OPINION OF ADVOCATE GENERAL ALBER

delivered on 19 January 1999 *

A — Introduction

1. The present proceedings for failure to fulfil obligations under the Treaty concern the assessment under Community law of the award of a series of works contracts in connection with a large project to construct government and administrative buildings and a cultural centre forming part of a plan to base the government of the *Land* of Lower Austria at St Pölten.

2. The following events underlie the proceedings for failure to fulfil obligations under the Treaty. Work on this large project started in 1992 in the case of the administrative centre and in 1994 in the case of the cultural centre. At the beginning of February 1995, a complaint drew the Commission's attention to the invitation to tender for a supply contract in connection with the project, which was published only in the *Niederösterreichisches Amtsblatt* (Lower Austrian Official Gazette). The Commission considered that the *Allgemeine Angebots- und Vertragsbedingungen* (General Tendering and Contract Conditions, 'AAVB'), on which the invitation to tender was based, were contrary to Community law since they infringed, *inter alia*, the advertising rules, the obligation to inform unsuccessful tenderers and the rules on specifications, and drew the Austrian Government's attention to those findings by letter of 12 April 1995. Some time later, as a response to that letter, the Commission received notification of a Vergabegesetz (Law on the Award of Contracts) published by the *Land* of Lower Austria on 31 May 1995, which itself gave cause for objection since it contained an exemption clause for the 'St Pölten *Land* Administrative and Cultural Centre' project (the so-called 'Lex St Pölten') and thereby, in practice, excluded the project from the application of the law.

3. All the issues involved were discussed at a bilateral meeting between the Commission and the Austrian authorities on 27 and 28 November 1995. The Commission alleged infringements of Council Directive 93/37/EEC of 14 June 1993 [1] and Council Directive 89/665/EEC of 21 December 1989 [2] and of Article 30 of the EC Treaty. Having been informed of the objections, the Austrian authorities gave an undertaking that the AAVB would be amended, that

* Original language: German.

1 — Directive concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

2 — Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

the exemption clause in the Vergabegesetz would be repealed and that the contracting authority, the Niederösterreichische Landeshauptstadt-Planungsgesellschaft mbH (hereinafter 'Nöplan'), would modify its practices relating to the award of contracts.

4. The Commission hoped that, as a result of the discussions, the Austrian authorities would take immediate action by ensuring that

— the award procedures still to be initiated would be carried out correctly,

— the procedures already initiated but not yet concluded by the award of contracts would be corrected, and

— contracts awarded in contravention of Community law but not yet performed would, as far as possible, be cancelled.

5. The Austrian authorities agreed in principle but pointed out that they would require a sufficient transitional period in order to amend the relevant legal provisions (Vergabegesetz and AAVB).

6. The Austrian authorities' willingness to adapt their award practices did not go far enough for the Commission, with the result that, by letter of formal notice of 15 December 1995, it initiated proceedings for failure to fulfil obligations under the Treaty. In that letter of formal notice, the Commission argued that the Austrian authorities had undertaken to intercede with the responsible decision-making bodies in order to ensure compliance with Community law from the end of January 1996 onwards.[3] In the letter of formal notice the Commission stated, *inter alia*, that it was extending its complaints 'specifically to include those lots for which the contract has already been awarded but where the tendering procedure was not in conformity with Community law'. It requested the Republic of Austria 'to ensure that Community law is complied with in the contracting procedures still outstanding' and 'to suspend the legal effects or prevent the completion of contracts already awarded in contravention of Community law, to defer pending award decisions until such time as compliance with Community law is secured, and to ensure that the Lower Austrian Vergabegesetz and the AAVB are amended without delay'.[4] In the letter of formal notice of 15 December 1995, the Commission laid down a period of one week for the submission of observations.

7. The Austrian Government replied by letter of 22 December 1995. In that letter it stated that, notwithstanding the 'scheduling difficulties made known at the bilateral meeting', Nöplan's bodies were 'looking into the subject of contract awards' and

3 — See point 6 of the letter of formal notice.

4 — See point 10, first and fifth paragraphs, of the letter of formal notice.

had decided 'that Nöplan must apply the EU directives *with immediate effect*'.[5] Finally, it is again stressed 'that, notwithstanding additional costs and scheduling disruptions, the EC directives must be applied *with immediate effect* to all invitations to tender'.[6]

8. In its reasoned opinion of 21 February 1996, the Commission pointed out that the contracting authorities of the *Land* of Lower Austria were 'under an obligation resulting directly from the directly applicable Community legislation to comply with the requirements thereof in the absence of transposition in conformity with Community law'.[7] The Commission also considered that the Austrian Government's reply to the letter of formal notice was inadequate. In that reply it could find no acknowledgement of an obligation to act in respect of pending procedures, 'since the observations concerning the obligation to advertise ... relate only to the future'. The Commission pointed out that it had asked the Austrian Government 'to send it a list of the contracts for which an award procedure has already been initiated or will be advertised in the future, and to give it details of the values of those orders'. It stressed: 'To date no satisfactory list has been sent'. Finally, it requested the Austrian authorities 'to take all appropriate steps to put an end to the infringements described'.[8] For that purpose it prescribed a period of two weeks from notification of the opinion.

