OPINION OF ADVOCATE GENERAL TRSTENJAK
delivered on 11 February 2010[1]

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I — Introduction

1. The present case originates in an action for failure to fulfil obligations brought by the Commission pursuant to Article 226 EC by which the Commission seeks a declaration from the Court of Justice that, by failing to make a public call for tenders or failing transparently to award service contracts in the field of public ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, and by failing to publish notices of contracts awarded, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [2] and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [3] and breached the principles of freedom of establishment and freedom to provide services (Articles 43 EC and 49 EC).

2 — OJ 1992 L 209, p. 1.
3 — OJ 2004 L 134, p. 114.

II — Legislative framework

A – *Directive 92/50*

2. Under Article 3(2) of Directive 92/50, contracting authorities must ensure that there is no discrimination between different service providers.

3. Article 10 of Directive 92/50 provides:

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

4. Article 16 of Directive 92/50 states:

'1. Contracting authorities who have awarded a public contract or have held a design

contest shall send a notice of the results of the award procedure to the Office for Official Publication of the European Communities.

2. The notices shall be published:

…'

B – *Directive 2004/18*

5. Under Article 2 of Directive 2004/18, contracting authorities must treat economic operators equally and non-discriminatorily and act in a transparent way.

6. Article 22 of Directive 2004/18 provides:

'Contracts which have as their object services listed both in Annex II A and in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).'

7. Article 35(4) of Directive 2004/18 states:

'Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

…

In the case of public contracts for services listed in Annex II B, the contracting authorities shall indicate in the notice whether they agree to its publication. For such services contracts the Commission shall draw up the rules for establishing statistical reports on the basis of such notices and for the publication of such reports in accordance with the procedure laid down in Article 77(2).

…'

III — Facts of the case

8. In the Federal Republic of Germany, the law governing ambulance services falls within the legislative competence of the *Länder*, which have exercised their legislative discretion in different ways.

9. In most German *Länder*, ambulance services are provided using a dual system which distinguishes between public ambulance services and the provision of ambulance services on the basis of authorisations granted under the regional laws on ambulance services.

10. Public ambulance services normally cover both emergency transport services and qualified patient transport services. Emergency transport consists in the conveyance, with appropriate medical care, of persons with life-threatening injuries or conditions by means of emergency doctor's car or ambulance. Qualified patient transport consists in the conveyance of persons who are ill, injured or otherwise in need of help but who are not emergency patients; they are conveyed, with appropriate medical care, by patient transport ambulance.

11. Several *Länder* have decided to leave it to the individual towns and cities, administrative districts, joint ambulance associations etc. to select service providers for public ambulance services. To that end, those local authorities generally conclude contracts with individual service providers for the area-wide provision of ambulance services for the public. Where the local authority pays for the services directly, the relevant contract model is known as the 'submission model'. On the other hand, where remuneration takes the form of charges levied directly by the contractor on patients or sickness funds, the 'concession model' is employed.

12. By its action, the Commission objects to the award of service contracts in the field of public ambulance services in the *Länder* of Lower Saxony, North Rhine-Westphalia, Saxony and Saxony-Anhalt, where the submission model is used throughout. In particular, the Commission alleges that in those *Länder* calls for tenders were not, as a rule, made for contracts in the field of public ambulance services which are covered by the procurement directives and that they were not awarded transparently.

IV — Pre-litigation procedure

13. After several complaints had been received by the Commission, it informed the Federal Republic of Germany by letter of 10 April 2006 that it might have infringed the procurement directives and primary law in awarding contracts for pecuniary interest in respect of ambulance services in the *Länder* of North Rhine-Westphalia, Lower Saxony, Saxony and Saxony-Anhalt. At the same time, the Commission informed the Federal Republic of Germany that it might have breached the principles of freedom of establishment and freedom to provide services in awarding service concessions for ambulance services. The Government of the Federal Republic of Germany was therefore invited, pursuant to Article 226 EC, to submit observations on the Commission's position within two months.

14. In its letter of 10 July 2006, the Federal Republic of Germany denied the alleged infringements of Community law. Furthermore, it claimed that in 2005 the law had been amended in Saxony, with the result that from 1 January 2009 at the latest contracts for ambulance services in Saxony would be awarded on the basis of a selection procedure having due regard to the principles of non-discriminatory competition.

15. By letter of 15 December 2006, the Commission sent the Federal Republic of Germany the reasoned opinion. In that opinion it concluded that the Federal Republic of Germany had failed to fulfil and continued to fail to fulfil its obligations under Directive 92/50 and Directive 2004/18 and had breached the principles of freedom of establishment and freedom to provide services. The Commission therefore called on the Federal Republic of Germany to take the necessary measures to comply with the reasoned opinion within two months of receipt.

16. In its letter of 22 February 2007, the Federal Republic of Germany once again rejected the Commission's legal opinion. It claimed that there were no infringements of Community law in any of the specific cases cited by the Commission.

V — Procedure before the Court of Justice and forms of order sought

17. Because the Federal Republic of Germany failed to comply with the reasoned opinion, the Commission brought an action under Article 226 EC on 15 April 2008.

18. The Commission claims that the Court should:

— declare that, by failing to publish notices of contracts awarded and by failing to make a public call for tenders or failing transparently to award service contracts in the field of public ambulance services, the Federal Republic of Germany has failed to fulfil its obligations under Directives 92/50/EEC and 2004/18/EC and breached the principles of freedom of establishment and freedom to provide services (Articles 43 EC and 49 EC);

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

19. The Federal Republic of Germany contends that the Court should dismiss the application and order the Commission to pay the costs.

20. By order of the President of the Court of 16 December 2008, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the Federal Republic of Germany. The Kingdom of the Netherlands claims, in support of the Federal Republic of Germany, that the Commission's application should be dismissed.

VI — Main submissions of the parties

21. In the view of the Commission, it has become the established practice in various German *Länder*, in awarding contracts in the field of public emergency and qualified patient transport services, to award contracts to local providers in contravention of procurement law without making a Europe-wide call for tenders and without ensuring proper transparency.

22. With reference to nine specific examples of contracts awarded in the *Länder* of Lower Saxony, North Rhine-Westphalia, Saxony and Saxony-Anhalt, the Commission stresses, first of all, that the towns and cities, administrative districts and joint ambulance associations responsible for the individual awards are to be regarded as contracting authorities within the meaning of the procurement directives. Furthermore, the contracts awarded in the field of public ambulance services are to be classified as public contracts for pecuniary interest, whose contract value in the cases in question is well above the financial thresholds

which are relevant for the applicability of Directives 92/50 and 2004/18.

23. Where those public contracts were concluded before 31 January 2006, they are subject to Directive 92/50. Because those contracts relate to mixed services, they should have been awarded in accordance with the provisions of Titles III to IV or Articles 14 and 16 of Directive 92/50, depending on whether the value of the transport services or the value of the medical services is greater. That directive contains a provision covering the contracts which were concluded after the expiry of the transposition period for Directive 2004/18.

24. Since all the examples cited concern contracts with a cross-border interest, the Federal Republic of Germany has also breached the principle of non-discrimination and the requirement of transparency contained within freedom of establishment and freedom to provide services.

25. In the Commission's view, the alleged infringements do not represent isolated cases, but are evidence of a general procurement practice which is contrary to Community law. The Commission believes that its view is confirmed by the extremely low number of Europe-wide calls for tenders for ambulance services and notices of contracts awarded.

26. In the view of the German Government, the Commission's attempt to obtain a comprehensive declaration that procurement practice in the Federal Republic of Germany is unlawful by making claims in relation to individual procurement procedures in four out of the sixteen *Länder* is not acceptable. In addition, various factual assertions made by the Commission are incorrect.

27. The German Government also relies on the exception under the first paragraph of Article 45 EC in conjunction with Article 55 EC, under which the chapters of the EC Treaty on freedom of establishment and freedom to provide services do not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority; that is the case with the contested ambulance services. Because the procurement directives have their legal basis in those two chapters of the EC Treaty, they are also not applicable in the present case.

28. In the alternative, the German Government claims that the contested ambulance services meet the conditions for preferential treatment under Article 86(2) EC. Because Article 86(2) EC contains an exception not only to the rules on competition, but also to all the other rules contained in the EC Treaty, the action brought by the Commission is also unfounded from this perspective. Lastly, the German Government refers to two orders of the Bundesgerichtshof (Federal Court of Justice) of 1 December 2008, according to which procurement law must now also apply to the award of contracts for ambulance services.

