33 — The 11th recital states that, 'in order to ensure an improved degree of protection, workers and/or their representatives ... must also be in a position to contribute, by means of balanced participation in accordance with national laws and/or practices, to seeing that the necessary protective measures are taken ...'; recital 12 emphasises that 'information, dialogue and balanced participation on safety and health at work must be developed between employers and workers and/or their representatives by means of appropriate procedures and instruments ...'.

devised since, in addition to the workers themselves, there is another group of people involved, comprising those who, under Article 7(1), are designated in each undertaking to be responsible for risk protection and prevention activities.

48. Those latter persons have to be involved in a balanced manner or be consulted by the employer in advance and in good time, in relation to the matters set out in Article 11(2), in particular, with regard to the information provision to which Article 9(1) and Article 10 refer, and on the use of services external to the company.

49. The Commission's claim against Austria relates to those two requirements, since it takes the view that the State in question has made no provision for the involvement of those agents in all the communication of information required by Article 10 nor in the enlistment of resources external to the entity.

(b) The information to be provided under Article 10

50. Article 11(2)(c) provides that the persons with responsibility for health and safety protection are to participate in or give their opinion on the matters referred to in Article 10. Specifically, the applicant Institution asserts that there is no provision for the involvement of those persons in relation to the following information:

— information to be given generally on health and safety risks, and the protective and preventive measures affecting 'each type of workstation and/or job' (Article 10(1)(a));

— information to be provided to employers of workers, from outside the undertakings or establishments (Article 10(2));

— and information which, as persons responsible for health and safety, they should receive both from 'protective and preventive measures, [and from] inspection agencies and bodies responsible for safety and health' (Article 10(3)(c)).

51. It should be pointed out that it is not in dispute that the relevant information has to be provided — were that so, there would be

an allegation of infringement of Article 10 of the Directive — but that a group of employees should be involved in obtaining it, a requirement which is applicable at an earlier stage.

(i) The risks and activities concerning the workstation and/or job (Article 10(1)(a))

52. The Republic of Austria argues that the works committee has to collaborate in detecting and assessing risks, and in determining the measures it is appropriate to take (third sentence of Paragraph 92a(1) of the Arbeitsverfassungsgesetz (Federal Law governing employment relationships and the labour structure of Undertakings)) (hereinafter the 'ArbVG');[34] if there are no workers' representative bodies, the persons responsible for safety carry out those tasks (Paragraph 11(6) of the ASchG); where there are neither, all workers must be consulted and must participate (Paragraph 13(2) of the ASchG). The measures in question must be implemented, where necessary for prevention, by reference to the workstation (Paragraph 4, in conjunction with Paragraph 5 of the ASchG and the Verordnung über die Sicherheits- und Gesundheitsschutzdokumente (Regulation governing Documents Relevant to Health and Safety)). Those obligations entail consulting workers about the information provided on the hazards in each workstation and/or job.

53. Despite the strenuous advocacy of the defendant State, it must be concluded that it has not correctly transposed the Directive:

— the provisions referred to operate within the logic of the Austrian system which, as explained, does not require the designation of persons responsible for safety in all undertakings, and is thus in breach of the Directive and exhibits the same errors as observed in examination of the transposition of Article 7(3), since the listing, in turn, of the agents involved by default — works committee, persons responsible for safety and workers in general — can lead to a situation, where there is a workers' representative body, in which those entrusted with prevention do not collaborate in relation to obtaining the information in question;

— at the same time, the rules make provision for the need for participation not in the information notices to be provided, but in detecting and preventing risks;

34 — BGBl. No 22/1974, as subsequently amended.

— further, the individual treatment of the risks relating to each type of workstation and/or job only comes into play when it is necessary for detection and prevention purposes, a limitation not present in the European Community Directive.

54. There must, accordingly, be a specific reference to the persons who are to be primarily responsible for protection and prevention activities, so that they can participate in or be consulted on the information to be supplied on the risks of each type of job and/or task, and the absence of any such reference in Austrian law constitutes a failure to fulfil obligations.

(ii) Information to be supplied to external undertakings (Article 10(2))

55. The defendant State contends that it has transposed Article 11(2)(c) in conjunction with Article 10(2) of the Directive, by requiring the employer to make workers from outside the undertaking aware of the risks associated with the workplace (first sentence of Paragraph 8(2) of the ASchG). [35]

35 — That provision concerns the coordination between employers where workers belonging to more than one undertaking are engaged, and requires, as a general rule, the mutual provision of information.