9. In the meantime, the Nöplan award committee had decided, at a meeting on 6 February 1996, to suspend all pending procedures and to invite tenders for and award, in conformity with Community law, the contracts still to be awarded. Subsequently, the defects complained of in regard to the Vergabegesetz were remedied and the AAVB were brought into conformity with Community law. Since then, the contracting practices followed have been manifestly in accordance with Community law.

10. Nevertheless, on 3 October 1996, the Commission brought an action for failure to fulfil obligations under the Treaty, which was registered at the Court on 7 October 1996, seeking a declaration that the Republic of Austria had failed to fulfil its obligations under Community law in awarding contracts, which were concluded before 6 February 1996 but which, on 7 March 1996, that is, at the time of expiry of the period laid down in the reasoned opinion of 21 February 1996, had not yet been performed or could reasonably have been cancelled. In essence, the Commission alleges that the Republic of Austria made no effort to cancel the contracts awarded after the bilateral meeting of 28 November 1995, that is, when it was aware of the problems with respect to Community law.

11. The Republic of Austria puts forward several objections to the admissibility of the action which it also considers to be substantively unfounded.

5 — See point 1 of the reply of 22 December 1995; emphasis added.

6 — See 'With regard to point 8' in the reply of 22 December 1995; emphasis added.

7 — See point 15 of the reasoned opinion of 21 February 1996.

8 — For the citations in this paragraph, see point 16 of the reasoned opinion of 21 February 1996.

12. The Commission claims that the Court should:

1. Declare that the Republic of Austria has failed to fulfil its obligations under Council Directives 93/37/EEC of 14 June 1993[9] and 89/665/EEC of 21 December 1989[10] and under Article 30 of the EC Treaty in connection with the construction of a new administrative and cultural centre for the *Land* of Lower Austria at St Pölten in awarding contracts which were concluded before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could reasonably have been cancelled;

2. Order the Republic of Austria to pay the costs.

13. The Republic of Austria claims that the Court should:

1. Dismiss as inadmissible (if appropriate, as unfounded) the European Commission's action of 7 October 1996 for a declaration that the Republic of Austria has failed to fulfil its obligations under Council Directives 93/37/EEC of 14 June 1993 and 89/665/EEC of 21 December 1989 and under Article 30 of the EC Treaty in connection with the construction of a new administrative and cultural centre for the *Land* of Lower Austria at St Pölten in awarding contracts, which were concluded before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could reasonably have been cancelled;

2. Order the European Commission to pay the costs.

14. I will come back to the arguments of the parties in the course of the legal assessment.

B — Opinion

I. *Admissibility*

15. The Austrian Government considers the action inadmissible on a number of grounds.

9 — Directive concerning the coordination of procedures for the award of public works contracts (cited in footnote 1).

10 — Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (cited in footnote 2).

1. Inadmissibility of the subject-matter of the proceedings

The Austrian Government asserts that the subject-matter of the proceedings, as indicated by the form of order sought by the action, renders the action inadmissible. It argues that the Court has consistently held that the subject-matter of proceedings for failure to fulfil obligations under the Treaty is delimited by the pre-litigation procedure. It is determined by the Commission's reasoned opinion. The action may therefore not be founded on complaints other than those referred to in the reasoned opinion. The demand that contracts awarded in contravention of Community law but not yet performed should, as far as possible, be cancelled is not found in the Commission's reasoned opinion of 21 February 1996. It is at most touched upon in the letter of formal notice of 15 December 1995. The complaint referred to in the action, namely, of failure to cancel contracts which could still be cancelled, on which the form of order sought is decisively based, is therefore inadmissible.

16. It must be conceded to the Austrian Government that the Court has consistently held that the subject-matter of proceedings for failure to fulfil obligations is defined by the pre-litigation procedure and the form of order sought by the action. At the same time, the application may not contain any complaints which are fundamentally different or new as compared with those discussed in the pre-litigation procedure. That approach can be explained by reference to the structure of proceedings for failure to fulfil obligations under the Treaty, which gives the parties an opportunity to reach an amicable settlement in the course of the pre-litigation procedure, before the matter is referred to the Court. Moreover, the Member State's rights of defence must be safeguarded, so that it may not be confronted with new complaints in the application.

17. The question is therefore whether the complaint of failure to cancel contracts awarded before 6 February 1996 constitutes a new and thus inadmissible plea. In this regard, the pre-litigation procedure and the form of order sought by the action must be examined in the light of the actual course of events.