29. The Netherlands Government takes the view that the Federal Republic of Germany has infringed neither the procurement directives nor Article 43 EC and Article 49 EC. The contested public ambulance services should be regarded as services of general economic interest within the meaning of Article 86(2) EC. In this regard, it should be borne in mind that the exception under Article 86(2) EC also applies to the fundamental freedoms. Lastly, the Netherlands Government considers the possibility that the exception under Articles 45 EC and 55 EC applies. The Netherlands Government tends towards the view that the conditions governing the application of these exceptions could be met in the case of the contested ambulance services.

VII — Legal assessment

A – *Admissibility*

30. A particular characteristic of treaty infringement proceedings under Article 226 EC is that the definition of the subject-matter in the pre-litigation procedure delimits the admissible subject-matter of the subsequent judicial proceedings. It is settled case-law that the reasoned opinion and the subsequent action for a declaration of failure to fulfil obligations must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion. [4]

31. This condition governing admissibility, which prohibits the grounds of complaint in the action being extended from the submissions made in the reasoned opinion, helps to protect the rights of defence of the Member State concerned, which is to be given an opportunity to comply with its obligations under Community law and to defend itself effectively against the charges formulated by

4 — See Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 29; Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraph 20; Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 8; and Case 186/85 *Commission* v *Belgium* [1987] ECR 2029, paragraph 13.

the Commission. At the same time, that condition reflects the general procedural principle that any contentious procedure must have a clearly defined dispute as its subject-matter. [5]

32. In my opinion, in formulating its claims in the present case the Commission has inadmissibly gone beyond the grounds of complaint raised in the reasoned opinion. In order in clarify and define this inadmissible extension of the action, I will first examine the classification of the contested ambulance services in the system of the procurement directives. I will then explain how the Commission has reformulated its claims from the reasoned opinion in the application and the way in which that reformulation has also modified the subject-matter of the proceedings.

33. The fact that Federal Republic of Germany has not expressly raised a plea of inadmissibility against the extension of the action is not relevant, however. Because the prohibition on extending the subject-matter of the dispute constitutes an essential guarantee intended by the EC Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations, [6] the Court may decide this of its own motion even without a complaint being raised by the Federal Republic of Germany. [7]

1. Ambulance services as mixed services in the system of the procurement directives

34. Both Directive 92/50 and Directive 2004/18 distinguish between 'priority' and 'non-priority' services. Priority services are listed in Annex I A to Directive 92/50 and in the identical Annex II A to Directive 2004/18 and include land transport services. Non-priority services are listed in Annex I B to Directive 92/50 and in the identical Annex II B to Directive 2004/18 and include health services. The most important distinction, for the purposes of procurement law, between priority services under Annexes I A and II A and non-priority services under Annexes I B and II B is that only priority services are subject to the full application of the relevant procurement directive. [8] For non-priority services, on

5 — See Case C-437/04 *Commission* v *Belgium* [2007] ECR I-2513, paragraph 39, and Case C-350/02 *Commission* v *Netherlands*, cited in footnote 4, paragraphs 18 and 19.

6 — See Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 59.

7 — The *a fortiori* argument follows from Article 92(1) of the Rules of Procedure of the Court of Justice. See also Karpenstein/Karpenstein, in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Article 226 EC, section 82 (Supplement 39, July 2009).

8 — Article 8 of Directive 92/50 and Article 20 of Directive 2004/18.

the other hand, it is merely provided that the rules on technical specifications apply and that contracting authorities must notify the Commission of contracts awarded. [9]

35. It is common ground in the present case that the contested ambulance services are to be classified as mixed services containing components of both priority and non-priority services. That classification follows directly from *Tögel*, [10] in which ambulance and patient transport services with a nurse in attendance were regarded as mixed services for the purposes of Article 10 of Directive 92/50. [11] The conveyance of persons is to be classified as a priority service and medical care during transportation as a non-priority service.

36. Under Article 10 of Directive 92/50 and under Article 22 of Directive 2004/18, mixed contracts for priority and non-priority services are subject to the full application of the relevant procurement directive where the value of the priority services is greater than the value of the non-priority services. If that is not the case, mixed contracts are to be treated as contracts for non-priority services.

2. Reformulation of the claims made in the application

37. In the reasoned opinion, the Commission expressly considered the mixed nature of the contested ambulance services both in its legal assessment and in formulating the individual grounds of complaint.

38. In the reasoned opinion, the Commission argued in particular that in the contested ambulance services the transport services within the meaning of Annex I A to Directive 92/50 and Annex II A to Directive 2004/18 predominate, with the result that, in awarding those contracts, the Federal Republic of Germany has infringed Article 10 in conjunction with Titles III to IV of Directive 92/50 and, since 1 February 2006, Article 22 in conjunction with Articles 23 to 55 of Directive 2004/18/EC. In the event that in individual cases among those cited the medical services within the meaning of Annex I B to Directive

9 — Article 9 of Directive 92/50 and Article 21 of Directive 2004/18.

10 — Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 40.

11 — The conveyance of persons comes under the subject 'land transport' within the meaning of Annex I A, Category 2 of Directive 92/50 and Annex II A, Category 2 of Directive 2004/18. Medical care comes under the subject 'health services' within the meaning of Annex I B, Category 25 of Directive 92/50 and Annex II B, Category 25 of Directive 2004/18.

92/50 and Annex II B to Directive 2004/18 should predominate, the Commission alleges in the alternative an infringement of Article 10 in conjunction with Article 16 of Directive 92/50 and, since 1 February 2006, Article 22 in conjunction with Article 35(4) of Directive 2004/18, and in any case a breach of the principles of freedom of establishment and freedom to provide services under Article 43 EC and Article 49 EC and the principle of non-discrimination contained within those principles.

39. In its application, the Commission deliberately refrained from answering the question whether the contested ambulance services have their emphasis on the transportation of persons or on medical care. There is now no need to answer the question, according to the Commission, because in any case the contested procurement procedures infringed the rules on the duty to notify contracts awarded under Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18 and also breached the principle of non-discrimination contained within freedom of establishment and freedom to provide services.

40. By reformulating the claim in this way, the Commission has inadmissibly modified the subject-matter of the proceedings.

41. While in its reasoned opinion the Commission took the position that the procurement of ambulance services breached the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary law only in cases where the aspect of medical care predominated, in its action it takes a different position, according to which regard must always be had to the principle of non-discrimination and the requirement of transparency in the award of the contested contracts. However, this must presuppose that the principle of non-discrimination and the requirement of transparency can also be directly breached in the case of procurement of ambulance services where the transport character predominates, which was not alleged either explicitly or implicitly in the reasoned opinion.

42. The extension of the subject-matter of the proceedings therefore lies in the fact that a breach of the principle of non-discrimination and the requirement of transparency, which stem from freedom of establishment and freedom to provide services, is now also being alleged in connection with the award of mixed ambulance services where the transport character predominates. In this respect the present action must be declared inadmissible.

43. This conclusion cannot be affected by the fact that the duties to make calls for tender

and to give notice under the procurement directives are ultimately expressions in secondary law of the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary law, or that in its application which is now founded on primary law the Commission did not therefore go substantively beyond the grounds of complaint raised in the reasoned opinion. The crucial factor is that in its application the Commission alleges an infringement of primary law in relation to priority mixed services, even though it claimed in the reasoned opinion that those services were fully subject to the procurement directives and consequently alleged only an infringement of those directives. Therefore, in the pre-litigation procedure the Federal Republic of Germany was not able to address the question whether the award of contracts for the provision of ambulance services which have their emphasis on transport of persons and are therefore fully subject to the procurement directives may actually be assessed directly on the primary-law basis of the principle of non-discrimination and the requirement of transparency. [12]

44. If this modification of the basis of the action were to be declared admissible, this would result in an unacceptable infringement of the rights of the defence enjoyed by the Federal Republic of Germany, because it would be deprived of the opportunity in the pre-litigation procedure to address the essential question of whether and to what extent the Commission was permitted to base its claims regarding the award of priority mixed services directly on primary law.

45. It should also be pointed out at this point that in its application the Commission appears in places to claim an infringement of Article 2 of Directive 2004/18 and a declaration against the Federal Republic of Germany to that effect. [13] In so far as the claims were to be interpreted in that way, that claim is also to be rejected as inadmissible because the complaint of an infringement of Article 2 of Directive 2004/18 was not expressly raised in the reasoned opinion.

12 — In this connection, the question arises in particular whether an examination of the award of the contested contracts on the basis of the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary law is compatible with the principle of the priority of application of secondary law and with the spirit and purpose of Treaty infringement proceedings under Article 226 EC. See point 95 et seq. of this Opinion.