56. However, the rule whose correct transposition is in dispute does not require the provision of that information — it is Article 10(2) which lays down that requirement —, but that those responsible for prevention and protection collaborate in or express their opinion on the matter, in respect of the scope or content of the information, for example.

57. The national provisions cited do not include that specific requirement of involvement by the persons with specific responsibility, and nor can it be inferred from their wording, so that the alleged infringement must be found to exist.

(iii) Additional information [Article 10(3)(c)]

58. The participation and consultation of the persons designated as responsible for prevention extends to the data they should receive, deriving from prevention activities and from inspection agencies and the bodies competent in relation to health and safety at work.

59. The Republic of Austria contends that the Arbeitsinspektionsgesetzes (Law on

Works Inspection) (hereinafter 'the ArbIG') [36] and the AschG fulfil that requirement.

60. Under the ArbIG:

— the workers' representative bodies must be present during the visits by inspectors to workplaces and workstations. The persons responsible for safety, safety representatives and occupational physicians must also be present, in sufficient numbers. In any event, their attendance is obligatory if they request to be present. The employer must give those bodies and persons notice of the presence of the inspector (Paragraph 4(8) of the ArbIG);

— further, the inspectorate must inform the works committees of the measures taken and the examinations carried out (Paragraph 5(4) of the ArbIG), and must also notify them of any sanctions imposed (Paragraph 9(4) of the ArbIG);

— those committees are to receive a copy of the orders sent to the employer with a view to preventing health and safety infringements, which must be communicated to the persons responsible for safety and to occupational physicians, when their content is relevant to the functions of those people (Paragraph 9(1) of the ArbIG);

— if, when the inspection is carried out, it is necessary to adopt measures to protect the life and health of the employees, a transcription of the request addressed to the competent authority must be sent to the designated employees (Paragraph 10(1) of the ArbIG).

61. As regards the terms of the ASchG, it is of note that:

— the employer must inform the persons responsible for safety of any obligations, orders and authorisations necessary for the protection of workers (Paragraph 11(7) of the ASchG) or, where there are none, inform all employees (Paragraph 12(7) of the ASchG);

— in matters affecting health and safety, and in agreement with the workers' representative bodies, the designated persons must defend the interests of

36 — BGBl. No 27/1993.

the workers vis-à-vis the employer, the competent authorities and other bodies (Paragraph 11(1)(3) of the ASchG);

— the companies must consult on those matters with the persons designated as responsible for protection (Paragraph 11(4) of the ASchG) and with the workers (Paragraph 13(1) of the ASchG).

62. A careful reading of that long list of requirements reveals a clear intention to comply with the duty under Article 10 of the Directive to provide information. However, as indicated, it is not the transposition of that provision which is in issue, but that of the following rule, which describes a different obligation, that of ensuring that workers with specific tasks in relation to prevention participate in or advise on such communications, that is to say, as I stated previously by way of illustration, as regards their scope or content.

63. Furthermore, in the light of the purpose and structure of the Directive, it cannot be held that the duty to collaborate is entailed by the general requirement to obtain their opinion on prevention, laid down by Austrian legislation.

64. Accordingly, since it does not expressly refer to that specific function of the group of workers in question, the defendant State is in breach of the Directive.

(c) Recourse to capabilities outside the undertaking

65. The Commission is also of the view that there is infringement of Article 11(2)(d) of the Directive because the participation or consultation of workers with specific tasks does not include the situation where, when the workplace has insufficient infrastructure to carry out protection and prevention activities, it can have recourse to persons or services outside the entity.

66. The Austrian Government claims that the persons responsible for safety must be informed in advance and their opinion must be sought as regards the appointment and removal of the safety delegates, occupational physicians and the persons to be responsible

for first aid, fire-fighting and evacuation (Paragraph 11(5) of the ASchG), unless there is a personnel representative body whose view can be elicited (Paragraph 92a(3) of the ArbVG and, in different terms, Paragraph 11(6) of the ASchG), or where those matters have been discussed by a health and safety committee (Paragraph 88 of the ASchG). [37] There are similar rules in the public sector (Paragraph 11(5) of the B-BSG). In its view, those provisions fulfil the requirements of Community law.