18. The Commission's *letter of formal notice* of 15 December 1995, which was addressed to the Austrian Government following the bilateral meeting of 27 and 28 November 1995, objects, on the one hand, to a legal situation which is contrary to Community law and, on the other, to award practices contrary to Community law which are based on that situation. The request for the *immediate bringing of the award practices into conformity with Community law* [11] is to be found in the letter of formal notice. Elsewhere, the Commission extends its complaints 'specifically to include those lots for which the contract has already been awarded but the tendering procedure was not in conformity with Community law'. [12] Finally, the Commission requests the Republic of Austria 'to ensure that Community law is complied with in the award procedures still outstanding. It further requests the Republic of Austria to suspend the legal effects or prevent the completion of contracts already awarded in contravention of Community law [and] to defer pending award decisions until such time as compliance with Community law is secured, ...'. [13]

11 — See the letter of formal notice, at point 7, paragraph 1.
12 — See the letter of formal notice, at point 10, paragraph 1.
13 — Letter of formal notice, point 10, paragraph 5.

19. Those words clearly express not only the Commission's requirement that further conduct contrary to Community law be prevented with immediate effect, but also the demand that award decisions taken in contravention of Community law be denied operative effect. However, the latter demand can only imply retaking such decisions subsequently in a manner consistent with Community law. An obligation to cancel award decisions already taken must therefore be inferred from the Commission's request as formulated in the letter of formal notice.

20. A request to intervene in award procedures already subject to implementation cannot be inferred with equal certainty from the Commission's *reasoned opinion* of 21 February 1996. Nevertheless, it may be inferred from the reasoned opinion that pending procedures are included in the general complaint that award practices were contrary to Community law. When the Commission takes the view that the undertakings given by the Austrian Government concerning the obligation to advertise in the future expressly do not go far enough, and when it complains that they do not cover 'those cases of awards where contracts are, for example, advertised nationally',[14] there can be no doubt that the Commission is identifying breaches of Community law in respect of past award practices and is demanding that they be remedied. Thus the Commission emphasises 'that it is incumbent on the Austrian authorities to take *all* appropriate steps to put an end to the infringements described'.[15]

21. Moreover, neither the reasoned opinion nor the actual course of events suggested that the request to intervene in award procedures already being implemented, which had already been made in the letter of formal notice, had been complied with. It may be assumed from this that the Austrian Government understood the Commission's request in the sense described here. In its reply of 22 March 1996, it devoted over three-and-a-half pages to commenting on these issues, under the heading 'The contracts already awarded'.[16] Any allegation of a breach of the principle of a fair hearing, which could be inferred from the objection to admissibility, is therefore also without foundation.

22. The Austrian Government is of the opinion that an express request to cancel contracts already awarded should have been included in the reasoned opinion. The steps to be taken should have been specified. Once a number of points, such as amendment of the Lower Austrian Vergabegesetz and the AAVB, had been mentioned, it was entitled to expect that no further measures would be required.

23. That view cannot be accepted. The Court has held[17] that the Commission is not required to specify what steps are to be taken to remedy a situation which is contrary to the Treaty. That allocation of tasks is also sensible since it is a Member State's responsibility to decide how and by

14 — See the reasoned opinion, at point 16, paragraph 4.

15 — See the reasoned opinion, at point 16, paragraph 6; emphasis added.

16 — See the Austrian Government's reply of 22 March 1996, at Chapter IV.

17 — Judgment in Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659.

what means it will comply with the requirements of Community law. If the Commission were required to specify the steps to be taken, jurisdictional conflicts would arise whenever the Member State has discretion as to the manner in which it creates a situation which is in conformity with Community law.

24. Nor, in this case, did the Commission create a legitimate expectation which would have entitled the Austrian authorities to assume that, by amending the legal situation, they had done everything necessary to remedy the Treaty infringement. On the contrary, as already explained, the Commission included the pending procedures in the letter of formal notice. In the reasoned opinion it expressly drew attention to the obligations resulting 'directly from the directly applicable Community legislation' for the contracting authorities of the *Land* of Lower Austria in the 'absence of transposition in conformity with Community law' [18] and emphasised that it was incumbent on the Austrian authorities to take all appropriate steps to put an end to the infringements.

25. Against that background, the complaint of failure to cancel contracts concluded in contravention of Community law can be regarded as falling within the subject-matter of the proceedings properly defined in the form of order sought by the action.

18 — See the reasoned opinion, at point 15, paragraph 2.

2. Putting an end to the infringements before the expiry of the period laid down in the reasoned opinion

26. The Austrian Government points out that under the second paragraph of Article 169 of the Treaty and the case-law relating thereto the material time for the existence of a Treaty infringement is the end of the period laid down in the reasoned opinion. However, on that date, 7 March 1996, Austria had put an end to all the infringements complained of in the reasoned opinion.