13 — Under the heading 'The infringement of Article 16 of Directive 92/50/EEC and Article 35(4) of Directive 2004/18/EC' the Commission states, in point 39 of its application of 15 April 2008, that Articles 14 and 16 of Directive 92/50 and Articles 23 and 35(4) of Directive 2004/18 are applicable at any rate in the present case. In point 40, it then alleges an infringement of Article 16 of Directive 92/50 and of Article 35(4) of Directive 2004/18. In point 41, the Commission states that Article 3(2) of Directive 92/50 and Article 2 of Directive 2004/18 are likewise applicable in the present case, but without expressly claiming an infringement of those provisions or putting forward further arguments on those two articles. In the summary of its claims in point 72, however, the Commission alleges an infringement of Article 10 in conjunction with Article 16 of Directive 92/50 and of Articles 2 and 22 in conjunction with Article 35(4) of Directive 2004/18.

3. Conclusion

46. In the light of these considerations, I conclude that the present action for failure to fulfil obligations should be dismissed as inadmissible in so far as it also alleges a breach of the principle of non-discrimination and the requirement of transparency, which stem from freedom of establishment and freedom to provide services, in respect of the procurement of ambulance services where the transport character predominates.

47. Should the Court conclude that by its action the Commission is also seeking a declaration of an infringement of Article 2 of Directive 2004/18, that claim is likewise to be rejected as inadmissible.

B – *Merits*

48. The Federal Republic of Germany counters the action for failure to fulfil obligations brought by the Commission with three lines of argument. The German Government relies, first, on the exception under Article 45 EC and, in the alternative, on the justification under Article 86(2) EC. Second, the German Government disputes some of the factual assertions made by the Commission. Third, the German Government objects to the Commission's application for a declaration that a practice contrary to procurement law exists.

49. Against this background, I will first consider below the issue of the award of contracts for ambulance services in the light of the first paragraph of Article 45 EC in conjunction with Article 55 EC and, later, in the light of Article 86(2) EC. I will then examine in detail the nine procurement procedures to which the Commission objects. Lastly, I will address the question whether the results of that examination justify a declaration that there is a practice contrary to procurement law.

1. Non-applicability of the exception under the first paragraph of Article 45 EC

50. Under the first paragraph of Article 45 EC in conjunction with Article 55 EC, the rules of primary law on the right of establishment and on freedom to provide services do not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the

exercise of official authority. If an activity is connected with the exercise of official authority in a Member State, it is therefore excluded from the application of freedom of establishment and freedom to provide services.

51. The same must hold for the secondary legislation adopted to implement the chapters on the right of establishment and freedom to provide services. In so far as such secondary legislation also governs an activity connected with the exercise of official authority, it must be found, by way of an interpretation of the secondary legislation in a manner in conformity with the Treaty, that those activities are excluded from the application of that legislation in the Member States concerned. [14]

52. If the emergency and patient transport services to which the contested contracts relate were connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC, the breach of the principles of freedom of establishment and freedom to provide services alleged by the Commission would have to be rejected as unfounded. Because, moreover, both Directive 92/50 and Directive 2004/18 were adopted on the basis of Article 47(2) EC and Article 55 EC and therefore pursuant to the primary-law rules on competences in the chapters on the right of establishment and on freedom to provide services, the claim that those procurement directives have been infringed would also have to be rejected as unfounded in that case.

53. However, it is unclear to me whether the operation of emergency and patient transport services may be classified as an activity within the meaning of the first paragraph of Article 45 EC connected, even occasionally, with the exercise of official authority.

54. It should be pointed out, first, that the interpretation of the expression 'exercise of official authority' within the meaning of the first paragraph of Article 45 EC falls within the scope of Community law. The Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect. [15]

14 — See the Opinion of Advocate General Lenz in Case C-306/89 *Commission* v *Greece* [1991] ECR I-5863, point 28. See also Randelzhofer/Forsthoff, in Grabitz/Hilf, *Das Recht der Europäischen Union*, Article 45 EC, section 14 (Supplement 39, July 2009).

15 — See Case C-314/06 *Société Pipeline Méditerranée et Rhône* [2007] ECR I-12273, paragraph 21; Case C-103/01 *Commission* v *Germany* [2003] ECR I-5369, paragraph 33; and Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30.

55. The question whether an activity has a connection with the exercise of official authority within the meaning of the first paragraph of Article 45 EC must therefore be answered on the basis of the Community-law definition of official authority under that provision.

56. A condition for assuming the existence of – a connection with – the exercise of official authority within the meaning of Article 45 EC is the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. [16]

57. In view of the basic importance of the fundamental freedoms for the single market, the first paragraph of Article 45 EC – if applicable, in conjunction with Article 55 EC – is to be given a narrow interpretation as an exception to the principles of freedom of establishment and freedom to provide services. [17] The exception under the first paragraph of Article 45 EC is not therefore applicable to any activity in which prerogatives outside the general law, privileges of official power and powers of coercion may be enjoyed over citizens. Rather, it is necessary for such a connection with the exercise of official authority to be sufficiently intense and direct.

58. In other words, the criterion of the 'exercise of official authority' within the meaning of the first paragraph of Article 45 EC requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion. The Court has summarised this qualitative assessment of the connection with official functions in the requirement that the application of the first paragraph of Article 45 EC – if applicable, in conjunction with Article 55 EC – requires a 'direct' and 'specific' connection with the exercise of official authority. [18]

59. Thus, in its judgment of 29 October 1998 in *Commission* v *Spain*, [19] in examining the question whether the activities of private security undertakings in Spain were connected with the exercise of official authority, the Court stressed that even where in specific situations such private security forces are called upon to assist public security forces, the functions they perform are only auxiliary functions. It follows that private security

16 — Opinion of Advocate General Mayras in Case 2/74 *Reyners* [1974] ECR 631, at 664.

17 — The Court has confirmed this restrictive approach in what is now settled case-law, stating that the review of exceptions to the freedom of establishment laid down in Article 45 EC must take into account the Community character of the limits imposed by that article on the exceptions to that freedom. See Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219, paragraph 35.

18 — See Case C-438/08 *Commission* v *Portugal*, cited in footnote 17, paragraph 36; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 46; and Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 22.

19 — Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraphs 38 and 39.

undertakings are not 'directly and specifically' involved in the exercise of official authority. Advocate General Alber had proposed this approach in his Opinion in that case, pointing out that the distinction between main and auxiliary functions must be understood not as a quantitative criterion, but as a qualitative one and that there is a difference of degree between the powers of the public security forces and those of the private security forces. [20]

60. Recently, the Court was similarly strict in its judgment of 22 October 2009 in *Commission* v *Portugal*, [21] in which it ruled that the activities of the private vehicle roadworthiness testing bodies did not fall within the exception provided for in Article 45 EC, even though such organisations issued certifications of the technical inspections carried out by them and also exercised official powers in this respect. However, the exercise of those official powers did not fulfil the qualitative criterion of a 'direct and specific' connection with the exercise of official authority within the meaning of Article 45 EC. In this connection, the Court pointed out that the certification drew only the legally envisaged conclusions from the relevant roadworthiness test, without the technical inspection bodies having real decision-making independence. Furthermore, the decisions whether or not to certify roadworthiness were taken in the context of direct State supervision. [22]

61. The Court had already ruled, in examining the applicability of the exception under Article 45 EC with regard to commissioners with insurance undertakings and private provident associations, that the performance of purely auxiliary and preparatory functions for an institution which actually exercises official authority by taking the final decision cannot be regarded as having a connection with the exercise of official authority within the meaning of that exception. [23]

62. In summary, it is now settled case-law that the 'exercise of official authority' within the meaning of the first paragraph of Article 45 EC is subject to high qualitative

20 — Opinion of Advocate General Alber in Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, points 27 and 28. The finding that the activities of undertakings providing surveillance and protection services are not normally directly and specifically connected with the exercise of official authority was confirmed in Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 31 et seq., Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363, paragraph 20 et seq., and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraphs 25 and 26.

21 — Case C-438/08 *Commission* v *Portugal*, cited in footnote 17.

22 — The Court had already reached a similar conclusion in Case C-404/05 *Commission* v *Germany* [2007] ECR I-10239, paragraph 39 et seq., and Case C-393/05 *Commission* v *Austria* [2007] ECR I-10195, paragraph 37 et seq., when examining the activities of private inspection bodies of organically farmed products.