67. However, those provisions only partially [38] satisfy the duty to ensure participation or consultation contained in Article 11(2)(b) of the Directive, which refers to the designation of workers under Article 7(1) — those responsible for the protection and prevention of occupational risks — and under Article 8(2) — those entrusted with implementing first aid, fire-fighting and evacuation measures —, but not that in Article 11(2)(d) .

68. In previous points of this Opinion I have observed that Article 7(1) of the Directive refers to the principal duty of the employer to designate the persons who are to be responsible for protection and prevention activities, whilst Article 7(3) sets out the subsidiary requirement that, if the entity's own resources are insufficient, it must call upon external services. The distinction between the two obligations is reflected in Article 11(2), with the effect that the transposition must mention both, and the latter cannot be subsumed in the former.

69. In addition, Article 11(2)(d) is not intended to ensure that those with specific responsibility for health and safety intervene in the selection of the persons who are to perform certain tasks in that field, but that they do so when the undertaking or establishment intends to enlist external services, in response to the inadequacy of its own resources, which involvement allows them to express an opinion on both issues.

70. The rules adopted by the defendant State contain no requirement that, at the time of deciding to enlist external services, the employees with responsibility for health and safety be allowed to intervene, [39] and there is therefore no doubt that the alleged breach has occurred.

37 — It adds that, if there are no workers specifically dedicated to those matters and no bodies representing the workers in question, the notification and discussion of appointments or removals is to take place with the entire workforce (Paragraph 13(2) of the ASchG).

38 — The involvement is not a requisite at all times, only when there is no works or health and safety committee.

39 — The omission makes sense in that, as I have explained above, the national law does not enshrine the order of precedence between Article 7(1) and Article 7(3) of the Directive.

5. The transposition of Article 13(2)(a) and Article 13(2)(b)

(a) Basis of the complaint

71. In describing the framework of Community law, I stated that, after the obligations on employers, the Directive, in Article 13, sets out those of employees, starting with a general principle (Article 13(1)) which it goes on to set out in detail, by listing a number of specific duties (Article 13(2)), which include making correct use of machinery, apparatus, tools, dangerous substances, transport equipment and the personal protective equipment supplied which, after use, the employees must return to its proper place (subparagraphs (a) and (b)).

72. The Austrian provisions require employees to handle work tools and the personal protective equipment made available to them properly and in accordance with their training and with the employer's instructions (Paragraph 15(2) of the ASchG and of the B-BSG).

73. The Commission notes the absence of rules on the proper handling of 'dangerous substances' and on returning protective equipment to its proper place, on which grounds it considers the transposition to be incomplete.

b) Dangerous substances

74. The defendant State claims that the guidelines for protection in respect of dangerous substances appear not alongside those relating to work tools, but in a different section of the ASchG itself (Title IV) [40] and in various administrative regulations, [41] a situation which the Commission considers inadequate to provide employees with clear information about their responsibilities.

75. According to the Court of Justice, the transposition of a directive into domestic law does not require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and that a general legal context may be sufficient if it actually ensures the full application of its provisions. [42]

40 — Paragraph 40 et seq. of the ASchG.

41 — In paragraph 62 of the defence, the representatives of the Republic of Austria cite, in relation to private sector workers, the Verordnung über Grenzwerte für Arbeitsstoffe und Krebserzeugende Arbeitsstoffe (Regulation on Maximum Levels of Substances and Carcinogens), the Verordnung zum Schutz der Arbeitnehmer/innen gegen Gefährdung durch biologische Arbeitsstoffe (Regulation for the Protection of Workers against the Dangers of Biological Substances) (Verordnung biologische Arbeitsstoffe), and Paragraph 52 et seq. of the Allgemeine Arbeitnehmerschutzverordnung — AAV (General Regulation for the Protection of Workers); as regards public sector workers, they cite the BundesGrenzwerteverordnung (BGBl. II No 393/2002) and the Verordnung über den Schutz der Bundesbediensteten gegen Gefährdung durch biologische Arbeitsstoffe (BGBl. II No 415/1999).

42 — Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 49; Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53, and *Commission* v *Italy*, cited above, paragraph 21.