27. The AAVB, it submits, have been amended along the lines required by the Commission and, in their new version, have formed the basis for all invitations to tender published in accordance with Community provisions since as long ago as 12 December 1995. Moreover, the award practices have also been modified since 6 February 1996. Since that date, the working committee on awards has no longer approved award recommendations submitted to it for a decision, and has decided to terminate immediately all pending award procedures not conducted in conformity with Community law and to hold a new invitation to tender in conformity with Community law. Award decisions in respect of contracts with a total value of ATS 217 000 000 were deferred, and by 7 March 1996 contracts with a total value of approximately ATS 470 000 000 had been put up for tender and awarded in conformity with Community law. Since the Austrian authorities had complied with the requests on 7 March 1996, the action is claimed to be inadmissible.

28. The Commission replies that the situation was not completely regularised on 7 March 1996. The contracts already awarded but not yet performed on 6 February 1996, and the contracts already awarded and (partly) performed but which could still reasonably have been cancelled on 6 February 1996, remained in place.

29. It is in fact the case that, by its action for failure to fulfil obligations under the Treaty, the Commission is no longer bringing the charge that the legal situation is contrary to Community law, any more than it is criticising the award practices followed after 6 February 1996. It nevertheless considers that the failure to cancel, within the bounds of possibility, contracts concluded in contravention of Community law constitutes a continuing infringement of the Treaty. As already observed above, it has admissibly made that plea the subject-matter of the action.

30. Since the Commission considers and alleges that there existed, at the time of expiry of the period laid down in the reasoned opinion, a situation which it regards as contrary to Community law and which continues to produce legal effects, the requirements as to the admissibility of the action should be met. Whether an infringement of the Treaty actually existed at the material time is a question concerning the substance of the action. Thus, although on 7 March 1996 the Austrian authorities had already complied with the Commission's requests in substantial respects, the action is admissible in respect of the complaints still subsisting.

3. The determination of periods in the pre-litigation procedure

31. The Austrian Government further claims that the periods prescribed in the pre-litigation procedure were too short, with the result that, for that reason also, the action for failure to fulfil obligations under the Treaty is inadmissible. It refers to Austria's federal structure in which certain decision-making processes are bound to take certain time. The period of one week laid down in the letter of formal notice and that of two weeks laid down in the reasoned opinion were extremely short. As early as 25 January 1996, the Commission informed the international press that it had decided to address a reasoned opinion to Austria, but that opinion was not notified until 21 February 1996.

32. The Commission should also have taken into consideration, when setting the periods, the fact that its complaints referred exclusively to the past since, as notified to the Commission on 7 February 1996, the Austrian authorities had adapted their award practices since 6 February 1996. Finally, it submits that the period of 21 days provided for in Article 3(3) of Directive 89/665 is an indication of what constitutes a reasonable period.

33. The Commission, on the other hand, takes the view that the shortness of the periods was reasonable under the circumstances. According to the information provided by the Austrian authorities, contracts of substantial value were still outstanding

at the beginning of December. An assurance that those contracts would be awarded with due regard for Community law and that pre-existing infringements would be remedied therefore had to be obtained from the Austrian Government as quickly as possible.

34. The Austrian Government's reply to the letter of formal notice allowed doubts to subsist as to its willingness to correct all the infringements complained of. Nor did it send the promised list with the calculation of the value of contracts still to be awarded. The Commission had to assume that, even at the beginning of 1996, a significant volume of contracts was still due to be awarded and had to prevent the creation of a *fait accompli*. Nor did the complaints in the reasoned opinion refer only to the past. The Commission definitely had in view the situation existing at the time of expiry of the period laid down in the reasoned opinion. Finally, the Austrian Government had learned prematurely of the Commission's intentions through the press, so that it may not rely on the unreasonableness of the periods.

35. It is appropriate to begin the examination of the objection to the admissibility of the action by considering this last point. It must be assumed that the procedure preceding the Treaty infringement action is subject to a certain stringency of form. This is borne out by the requirements governing the designation of the subject-matter of proceedings and the reasonableness of periods to be complied with, which, if not observed, result in inadmissibility of the action. Matters which are of importance to the Member State concerned must be unambiguously apparent from the Commission's documents marking the individual stages of the procedure. Consequently, only the periods prescribed in the documents served on the Member State can be binding. A Member State cannot act on 'hearsay' in the context of a formal pre-litigation procedure. There can therefore be no question of regarding the period between learning of the Commission's intentions through the press and formal service of the opinion as preparation time.

36. Beyond the purely legal assessment, I also consider it bad form to publish a press release about the imminent dispatch of a reasoned opinion in Treaty infringement proceedings against a Member State when the document in question is not served on the Member State concerned until almost four weeks later. The Commission could have allowed a longer period by dispatching the reasoned opinion at an earlier date. Earlier dispatch would have been possible under the circumstances.