23 — Case C-42/92 *Thijssen*, cited in footnote 18, paragraph 17 et seq. See also Case C-451/03 *Servizi Ausiliari Dottori Commercialisti*, cited in footnote 18, paragraph 44 et seq., with regard to certain tax advice and assistance activities by Centri di Assistenza Fiscale in Italy.

requirements, which have thus far frustrated reliance on Article 45 EC almost without exception. [24]

63. In the present case too, it would appear that the providers of emergency and patient transport services have a connection with the exercise of official authority to a limited extent, but without displaying the necessary qualitative characteristics for the application of Article 45 EC.

64. The Federal Republic of Germany considers that there are grounds for a connection with the exercise of official authority, first, because the agreements in question are to be regarded under German law as public-law agreements. Second, the Federal Republic of Germany points out the special prerogatives enjoyed by the ambulance services under the law on roads and on road transport, which consist in particular in giving instructions to other road users through the use of flashing blue lights and sirens which must be observed and with regard to which non-compliance may be penalised by a fine. Third, the Federal Republic of Germany states that the ambulance services are often involved in organising the ambulance service and in performing the official functions in the fields of fire protection and civil protection and support police security protection through the provision of emergency vehicles within the framework of public safety measures. Fourth, the Federal Republic of Germany stresses the appointment of ambulance service personnel as administrative enforcement officers which is often provided for under regional law.

65. These arguments are not convincing.

66. With its first argument, the Federal Republic of Germany disregards the principle that the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems. [25] The fact that under German law the contested ambulance services are to be organised on a public-law basis is irrelevant to the question whether those ambulance services fall within the scope of Article 45 EC.

67. Even though the Federal Republic of Germany then rightly takes the view that the use of flashing blue lights and sirens by the

24 — In addition to the judgments already cited, see Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 35 et seq., with regard to university teaching activities.

25 — See points 54 and 55 of this Opinion.

ambulance services is to be regarded as the exercise of a special prerogative, the specific expression of this special prerogative does not seem to have the intensity which, according to settled case-law, is required for the application of Article 45 EC. The special prerogatives claimed simply amount to, on the one hand, specially fitting out ambulance service vehicles and equipping them with flashing blue lights and siren and, on the other, claiming traffic priority over other road users with those vehicles under certain conditions, whereby failure by other road users to comply with those special prerogatives is punishable by a fine. In my opinion, these relatively weak special prerogatives do not meet the abovementioned high qualitative requirements for the exercise of official authority within the meaning of Article 45 EC.

68. In this connection, the involvement by the ambulance services, cited by the German Government, in organising the ambulance service and in fire protection and civil protection and in providing emergency vehicles in support of security authorities and fire services is not convincing either. It should be pointed out, first of all, that the provision of emergency vehicles in support of security authorities is generally to be regarded as a purely auxiliary and preparatory activity which cannot, according to the abovementioned case-law, have a direct connection with the exercise of official authority. Even if the examples cited by the Federal Republic of Germany of the ambulance services' involvement in organising the ambulance service and in fire and civil protection [26] went beyond purely auxiliary and preparatory activities, those activities too do not meet the abovementioned high qualitative requirements for the exercise of official authority within the meaning of Article 45 EC.

69. Lastly, the argument of the possibility, often provided for under the law of the *Länder*, of appointing ambulance service personnel as administrative enforcement officers cannot be accepted because it is clear from the Court's case-law that the extension of the exception allowed by Articles 45 EC and 55 EC to an entire profession is not possible when the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole. [27]

70. In the light of the foregoing, I conclude that the contested activity of providing

26 — As examples of public functions performed by ambulance personnel, the Federal Republic of Germany refers to clearing, securing and cordoning-off in emergencies and, in general, to the involvement of ambulance personnel in planning, organising and administering the ambulance service, as part of which they have the right, for example, to impose information and notification duties on third parties, or can make decisions on the deployment of other specialist services.

27 — Case C-404/05 *Commission* v *Germany*, cited in footnote 22, paragraph 47, and Case C-393/05 *Commission* v *Austria*, cited in footnote 22, paragraph 45.

ambulance services does not as such imply any direct and specific connection with the exercise of official authority. In the present case the exception under Article 45 EC is not therefore relevant.

2. No justification under Article 86(2) EC

71. Relying on *Ambulanz Glöckner*,[28] the Federal Republic of Germany claims, in the alternative, that ambulance services are to be classified as services of general economic interest within the meaning of Article 86(2) EC, the justification contained in that provision being applicable without reservation to the field of freedom of establishment and freedom to provide services.

72. These arguments are not convincing.

73. The Federal Republic of Germany is correct in so far as it argues that in the judgments of 23 October 1997 in *Commission* v *Netherlands*[29] and of 18 June 1998 in *Corsica Ferries France*,[30] the Court declared the justification under Article 86(2) EC also to be applicable to State measures which were incompatible with the provisions of the EC Treaty on free movement of goods and freedom to provide services, and thereby confirmed that Article 86(2) EC may be relied on to justify infringements of Article 86(1) EC in conjunction with the fundamental freedoms.[31]

74. In the light of recent developments in the case-law of the Court of Justice, however, the question arises, first of all, whether *Commission* v *Netherlands* and *Corsica Ferries France* may still be applicable without reservation in this respect. According to the most recent case-law, the fact that an activity falls outside the scope of the rules on competition, having regard to its specific form, does not necessarily mean that it also falls outside the scope of the provisions on free movement.[32]

75. Against this background, the question arises whether this line of case-law following from *Commission* v *Netherlands* and *Corsica Ferries France* on the applicability of

28 — Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

29 — Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 27 et seq.

30 — Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 59.

31 — See also Mestmäcker/Schweitzer, in Immenga/Mestmäcker, *Wettbewerbsrecht. Kommentar zum Europäischen Kartellrecht*, 4th edition, Munich 2007, Article 86(2) EC, section 42; Pernice/Wernicke, in Grabitz/Hilf, loc. cit. (footnote 14), Article 86 EC, section 53.

32 — Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, 'Viking Line,' [2007] ECR I-10779, paragraph 53. See also Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, paragraphs 31 to 34.

Article 86(2) EC in the field of the fundamental freedoms should be re-examined, especially as the Court appeared to rule out such applicability in its earlier case-law. [33]

76. Nevertheless, in the present case there is no need to consider this question any further, since the Federal Republic of Germany has not even shown that the conditions governing the application of Article 86(2) EC as such are met.

77. It is incumbent upon the Member State which invokes Article 86(2) to demonstrate that the conditions laid down in that provision are met. [34]

78. In the present case, Article 86(2) EC requires the following elements to be demonstrated: that the contested ambulance services are to be classified as services of general economic interest, that a modification of the contested procurement practice in accordance with Community law would obstruct or jeopardise the performance, in law or in fact, of those services, and that the development of trade has not been affected to such an extent as is incompatible with the interests of the Community.

79. Whilst it would appear to be common ground that emergency transport services are to be classified as services of general economic interest within the meaning of Article 86(2) EC, [35] the Federal Republic of Germany has failed to demonstrate in the present case that the contested procurement practice is absolutely necessary and that the performance of the task of providing the contested ambulance services cannot therefore be guaranteed by other means which are more commensurate with Community law.

80. In this respect, the Federal Republic of Germany merely argues that the integration of new ambulance service providers in a region's ambulance service system could hinder or prevent cross-subsidies between densely built-up areas, where the provision of ambulance services is more profitable, and a large number of less profitable areas with a low population density. In addition, it claims that the protection, inherent in current

33 — Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 19.

34 — See Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 101.

35 — See Case C-475/99 *Ambulanz Glöckner*, cited in footnote 28, paragraph 55.

procurement practice, of membership-based assistance organisations operating in Germany is necessary because those organisations have a duty to provide assistance in the event of an emergency. Only those organisations therefore guarantee that in an emergency there can be recourse to a large number of locally based voluntary workers, and such workers must have the option to gain regular practical experience in the ambulance service.

81. In its reply, the Commission responded to the cross-subsidy argument by stating that the claim that ambulance service organisations required cross-subsidies in order to make provision for less profitable areas was not an argument against a call for tender for ambulance services in accordance with Community law. Allowances could be made for differences in profitability of certain districts by paying a higher amount for less profitable districts. Another option was the combined procurement of emergency ambulance services and patient transport services for geographically defined areas which cover both more profitable and less profitable districts.

82. In its rejoinder, the Federal Republic of Germany did not claim that, in the light of the relevant factual and legal circumstances, these procurement alternatives put forward by the Commission would hinder or even render impossible the performance of the task of providing emergency transport services. Against this background, the argument of the necessity of the contested procurement practice on account of the ensuing cross-subsidies must be rejected because it has not been sufficiently substantiated.