76. In accordance with that case-law, it is necessary to examine whether Article 13 of the Directive requires reference in the same place to all the sources of risk in question and, if it does, whether that requirement goes to the intention sought.

77. Although nothing has been pleaded on that point, the differentiated approach is warranted in the light of the fact that the principal causes of dangerous working conditions can be divided into two main groups, with equivalent measures to be taken in order to give full effect to the principle of the integrated approach to safety. [43] The first group encompasses sources relating to the workplace itself, such as those arising from the structure of the buildings, from environmental conditions or from the organisation of the provision of services. The second group includes those associated with the elements which workers have to handle. [44]

78. Within the latter sources of danger one can distinguish two types: on the one hand, those deriving from mechanical instruments, whether tools, work equipment or machinery, and on the other, those caused by physical, chemical or biological substances.

79. The separation of the types of risk corresponds, not only to their origin, but also to the use of health and safety prevention methods specific to each, in view of the fact that ascertaining the reliability of equipment uses collective or individual safety techniques, whilst monitoring exposure to noxious substances employs industrial hygiene procedures.

80. Accordingly, the fact that Article 13(2) refers to dangerous substances amongst work tools does not preclude their being differentiated, in the national context, provided that the objective expressed in Article 13(1) of the Community Directive, that workers must take care of their health and safety, and those of other persons affected, is attained.

81. The Commission has not proven the extent to which the Austrian provision impedes that outcome, since it has confined itself to stating that, with a combined reference to both factors, the worker would have a more detailed idea of his duties, which is mere conjecture, because we do not know the grounds for the alleged inadequacy of the national provisions on dangerous substances referred to in the defence. It is necessary to recall that, according to settled case-law, in order to make a finding of failure to fulfil obligations under Community law, the Court

43 — Lozano Lares, F., op. cit., pp. 74 to 77.

44 — The existence of those two interrelated groups is discernible in the Community context in which, alongside the provisions based on Article 95 EC, intended to ensure the technical harmonisation of products, there are others, under Article 137 EC, which seek the convergence of conditions in workplaces.

of Justice must be provided with the evidence necessary to enable it to make the appropriate finding, and may not rely on any presumption. [45]

(c) Individual protective equipment

82. The State criticised in these proceedings refutes one of the arguments advanced by the Commission in support of its action, concerning the use of equipment by several people, submitting that the items so provided are, for reasons of hygiene, for personal use by one worker only, with the effect that their return would be pointless, because other employees cannot use them.

83. That claim, however, does not justify the absence of an explicit requirement in the Austrian rules compelling the person who has used the equipment in question to return it to its proper place.

84. The correct location of equipment is no less important than its proper handling, which would be impossible if the equipment were not in its place when it was needed, a reality which goes beyond the above notion of hygiene. For that reason, the Directive makes a distinction between the two actions, giving them equal importance, with the effect that, if the national legislation omits express reference to both, the transposition is incomplete.

C — *Conclusions*

85. The above considerations lead me to the view that the defendant State has failed to comply with its obligations under Article 18 of the Directive and inadequately transposed into national law Article 2(1), Article 7(3), Article 8(2), Articles 11(2)(c) and (d) and Article 13(2)(b) of the Directive, but has not infringed Article 13(2)(a).

VI — Costs

86. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for by the other party. Under Article 69(3), where the claims of each party are upheld in part, the Court of Justice may order that the costs be shared or rule that each party should pay its own costs.

45 — Amongst others, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 26, and Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21.

87. In view of the fact that the Commission and the Republic of Austria have each applied that the other be ordered to pay the costs of the proceedings and that I propose that the action should be upheld practically in its entirety, that State should pay nine tenths of the costs of the Community Institution which should, for its part, bear one tenth of the costs of the other party.

VII — Conclusion

88. In accordance with the foregoing considerations, I suggest that the Court of Justice should:

(1) declare that the Republic of Austria has failed to fulfil its obligations under Article 18 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, and that it has incorrectly transposed into national law Article 2(1), Article 7(3), Article 8(2), Articles 11(2)(c) and (d) and Article 13(2)(b) of that Directive;

(2) dismiss the action for the remainder;

(3) order the Republic of Austria to pay nine tenths of the costs of the Commission;

(4) order the Commission to pay one tenth of the costs of the Republic of Austria.