37. For the remainder of the examination, therefore, it must be assumed that only the periods prescribed in the pre-litigation documents are relevant.

38. In order to be able to assess the reasonableness of a period, it is first important to ascertain what response it is hoped to elicit within the prescribed period. Alteration of a legal situation can certainly not be expected to take place within a period measured in weeks. Thus, the pre-litigation procedure was certainly concerned in part with a clause in the Lower Austrian Vergabegesetz which was contrary to Community law. There is no dispute that amendment of the law had not yet been carried out when the period laid down in the reasoned opinion expired on 7 March

1996. The procedure was not concluded until May 1996. Nevertheless, in that respect the Commission refrained from bringing the action for failure to fulfil obligations under the Treaty, since the amendment of the law entered into force without significant delay.

39. What mattered to the Commission, however, was that the Austrian Government should realise and formally acknowledge that the situation was contrary to Community law so that, on the one hand, further awards of contracts could be prevented and, on the other, the contracts awarded in contravention of Community law could, as far as possible, be cancelled.

40. In response to the letter of formal notice of 15 December 1995 the Austrian Government also gave an assurance, within the period of one week, that it would, '*with immediate effect*',[19] apply the Community directives to the contracts still to be awarded. In reality, however, the authorities continued to award the contracts still outstanding. The award committee's decision to suspend the current procedures, which had been expected earlier, was not taken until 6 February 1996.

41. In view of the urgency of stopping further awards of contracts, at least for the time being, the period of one week was reasonable in this case. Indeed, the Austrian Government complied with the request by means of the statements in its reply of 22 December 1995. The discrepancy between words and actions must be examined separately.

42. With regard to the circumstances at the time of the adoption of the reasoned opinion, it is striking that it was only after the formal decision to dispatch the reasoned opinion had become known in the press that the award committee, on 6 February 1996, took the decision, *inter alia*, to suspend current award procedures. The Commission therefore had reason to suppose that the Austrian authorities were creating a *fait accompli* and that urgency was required. Viewed in that way, the short period of two weeks laid down in the reasoned opinion also seems reasonable.

43. The possibility of applying for interim legal protection, to which attention was drawn in both pre-litigation documents and which was also raised at the hearing, must also be viewed in this context. Under Article 186 of the Treaty, the Court may prescribe necessary interim measures only in cases already pending before it. However, an action under Article 169 of the Treaty may be brought only after the pre-litigation procedure has been concluded. Where there is increased danger in any delay, the Commission must therefore bring the pre-litigation procedure to a rapid conclusion in order, as far as possible, to prevent irreparable infringements.

19 — The Austrian Government's reply of 22 December 1995, pp. 2 and 7.

44. That situation may be regarded as a weakness of the system, but it can be remedied only by amendment of the relevant legal bases. Nor do the possibilities provided for by Directive 89/665 [20] offer a satisfactory solution as a way out of the dilemma. The directive applies primarily to the relationship between the tenderer and the contracting authority. Moreover, the possibilities afforded to the Commission in Article 3 of the directive are not suited to all situations and in any case do not limit the Commission's authority to initiate proceedings for failure to fulfil obligations under the Treaty.

45. In the light of all the foregoing considerations, the periods prescribed by the Commission in the pre-litigation procedure must be regarded as reasonable under the circumstances.

4. The clear and precise nature of the form of order sought by the action

46. The Austrian Government expresses legal reservations about the phrase 'contracts, which were concluded before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could reasonably have been cancelled' in the form of order sought by the action. By using the expression 'could reasonably have been cancelled', the Commission shows that it, too, does not think that there is an unlimited obligation to cancel contracts, but it fails to provide a definition of reasonableness. The form of order sought is therefore too imprecise to form the basis of an obligation to act resulting from Article 171 of the Treaty, thus rendering the action as such inadmissible.

47. The Commission takes the view that the Court is not required to rule on what is and what is not to be regarded, in specific terms, as reasonable in a Member State. That is the task of the national courts applying national law. Observations on the question of reasonableness are therefore irrelevant from the outset in the context of these proceedings before the Court.

48. On this point, the Commission's view must be endorsed without qualification. It is neither the task of the Commission nor that of the Court to investigate the possibilities for cancelling contracts concluded in the field of public procurement. On the contrary, an instruction — whether from the Commission or the Court — to cancel a contract under a Member State's legal rule to be specified would constitute an *ultra vires* act by the Community institutions vis-à-vis that Member State's authorities. That freedom of the Member State to choose the form and the means must necessarily also find expression in a request by the Commission to put an end to a situation contrary to the Treaty. This relative lack of precision as regards the steps to be taken is therefore, in the final analysis, a manifestation of the division of powers between the Community and the Member State. The wording at issue defines the objective of unwinding contracts awarded in contravention of Community law within the

20 — See the Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (cited in footnote 2).

limits of what is legally possible. The form of order sought is therefore not open to objection.