83. The same holds for the argument regarding the large number of local voluntary workers. In this respect, the Commission pointed out, as an alternative which is consistent with procurement law, the possibility of a call for tenders where local availability was taken into consideration as a selection criterion. The Federal Republic of Germany did not provide sufficient evidence to refute this possibility in its rejoinder either.

84. In the light of these considerations, I conclude that the Federal Republic of Germany has not provided the evidence incumbent on it that the contested procurement practice

for ambulance services meets the criteria laid down in Article 86(2) EC. Its reliance on Article 86(2) EC must therefore be rejected as unfounded for that reason.

contracts for pecuniary interest in relation to ambulance services from October 2005. The service purportedly covered the provision of vehicles and personnel for emergency ambulance services and qualified patient transport services for the period 2007 to 2011, with a contract value of more than EUR 7 000 000 per year. There was apparently no Europe-wide call for tenders.

3. Analysis of the nine contested procurement procedures

87. This description of the facts is not disputed by the Federal Republic of Germany.

85. The Commission objects to nine procurement procedures for the provision of ambulance services in four *Länder*. On that basis, it seeks a declaration that the procurement practice in the Federal Republic of Germany is unlawful. Because an unlawful practice can exist only in so far as Community law has actually been infringed in the implementation of the individual contested procurement procedures, I will first examine whether and to what extent infringements of the rules and principles cited by the Commission may be established in connection with the implementation of the individual procurement procedures.

88. In the view of the Commission, this procurement procedure constitutes an infringement by the Federal Republic of Germany of Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18. Furthermore, the procurement procedure also breached the principle of non-discrimination and the requirement of transparency contained within freedom of establishment and freedom to provide services.

(a) Award of contracts by the City of Magdeburg (Saxony-Anhalt)

(i) Infringement of Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18

86. According to the Commission, the City of Magdeburg (Stadt Magdeburg), as the contracting authority, conducted a so-called 'authorisation procedure' for the award of

89. I concur with the Commission in so far as in any case the award of the contested contracts by the City of Magdeburg infringed

Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18.

90. According to the undisputed description given by the Commission, the City of Magdeburg, as the contracting authority within the meaning of the procurement directives, concluded with a service provider a written contract for pecuniary interest in respect of the provision of ambulance services, whose estimated contract value was greater than the thresholds laid down in Directive 92/50 and Directive 2004/18. Even though it has not been established precisely at what time certain events which are relevant for procurement law purposes took place – according to the Commission the procedure was conducted from October 2005 – and it is not therefore clear whether the award of the contested contracts is to be examined completely or partially on the basis of Directive 92/50 or completely or partially on the basis of Directive 2004/18, [36] the absence of more precise information on the chronology of the procurement procedure in the present case cannot lead to a finding that there was no infringement of procurement law. Both under Directive 92/50 and under Directive 2004/18 the City of Magdeburg was required to comply with the duty to give notice of contracts awarded (Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18), irrespective of whether the transport component or the medical care component of the ambulance services was larger.

(ii) No breach of the principle of non-discrimination laid down in primary law or the requirement of transparency laid down by primary law

– Consideration of the merits on the assumption that the plea of an infringement of primary law is partially inadmissible

91. As I have already mentioned in the examination of admissibility, the present action should be dismissed as inadmissible in so far as it seeks a declaration that the award of contracts for the provision of ambulance services which have their emphasis on the transport of persons breached the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services. [37]

92. The plea of an infringement of those principles of primary law is therefore admissible only in so far as it finds fault with the

36 — It is the legal situation at time of the alleged action or failure to act that is relevant. See Egger, A., *Europäisches Vergaberecht*, Baden-Baden 2008, section 416. See also Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraph 38 et seq.

37 — See point 30 et seq. of this Opinion.

procurement of ambulance services which have their emphasis on medical care.

93. For this plea – restricted in that way – to be well-founded, the Commission would have to prove first of all that the procurement procedure challenged by it concerned ambulance services which had their emphasis on medical care. However, the Commission has not made any submissions on this, let alone proven it, in the present case. Rather, in the Commission's view there is no need to answer the question whether the contested services have their emphasis on transport of persons or on medical care.

94. Because in proceedings under Article 226 EC for failure to fulfil obligations it falls to the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to assess the case [38] and, in view of the above findings, the Commission has failed to comply with that duty to produce evidence and burden of proof, the plea of a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, in so far as it is admissible, should be rejected as unfounded.

38 — See Case C-246/08 *Commission* v *Finland* [2009] ECR I-10605, paragraph 52; Case C-438/07 *Commission* v *Sweden* [2009] ECR I-9517, paragraph 49; and Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 33.

– In the alternative: Consideration of the merits in the event that the plea of an infringement of primary law should be declared admissible in its entirety

95. If, contrary to my view, the Court were to declare as admissible in its entirety the plea of a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, the merits of that plea would also have to be considered in its entirety.

96. In that scenario, the starting point for the consideration of the merits is the finding that the Commission deliberately left open the question whether the contested ambulance services have their emphasis on transport of persons or on medical care. As a result, it is not possible to determine whether those ambulance services – as mixed services for the purposes of Directive 92/50 and Directive 2004/18 – are subject to the full application

of the procurement directives [39] and whether calls for tender should therefore have been made in compliance with the procurement procedures laid down in those directives. The Commission has attempted to circumvent this problem in its action by alleging a general breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

97. Because of this tactical decision by the Commission, however, the basic question arises in the present case whether, if the Commission establishes that a Member State's behaviour might infringe both primary law and, fully, Directives 92/50 and 2004/18, it is free to decide, in proceedings under Article 226 EC, whether to bring its claims on the basis of primary law or on the basis of the procurement directives. I will examine this question below with reference to the principle of the priority of application of secondary law and having regard to the spirit and purpose of proceedings under Article 226 EC.

98. I will then consider the strict conditions of primary law which, according to recent case-law, apply to proof of a cross-border interest in the procurement of non-priority services and examine what conclusion may be drawn from that case-law for the assessment of the present case.

Principle of the priority of application of secondary law

99. According to settled case-law, the principle of the priority of application of secondary law states that the exhaustive harmonisation of secondary law in a certain sphere at Community level means that each national measure in that sphere must be assessed in the light of the provisions of the secondary measure and not those of the EC Treaty. [40]

100. In the present case, at the level of primary law the Commission essentially alleges a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

39 — See point 34 et seq. of this Opinion.

40 — See Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64.

101. It is settled case-law that the principle of equal treatment under primary law in the field of public procurement is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality. [41] The principles of equal treatment and non-discrimination on grounds of nationality imply a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the award of the contract to be opened up to competition and a review of the impartiality of the procurement procedures. [42]

102. These requirements of equal treatment laid down in primary law and of the establishment of sufficient transparency have been extensively harmonised in Directive 92/50 and in Directive 2004/18 on the basis of extremely detailed rules on various duties relating to information, communication and giving notice. These duties of transparency under secondary law are characterised by detailed harmonisation, which is to be regarded as full harmonisation in relation to various points. [43]

103. In the light of the priority of application of secondary law, the question therefore arises in the present case whether the Commission can allege a breach of the principle of non-discrimination laid down in primary law and of the resulting requirement of transparency, even though the award of the contested contracts would be fully covered by the procurement directives if the transport element was predominant in value terms [44] and although the principle of non-discrimination and the

41 — Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48.

42 — Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 49, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21. With regard to this relationship between the principle of non-discrimination and the requirement of transparency, see C-507/03 *Commission* v *Ireland*, cited in footnote 38, paragraphs 30 and 31; Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 66; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 17 and 18; and Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60 et seq.

43 — It must be assumed in general that Directive 92/50 and Directive 2004/18 were not as such intended to harmonise fully the award of public contracts which fall within their respective scopes. This is clear from the titles of those directives, which mention the 'coordination' of procedures for the award of contracts. The fact that those directives sought minimum harmonisation does not, however, rule out exhaustive harmonisation in certain areas. In view of the extremely detailed rules which those directives contain with regard to the duties relating to information, communication and giving notice in the individual procurement procedures, it is extremely difficult in this area to distinguish between – very detailed – minimum harmonisation and exhaustive full harmonisation. As Advocate General Mazák rightly stated in his Opinion of 22 September 2009 in Case C-299/08 *Commission* v *France* (point 12 et seq.) and the Court confirmed in its judgment of 10 December 2009 in Case C-299/08 *Commission* v *France* [2009] ECR I-11587, paragraph 28 et seq., the individual procurement procedures referred to in Article 28 et seq. of Directive 2004/18 are to be regarded as exhaustive. It follows directly that at least some of these provisions concerning those procedures are to be regarded as an expression of full harmonisation.

44 — If, on the other hand, the Commission had proved that the ambulance services should be treated as contracts for non-priority services and were therefore only partially covered by the procurement directives, according to consistent case-law it would be possible – if there were a clear cross-border interest – that the principles under Articles 43 EC and 49 EC would apply. See Case C-507/03 *Commission* v *Ireland*, cited in footnote 38, paragraphs 29 and 30.

requirement of transparency which stem from freedom of establishment and freedom to provide services have been harmonised in detail and in some areas even exhaustively in those procurement directives.

104. This question has not yet been answered definitively in the Court's case-law.

105. It is clear that the priority of application of secondary law precludes reliance on justifications, established in primary law, of infringements of fundamental freedoms, in so far as the infringement concerns an area in which the justifications have been fully harmonised. [45] Conversely, a national rule whereby a Member State discharges its obligations under secondary legislation cannot be characterised as a breach of a fundamental freedom. [46] It would call into question the validity of secondary legislation if an authorisation under primary law could be played off against a prohibition under secondary law, or a requirement under secondary law against a prohibition under primary law. [47]

106. Even though it has also been confirmed in several preliminary rulings that national measures may no longer be assessed on the basis of the fundamental freedoms if and to the extent that there is exhaustive secondary legislation, [48] thus far it has largely not been clarified whether in Treaty infringement proceedings too complaints may no longer be raised directly against failure to observe the fundamental freedoms if the contested conduct at the same time constitutes or could constitute an infringement of secondary legislation by which an area coming under one of those fundamental freedoms has been fully harmonised. [49]

107. In my opinion, complaints may no longer be raised in treaty infringement

45 — Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 25; Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457, paragraph 25; Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 35; and Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 33 et seq.

46 — See Case C-322/01 *Deutscher Apothekerverband*, cited in footnote 40, paragraph 52 et seq.

47 — See to that effect Randelzhofer/Forsthoff, in Grabitz/Hilf, loc. cit. (footnote 14), Articles 39-55 EC, section 149.

48 — As a leading judgment reference can be made to Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947. See also Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraph 22 et seq.; Case C-309/02 *Radlberger Getränkegesellschaft* [2004] ECR I-11763, paragraph 52 et seq.; and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32 et seq.

49 — For a restriction of the scope of the fundamental freedoms by fully harmonising secondary legislation, see Kingreen, T., *Kommentar zu EUV/EGV* (ed. Calliess, C./Ruffert, M.), 3rd edition, 2007, Articles 28-30 EC, section 18.

proceedings directly against failure to observe the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services if the contested conduct at the same time constitutes an infringement of secondary legislation which effects full harmonisation. If, on the other hand, the Commission were given the option in such a case to raise a complaint of either a breach of the fundamental freedom or an infringement of the fully-harmonised secondary legislation, this would seriously undermine the validity of the secondary legislation.

108. The distinctive feature of fully harmonising secondary legislation is that the Member States may neither surpass nor fall short of the relevant stipulations of Community law. Against this background, the fully harmonising rules are generally very specific. If, therefore, an area which is covered by a fundamental freedom is made the subject of full secondary-law harmonisation, it is almost ruled out that primary law and secondary law will impose exactly the same obligations on the Member States. The secondary legislation elaborates and shapes the provisions on the fundamental freedoms as specific rights and duties. The stipulations of primary law, on the other hand, are much more general and can therefore, in principle, be complied with in different ways. These different depths of regulation inevitably lead to a substantive tension between primary law and fully harmonising secondary law, in particular between an 'authorisation under primary law' and a 'prohibition under secondary law' or vice versa.

109. In the abovementioned rulings on the non-applicability of justifications under primary law, if and in so far as these are subject to full harmonisation, this tension between an 'authorisation under primary law' and a 'prohibition under secondary law' is resolved in favour of the prohibition under secondary law, which is thus accorded priority of application. On the basis of the same balancing of interests, the general tension between the substantively more abstract and less shaped fundamental freedom under primary law and substantively highly specific and shaped secondary legislation which effects full harmonisation and is based on that freedom must also be eliminated in favour of that secondary legislation, [50] as the Court has now confirmed in settled case-law in the preliminary ruling procedure. [51]

50 — Even though in *Danske Slagterier*, cited in footnote 45, paragraph 18 et seq., the possibility of the public relying on free movement of goods despite the existence of two harmonising directives was confirmed, in that judgment the Court did not rule against the priority of application of secondary law in the sense suggested here. As I stated in my Opinion of 4 September 2008 in that case (point 82), there is nothing to suggest that the Community legislature in adopting the directives intended also to elaborate the rights of citizens of the Union and thus remove the possibility for them to rely on the right to the free movement of goods established by Article 28 EC.

51 — See the judgments cited in footnote 48.

110. In the light of the above considerations, if the Commission finds that a Member State's behaviour might infringe both rules of primary law and fully harmonising secondary legislation based on that primary law, it cannot simply raise a general objection of an infringement of primary law in Treaty infringement proceedings.

111. The same must be true in a case like the present one, where a complaint is raised against a breach of the principle of non-discrimination and the consequent requirement of transparency which stem from freedom of establishment and freedom to provide services, even though the procurement directives might be fully applicable and precisely the requirement of transparency has been regulated in detail – and in some respects exhaustively – in those directives. On account of the extremely detailed clarification in secondary law of the transparency requirements in the procurement directives, there is a problem here too of a tension between an 'authorisation under primary law' and a 'prohibition under secondary law' and vice versa, which, in the light of the above assessment, must be eliminated in favour of the secondary legislation. [52]

112. In the light of these considerations, in a case like the present one, the Commission cannot simply raise a general objection to a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

113. This finding is confirmed on a closer examination of the spirit and purpose of treaty infringement proceedings under Article 226 EC. Those proceedings essentially have an objective function, namely the uniform enforcement and safeguarding of Community law. [53] The aim of treaty infringement proceedings under Article 226 EC is not therefore to punish a Member State. A finding that a certain procedure or state of affairs

52 — It should be born in mind in this connection that in the case of minimum harmonisation the minimum standards to be achieved by the Member States are established. If such minimum standards lay down strict rules on procedures and time-limits which must be observed in order to safeguard the requirements of equal treatment and transparency, a tension may arise with the requirements of primary law which is no less marked than in the case of full harmonisation.

53 — Gaitanides, C., in: von der Groeben, H., Schwarze, J. (ed.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edition, Baden-Baden 2003, Article 226 EC, section 2. See also Rengeling, H.W./Middeke, A./Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, 2nd edition, Munich 2003, § 6 paragraph 2.

is contrary to Community law is not an end in itself, but is intended, primarily, to establish certainty as to whether and to what extent a state of affairs contrary to Community law exists. A judicial finding of a failure by a Member State to fulfil its obligations under the Treaties is also intended to make it possible to ascertain what measures are necessary from the point of view of Community law to create or restore the state of affairs consistent with Community law. [54]

114. If, in a case like the present one, a general finding were to be made that, by the award of the contested contracts, the Federal Republic of Germany has breached the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary law, without clarifying whether the contested mixed services have their emphasis on priority service elements and whether the procurement directives are therefore fully applicable, it would not be possible subsequently to ascertain with certainty what measures were necessary from the point of view of Community law to create or restore the state of affairs consistent with Community law. If the ambulance services were fully covered by the procurement directives, compliance with the substantively less shaped and specific requirement of transparency laid down in primary law would not be sufficient to satisfy the extremely detailed stipulations of the procurement directives. [55]

115. On the basis of these considerations, I conclude that, having regard to the priority of application of secondary law and the purpose of Treaty infringement proceedings under Article 226 EC, the award of the contracts by City of Magdeburg which is contested by the Commission may not be assessed on the basis of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

Proof of a cross-border interest in the procurement of non-priority services

116. Purely national situations do not, in principle, fall within the scope of the fundamental freedoms. Consequently, if the

54 — See Gaitanides, C., loc. cit. (footnote 53), paragraph 12, according to whom proceedings under Article 226 EC relate neither to the liability of the Member States for the purposes of general international law nor to a condemnation, but an objective finding of a state of affairs. The proceedings have a purely organisational function and have the sole purpose of compelling the Member States to rectify current Treaty infringements. The holding up to obloquy of the infringing State may possibly be a side-effect, but is never the aim of the proceedings.