5. Legal interest in bringing proceedings

49. The question concerning the legal interest in bringing the present action represents an objection to admissibility which, while not expressly raised by the Austrian Government, nevertheless follows implicitly from the objections to admissibility which are raised by it. When the Austrian Government asserts that the infringements concerned are by their very nature irreparable, it is indeed questionable whether any interest is served by an abstract finding of failure to fulfil obligations under the Treaty. The Austrian Government's view, that the denunciation of a Member State is neither the subject-matter nor the purpose of Treaty infringement proceedings, must be endorsed.

50. In order to assess the legal interest in bringing proceedings, it is important to ascertain whether the Commission's request is directed towards an objectively impossible act or whether there are ways and means of complying with the Commission's requirements, on the basis that the material time is the end of the period laid down in the reasoned opinion. The issue thus identified is ultimately a question to be answered in the examination of the merits of the action. The answer to the question concerning the legal interest in bringing proceedings must therefore await an examination of the merits of the action.

II. *Merits*

51. The Commission points out, firstly, that Austria has been required to comply with the provisions of Community law, including the legislation on the award of contracts, since its accession to the EEA Agreement with effect from 1 January 1994 and, *a fortiori*, since the date of its accession to the European Union, that is 1 January 1995.

52. It alleges that, in the case of the contracts awarded in the period from 27 November 1995 to 6 February 1996, which had a total value of more than ATS 360 000 000, Austria infringed several provisions of Community law. Thus, Articles 8, 10(6), 11(6) and (11), 12 and 30 of Directive 93/37, Article 30 of the Treaty and Articles 1(1) and (3) and 2(1)(c) of Directive 89/665 were infringed. The Commission sets out the alleged infringements in detail. There is, it argues, no justification under Community law for the conduct engaged in during the period in question, which was aimed at 'getting the contracts home and dry'.

53. As evidenced by the Austrian Government's reply to the reasoned opinion, the Austrian authorities consciously acted 'at their own risk'. Modification of the award practices would not, unlike amendment of the Vergabegesetz, have necessitated any time-consuming procedures, a fact proved

by the award committee's decision adopted subsequently. Finally, the award of some of the contracts in question [21] could have been delayed without harm to the project as a whole.

54. The Austrian Government takes the view that the cancellation of contracts concluded in contravention of Community law cannot be required in the context of Treaty infringement proceedings. The second paragraph of Article 2(6) of Directive 89/665 leaves a Member State free to limit itself to awarding damages to any person harmed by an infringement. In principle, the Commission cannot require more in proceedings under Article 169 of the Treaty.

55. Moreover, it submits, the Commission shows that even it does not assume that there is an absolute obligation to cancel contracts. In any case, the principle of the protection of legitimate expectations precludes such an obligation. The legitimate expectations of parties to a contract are worthy of protection and take precedence over the Commission's application. Finally, the practical effect of Directive 93/37, in the form of equal conditions of competition, can no longer be ensured even by the cancellation of contracts. The initially successful tenderers had made arrangements giving them clear advantages over their competitors. Cancelling the contracts concerned would have entailed stopping the construction work and therefore, in the final analysis, have been impossible for that reason also.

56. In conclusion, the Austrian Government raises two points of law of a fundamental nature. Firstly, it brings up the legal status of Nöplan, and links to that the question of how far individuals are entitled to rely on a directive as against that institution. Secondly, it considers that it has not been made clear why the large St Pölten project should have been made subject to the directives on the award of contracts since as long ago as Austria's accession to the European Economic Area. The project, which must be viewed as a whole and therefore cannot be divided up, was started even before the entry into force of the EEA Agreement and before Austria's accession to the Community.

57. The Commission replies that its powers under Article 169 of the Treaty are separate from the procedure under Directive 89/665. The Court has already found to that effect elsewhere. [22] With regard to Nöplan's role, it observes that it has indisputably been unanimously assumed that Nöplan is to be regarded as the extension of the *Land* of Lower Austria in its function as a contracting authority.

58. For reasons of methodology, it is appropriate to begin the examination with the last-mentioned legal reservations expressed by the Austrian Government.

21 — Final cleaning of the Lower Austrian *Land* government building, public-address system for the shopping centre, planting in the grove, etc.

22 — Judgment in Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-157, at paragraphs 13 and 14.

59. The question as to the applicability of the Community legislation on the award of contracts at the time of the Republic of Austria's accession to the EEA can be left aside here since that legislation in any case became binding on the acceding Member State by virtue of its membership of the European Community on 1 January 1995 and did so — unless transitional periods had been expressly negotiated — immediately upon accession.