55 — Thus, it is settled case-law that the obligation of transparency requires the authority to ensure, for the benefit of any potential contractor, a sufficient degree of advertising, but does not necessarily imply an obligation to launch an invitation to tender; see Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, and *Coname*, cited in footnote 42, paragraph 21. In this connection, Egger, A., loc. cit. (footnote 36), paragraph 147 et seq., points out that the requirements of primary law allow the Member States a broader margin of discretion than the procurement directives. He rightly points out that not only does a different intensity of examination apply, but also the requirements of primary law are more general and therefore by and large less strict and detailed. See I.J. van den Berge, 'De reikwijdte van het transparantiebeginsel bij de verlening van dienstenconcessies', *NTER* 2005, p. 241, 243, in whose view Articles 28 EC, 43 EC and 49 EC do not really allow generally applicable statements to be made regarding the duties of transparency to be observed.

Commission alleges a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, it must prove a cross-border interest in the award of the contracts in question.

117. In its judgment in Case C-507/03 *Commission* v *Ireland*,[56] the Court stated with regard to the procurement of services under Annex I B to Directive 92/50 that such services are in principle subject to the principles of the EC Treaty in the field of freedom of establishment and freedom to provide services, but that the Commission must always prove that the contract in question is of certain cross-border interest. In this connection, a mere statement by the Commission that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest and that there was therefore a failure to fulfil obligations.[57]

118. This strict examination of the existence of a cross-border interest in the procurement of non-priority services can be explained, at least partially, by the fact that, in the opinion of the Community legislature, contracts for services under Annex I B to Directive 92/50 and Annex II B to Directive 2004/18 are not, in the light of their specific nature, of cross-border interest. Against this background, Directive 92/50 and Directive 2004/18 merely impose a requirement of publicity after the fact for that category of services.[58]

119. Because in proceedings for failure to fulfil obligations it falls to the Commission to place before the Court the information needed to assess the case, it cannot circumvent the stricter requirements of primary law relating to proof of a cross-border interest which apply to the procurement of mixed services with predominantly non-priority service components by deliberately leaving open the question of the classification of the contested mixed services for the purposes of procurement law. In a case like the present one, the Commission must therefore also prove a cross-border interest in the procurement of the contested services in accordance with the strict conditions which the Court laid down with regard to non-priority services in its judgment in Case C-507/03 *Commission* v *Ireland*.

120. As proof of the existence of a cross-border interest in the award of contracts by the City of Magdeburg, the Commission merely refers to a general complaint regarding the

56 — *Commission* v *Ireland*, cited in footnote 38, paragraph 29 et seq.

57 — Ibid., paragraph 34.

58 — Ibid., paragraph 25. See also Frenz, W., *Handbuch Europarecht. Bd. III. Beihilfe- und Vergaberecht*, Berlin et al. 2007, section 2116.

procurement of ambulance services in Germany and to the economic importance of the services in question, it being assumed that there is inevitably a keen interest from foreign service providers on account of the large volume of the contracts. These general statements by the Commission, which do not make any reference to the award of contracts by the City of Magdeburg and which, moreover, are based to some extent on presumptions, do not meet the high requirements governing proof of a cross-border interest in the procurement of non-priority services.

121. In the absence of proof of the cross-border connection, the Commission's claim that the award of contracts by the City of Magdeburg also breached the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services is to be rejected as unfounded.

(iii) Conclusion

122. In the light of the above considerations, I conclude that in the award of the contested contracts by the City of Magdeburg, the Federal Republic of Germany has infringed Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18. In other respects, the Commission's submissions regarding the award of contracts by the City of Magdeburg should be rejected as inadmissible, or at least as unfounded.

(b) The cases of procurement by the City of Bonn (North Rhine-Westphalia), the municipality of Witten (North Rhine-Westphalia), the Region of Hanover (Lower Saxony) and the administrative district of Hameln-Pyrmont (Lower Saxony)

123. With regard to the contested cases of procurement by the City of Bonn (Stadt Bonn), the municipality of Witten (Stadt Witten), the Region of Hanover (Region Hannover) and the administrative district of Hameln-Pyrmont (Landkreis Hameln-Pyrmont), the Commission puts forward the following arguments.

124. In 2004 the City of Bonn, as the contracting authority, awarded a contract for ambulance services for the period from 1 January 2005 to 31 December 2008, without making a Europe-wide call for tenders. The contract concerned inter alia the operation of four ambulance stations. The value of the contract was estimated to be at least EUR 5,28 million.

125. Since 2005 at least, the municipality of Witten, as the contracting authority, has awarded contracts for ambulance services to the value of EUR 945 753 per year without making Europe-wide calls for tender. The contracts concern the operation of one ambulance station.

126. In 2004, the Region of Hanover, as the contracting authority, launched a call for tenders for the provision of ambulance services in its territory, in which only the previous providers – Arbeiter-Samariter-Bund (ASB), Deutsches Rotes Kreuz (DRK), Johanniter-Unfallhilfe (JUH) and RKT GmbH – were permitted to participate. The contract awarded related to the period from 1 January 2005 to 31 December 2009 and had a total value of approximately EUR 65 million.

127. In 1993, the administrative district of Hameln-Pyrmont awarded the district association of the DRK a contract for the provision of ambulance services in its territory. The term, which had an original duration of ten years, was not terminated, but in 2003 was renewed for a further ten years without a call for tenders. In addition, in 1999 a new ambulance station was built in the municipality of Emmerthal, with the operation of which the DRK was also entrusted without any call for tenders. The total value of these procurement procedures amounts to EUR 7,2 million per year.

128. This description of the facts is not disputed by the Federal Republic of Germany.

129. In all these cases, the Commission alleges an infringement of the rules on the notification duty for awarded contracts (Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18). The existence of those infringements is not disputed.

130. On the other hand, I do not consider the breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, which is also alleged by the Commission in all these cases, to have been proved. This plea cannot be accepted because of the same jurisprudential and evidential reservations which I have already set out in examining the award of contracts by the City of Magdeburg. [59]

(c) Award of contracts by the administrative district of Uelzen (Lower Saxony)

131. With regard to the award of contracts by the administrative district of Uelzen (Landkreis Uelzen), the Commission claimed that on the basis of a contract of 10 July 1984 the

59 — See point 91 et seq. of this Opinion.

DRK provided ambulance services within the administrative district of Uelzen with the exception of the Bevensen-Bienenbüttel area. In 2004 material amendments were made to this contract, which should be regarded as a new contract. The award of this new contract did not comply with Article 16 of Directive 92/50. In addition, the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services were breached in connection with the award of that new contract.

132. The Federal Republic of Germany claims that the reason for the amendment of the contract was that in 1984 the administrative district of Uelzen entrusted the joint municipality of Bevensen (Samtgemeinde Bevensen) with ambulance services in the Bevensen-Bienenbüttel area. In 2002, the DRK took over the entire ambulance service of the Samtgemeinde Bevensen. This explains the contractual amendments negotiated between the administrative district of Uelzen and the DRK in 2004, which are not so material as to constitute a new procurement procedure which is relevant for the purposes of procurement law. It argues that because the award of the contested contract originated from 1984 and therefore took place before the expiry of the transposition period for Directive 92/50, the complaint of non-compliance with that directive can no longer be raised.

133. The Court has answered the question of the conditions under which amendments to an existing contract are to be regarded as a separate award of a contract for the purposes of the procurement directives in *pressetext Nachrichtenagentur*. [60] It stressed in particular that amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. [61] An amendment may be regarded as being material inter alia when it extends the scope of the contract considerably to encompass services not initially covered. [62]

134. It is clear from the documents submitted by the German Government and from its observations that in 2004 the public contract was extended to include the provision of public ambulance services in the area of the Bevensen ambulance station, which accounts for around one quarter of the total area of the administrative district. Furthermore, the Federal Republic of Germany acknowledges that the value of the contract for the entire administrative district of Uelzen amounts to around EUR 4450000 per year and that the value of the ambulance services to be provided in the

60 — Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 28 et seq.

61 — Ibid., paragraph 34.

62 — Ibid., paragraph 36.

area of operation of Bevensen ambulance station amounts to at least EUR 670 000 per year. [63]

135. The contractual amendments negotiated between the Administrative District of Uelzen and the DRK in 2004 have therefore meant that the contract for the provision of ambulance services has been extended to an additional area in the administrative district, as a result of which the total area of operation increased by around 25% and the total value of the contract rose by at least 15%. The amendments to the contract negotiated in 2004 are therefore to be regarded as material, with the result that this process is to be seen as a new award of public ambulance contracts in the entire administrative district which was subject to Directive 92/50. This assessment is not affected by the – undocumented – information provided by the Federal Republic of Germany regarding the takeover of the ambulance service operated by another service provider.

136. It is not disputed in this connection that the new award of the contract in 2004 did not comply with Article 16 of Directive 92/50. An infringement of that provision by the Federal Republic of Germany has therefore been proved in the present case.

137. On the other hand, I do not consider the breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, which is also alleged by the Commission, to have been proved. This plea cannot be accepted because of the same jurisprudential and evidential reservations which I have already set out in examining the award of contracts by the City of Magdeburg. [64]

(d) The cases of the award of contracts by the Westsachsen (Saxony), Chemnitz/Stollberg (Saxony) and Vogtland (Saxony) joint ambulance associations

138. With regard to the contested cases of the award of contracts by the Westsachsen, Chemnitz/Stollberg and Vogtland joint ambulance associations, the Commission makes the following submissions.

139. The Westsachsen joint ambulance association, as the contracting authority, concluded with ASB, the DRK, JUH and Zwickau fire service contracts for the provision of ambulance services each with a duration of four years and a total contract value of

63 — Defence of the Federal Republic of Germany of 4 September 2008, point 22.

64 — See point 91 et seq. of this Opinion.

EUR 7,9 million per year. In 2003 those contracts were renewed for four years without making a call for tenders. Upon their expiry, those contracts were renewed until 31 December 2008.

140. The Chemnitz/Stollberg joint ambulance association, as the contracting authority, concluded with ASB, the DRK, JUH and Chemnitz fire service contracts for the provision of ambulance services each with a duration of four years and a total contract value of EUR 3,3 million per year. In 2002 those contracts were renewed for four years without making a call for tenders. Upon their expiry, those contracts were renewed until 31 December 2008.

141. In 2002 and 2004, the Vogtland joint ambulance association, as the contracting authority, concluded with ASB, the DRK, JUH, a Plauen private ambulance company and Plauen fire service contracts for the provision of ambulance services each with a duration of four years and a total contract value of EUR 3,9 million per year, without making a call for tenders. Those contracts had a duration of four years and upon their expiry were renewed, without making a call for tenders, until 31 December 2008.

142. In all these cases, the Commission alleges an infringement of the rules on the notification duty for awarded contracts (Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18). Those infringements do exist.

143. This finding is not precluded by the arguments put forward by the Federal Republic of Germany to the effect that, since the entry into force in Saxony of the Gesetz über den Brandschutz, Rettungsdienst und Katastrophenschutz (Law on fire protection, ambulance services and civil protection) of 1 January 2005, the award of a contract in the field of ambulance services must be preceded by a selection procedure. In particular, the Federal Republic of Germany has not refuted the Commission's finding that in all the contested cases the award of the contracts was renewed under the old rules up to 31 December 2008.

144. It is settled case-law that the question whether there has been a failure to fulfil obligations must be examined 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. [65] The position on 16 February 2007 is therefore relevant in the present

65 — Case C-562/07 *Commission* v *Spain* [2009] ECR I-9553, paragraph 23; Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103, paragraph 98; and Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 72.

case. At that time, the alleged infringement of the procurement directives did exist.

145. On the other hand, I do not consider the breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, which is also alleged by the Commission in all these cases, to have been proved. This plea cannot be accepted because of the same jurisprudential and evidential reservations which I have already set out in examining the award of contracts by the City of Magdeburg. [66]

(e) Conclusion

146. In the light of my above considerations, I conclude that in the contested cases of the award of contracts by the 'Cities of Magdeburg and Bonn, the municipality of Witten, the Region of Hanover, the administrative districts of Uelzen and Hameln-Pyrmont and the Westsachsen, Chemnitz/Stollberg and Vogtland joint ambulance associations there is an infringement by the Federal Republic of Germany of Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18. On the other hand, a further-reaching breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services has not been proved by the Commission.

4. Unlawful procurement practice in the Federal Republic of Germany

147. In the present case, the Commission claims that the procurement procedures with which it finds fault indicate the existence of a consistent and general procurement practice. Against this background, it seeks a declaration that the Federal Republic of Germany has infringed Community law on account of unlawful procurement practice.

148. If the existence of a practice in a Member State which is contrary to procurement law is proven, a complaint may be raised against that practice as such in proceedings under Article 226 EC. [67] In this connection, in a first phase the Commission must make detailed allegations of repeated failures to comply which indicate the existence of a practice. It is then for the Member State concerned to

66 — See point 91 et seq. of this Opinion.

67 — In this connection, reference is made to settled case-law, according to which a failure to fulfil obligations under Community law may arise from an administrative practice, even if the applicable national legislation complies with Community law. See Case C-416/07 *Commission* v *Greece* [2009] ECR I-7883, paragraph 24 with further references.

refute specifically the alleged infringements. In a second phase, it must be ascertained whether the proven infringements may be regarded as sufficiently documented and detailed proof of the existence of the alleged practice. [68]

149. In the present case, the Commission has proved that, in awarding contracts for ambulance services, the City of Magdeburg (Saxony-Anhalt), the City of Bonn (North Rhine-Westphalia), the municipality of Witten (North Rhine-Westphalia), the Region of Hanover (Lower Saxony), the administrative district of Uelzen (Lower Saxony), the administrative district of Pyrmont-Hameln (Lower Saxony) and the Westsachsen (Saxony), Chemnitz/Stollberg (Saxony) and Vogtland (Saxony) joint ambulance associations have failed to comply with the rules on the notification duty under Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18.

150. Furthermore, the Commission has argued that its research reveals that in the period from 2001 to 2006, in the entire Federal Republic of Germany, only two notices of contracts awarded were published. The Federal Republic of Germany has not disputed this factual finding.

151. On the basis of the foregoing, it can therefore be stated that in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony there exists a consistent and general procurement practice for ambulance services which fails to comply with the rules on the notification duty under Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18.

152. The finding of such a practice in those *Länder*, in contravention of procurement law, is also not precluded by the argument put forward by the Federal Republic of Germany that in the light of two orders of the Bundesgerichtshof of 1 December 2008 [69] the *Länder* must review their existing procedures for the procurement of ambulance services and reorganise them having due regard to procurement law.

153. As I have already discussed, it is settled case-law that the question whether there has been a failure to fulfil obligations must be examined 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. [70] The position on 16 February 2007 is therefore relevant in the present case. At that

68 — See Case C-489/06 *Commission* v *Greece* [2009] ECR I-1797, paragraph 40 et seq.

69 — Order of the Bundesgerichtshof of 1 December 2008, X ZB 31/08. See point 28 of this Opinion.

70 — See point 144 of this Opinion.

time, the alleged infringement of the procurement directives did exist.

154. For the same reason, the arguments put forward by the Federal Republic of Germany regarding the modification of the legal position in the *Land* of Saxony, whereby the submission model was abandoned as from 1 January 2009, have no further relevance in the present case.

155. However, it is disputed whether the Commission found fault only with the procurement practice in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony or whether it put forward the procurement practice in those four *Länder* as an example of a consistent and general procurement practice in all the *Länder*.

156. The Commission's submissions in this respect are contradictory in so far as in its application it expressly stated that the present action was confined to the procurement practice in Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, even though the contested procurement practice could also be found in other German *Länder*. [71] In its reply, however, the Commission sought a declaration that that practice is contrary to procurement law for the entire territory of the Federal Republic of Germany. [72]

157. In this connection it should be borne in mind that new pleas in law introduced in the course of proceedings are inadmissible in principle. [73] Against this background, it must be assumed in the present case that the Commission is making the geographically limited claim contained in the application, by which it raises complaints only against the contested procurement practice in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

158. In the light of the above considerations, I therefore conclude that in awarding contracts for pecuniary interest in respect of the provision of ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, the Federal Republic of Germany has infringed,

71 — See point 10 of the Commission's application of 15 April 2008. In point 5 of the application, the Commission had already stated that its action was restricted to the procurement practice for ambulance services according to the submission model, which applies in the majority of the German *Länder*.

72 — See point 17 et seq. of the Commission's reply of 21 November 2008.

73 — See Article 42(2) of the Rules of Procedure of the Court of Justice.

up to 31 January 2006, Article 10 in conjunction with Article 16 of Council Directive 92/50 and, since 1 February 2006, Article 22 in conjunction with Article 35(4) of Directive 2004/18.

VIII — Costs

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

160. In this case, the Commission's action has been only partially successful, and I therefore suggest that the Court should order that the Commission and the Federal Republic of Germany bear their own costs.

IX — Conclusion

161. In the light of all the foregoing considerations, I suggest that the Court should:

(1) declare that, in awarding contracts for pecuniary interest in respect of the provision of ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, the Federal Republic of Germany has infringed, up to 31 January 2006, Article 10 in conjunction with Article 16 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and, since 1 February 2006, Article 22 in conjunction with Article 35(4) of 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;

(2) dismiss the remainder of the action;

(3) order the Commission and the Federal Republic of Germany to bear their own costs.