60. The Commission has already expressed the view in the pre-litigation procedure that Directive 93/37 concerning the coordination of procedures for the award of public works contracts is applicable, pursuant to Article 6 thereof, to the construction project. [23]

Article 6(1) and (3) provide:

'1. The provisions of this Directive shall apply to public works contracts whose estimated value net of VAT is not less than ECU 5 000 000. [24]

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1 000 000, provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.'

61. With regard solely to the value of the contract for the building services control system, which was the original cause of the dispute, the Commission stated in the reasoned opinion:

'... Although the value of the contract for the building services control system, for which tenders were invited only on a regional basis, is approximately ATS 26 - million, that is, below the threshold value laid down in the directive, the provisions of the directive are applicable to such a contract pursuant to the second sentence of Article 6(3) (threshold value exceeded when lots are aggregated)'. [25]

62. That legal assessment, that is to say the finding that the contract is subject to Community law, is correct and also applies

23 — See the reasoned opinion, at point 13.

24 — ECU 1 is equivalent to ATS 13.7789 (as at 1.12.1998).

25 — See the reasoned opinion, at point 13.

to other contracts forming part of the project as a whole. Apart from its reference to the legal status of Nöplan, the Austrian Government has not otherwise adduced before the Court any facts which might preclude the applicability of the relevant directives.

63. The reference to the legal status of Nöplan should now be examined. That body has already been the subject of discussions in the preliminary stage of these proceedings, including with regard to its status. The annexes to the application include a letter of 12 May 1995 from the Austrian Government to the Commission, setting out the control structure of Nöplan, which states:

'... The Nö Landeshauptstadt Planungsgesellschaft mbH (Nöplan) was established as a private-law partnership for the purpose of carrying out all planning measures necessary in connection with the construction of the capital of the *Land* of Lower Austria, St Pölten. Its ownership is 51% in the hands of the *Land* of Lower Austria, 10% in the hands of the city of St Pölten and 39% in the hands of the NÖ HYPO Leasinggesellschaft mbH. The award of contracts with a value exceeding ATS 2 - million requires the approval of the award committee. The award committee is appointed by the *Land* Government of Lower Austria. The members of the other organs of Nöplan (supervisory board, general meeting and finance committee) are appointed by the owners ...'. [26]

64. Throughout the procedure before the Court the parties have assumed that Nöplan is an 'extension' ('*verlängerter Arm*', lit. 'extended arm') of the *Land* Government of Lower Austria. That term, although non-technical, graphically describes the dependency of the legal person on the politically responsible *Land* authorities. The basic decision of 6 February 1996 to suspend the current procedures, which fundamentally changed the course of the proceedings, was taken by the '*Vergabeausschuß*' (Award Committee).

65. Article 1(b) of Directive 93/37 defines contracting authorities as: 'the State, regional or local authorities, bodies governed by

26 — See the letter of 12 May 1995 from the Austrian Government to the Commission, at Annex 3 to the application. The Austrian Government's reply of 22 December 1995 to the Commission's letter of formal notice states:
'With regard to point 8
Nöplan is not only a partnership established for the exclusive purpose of carrying out all the planning measures necessary in connection with establishing St Pölten as the *Land* capital of Lower Austria. On the contrary, its activities also include, in addition to the construction schemes involved in that, a multitude of other schemes, including private residential and industrial and commercial construction projects, for which Nöplan has to compete commercially.'
The purpose of the partnership has not been raised further as an issue before the Court.

public law, associations ...'. It goes on to state:

'A "body governed by public law" means any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

— having legal personality, and

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I ....'

66. The *Land* of Lower Austria, as a local or regional authority, is indisputably a contracting authority. Even if one does not wish to limit oneself to the assessment that Nöplan is an 'extension' of the *Land*, which simply means that responsibility rests ultimately with the *Land*, viewing Nöplan in isolation also leads to a similar result. According to the account [27] of the purpose, legal personality and economic control structure of Nöplan given by the Austrian Government in its letter of 12 May 1995, the company fulfils the criteria [28] laid down in the second subparagraph of Article 1(b) of Directive 93/37 for classification as a 'body governed by public law'. Such a body is to be regarded as a contracting authority within the meaning of the directive. [29]

67. The question as to which body is liable, in the final analysis, to meet any claims for compensation made by tenderers is one which must be assessed according to the law of the Member State concerned. In any event, it is the Member State which is liable in relation to the Community. [30] Since there

27 — Cited above, at point 63.

28 — See the judgment in Case C-44/96 *Mannesmann Anlagenbau Austria* [1998] ECR I-73, at paragraph 21.

29 — See the judgment in Case C-44/96, cited in footnote 28, at paragraph 29.

30 — See most recently to that effect the judgment in Case C-353/96 *Commission* v *Ireland* [1998] ECR I-8565, at paragraph 23.

is thus no doubt about where liability in principle lies under Community law governing the award of contracts, the issue to be resolved by the Court boils down to the legal and factual preconditions for the existence of an obligation to cancel contracts already concluded.

68. It is first necessary to examine the technical point that the powers in Treaty infringement proceedings should not go beyond the possibility, expressly granted to a Member State by the secondary legislation, of limiting the consequences of a contract award made in contravention of Community law to the award of damages to the tenderer harmed. The submission that both the procedure under Article 3 of Directive 89/665 and Treaty infringement proceedings have the same objective must be endorsed in so far as the objective is defined as compliance with the Community rules on the award of public contracts. However, it must also be borne in mind that the review procedures required by the directive are primarily concerned with the relationship between the tenderer and the contracting authority. The procedure under Article 3 of the directive, which gives the Commission power to act, is, as the Court has expressly held, [31] a preventive measure. The Commission's powers under Article 169 of the Treaty are neither altered nor replaced by the special procedure under the directive. [32] It can thus be assumed that the powers conferred on the Commission by Directive 89/665 do not restrict, either in form or in substance, its powers in Treaty infringement proceedings, which in principle are wide-ranging.

69. A particular problem arises in this case from the fact that the contracts still outstanding as part of the overall project at the time of expiry of the period laid down in the reasoned opinion were awarded in conformity with Community law. It must therefore first be established to what extent an infringement still existed at that time. The alleged infringement can be summed up in a short formula: by the conclusion of contracts awarded in contravention of Community law, the infringement was complete but not yet at an end. The contracts had still to be performed.

70. The following should be said with regard to the contracts which were awarded. There is no doubt that the award of those contracts was objectively contrary to Community law. A divergence between the legal situation in the Member State concerned at that time and the requirements of Community law is now indisputable. The Austrian Government came to share that assessment in due course and saw to it that both the criticised AAVB and the legal situation were adapted. It can also be assumed that the legislative bodies acted on the basis that the general legislation on the award of contracts was applicable to the large St Pölten project when they included the disputed exemption provision in the Lower Austrian Vergabegesetz.

31 — Judgment in Case C-359/93 *Commission* v *Netherlands*, cited in footnote 22, paragraph 13. See, most recently, the judgment in Case C-353/96 *Commission* v *Ireland*, cited in footnote 30, paragraph 22.

32 — See the judgment in Case C-359/93 *Commission* v *Netherlands*, cited in footnote 22, at paragraph 14, and the judgment in Case C-353/96 *Commission* v *Ireland*, cited in footnote 30, at paragraph 22.

71. However, the latter point is not of decisive importance. It is established that the award procedures carried out in 1995 were objectively contrary to Community law. There is no need here to examine in detail the incompatibility of the legislation on the award of contracts which was then in force, since it has been acknowledged by the Austrian authorities and rectified by amending the law to bring it into conformity with the requirements of Community law and the Commission no longer raises this issue in these proceedings.

72. It is however questionable to what extent, after 27 and 28 November 1995, the objective breach of Community law assumed a different quality to which an obligation to cancel contracts concluded after that date could, if appropriate, be attached.

73. The Commission takes the view that the Austrian authorities were already aware of the problem with respect to Community law as a result of the exchange of correspondence which took place in the course of 1995. However, the whole issue was discussed in detail at the bilateral meeting on 27 and 28 November 1995, so that, in awarding contracts after that date, the Austrian authorities acted against their better knowledge.

74. The Austrian Government's response is to say, as the Austrian Government's representative expressly pointed out at the hearing, that the discussions during the meetings took place in a non-binding context: those discussions could have no legally binding effects. Moreover, initially the Austrian authorities had, with good reason, taken a different view and only later deferred to the Commission's views.

75. It is indeed questionable how far the Austrian Government should have assumed that the view expressed by the Commission at the bilateral meeting was binding. An informal meeting of that kind is not capable of producing direct legal effects. However, it must not be forgotten that, objectively speaking, an infringement existed and there was a danger that continuation of the practices contrary to Community law could have serious and, in part, irreparable economic consequences. Once Treaty infringement proceedings had been officially initiated by the letter of formal notice of 15 December 1995, the Austrian authorities were obliged to prevent further damage. As already intimated, that did not require a lengthy procedure to amend the law; provisional suspension pending investigation of the situation would have sufficed. The subsequent decision adopted by the award committee on 6 February 1996 shows that such an approach was also possible in practice.

76. I am therefore of the opinion that the awarding of contracts from the time of the official initiation of Treaty infringement proceedings until the decision of 6 February 1996 constituted a serious infringement of Community law, to which an obligation to cancel the contracts in question could undoubtedly also be attached. These were, after all, contracts with a total value considerably in excess of ATS 300 000 000, which were awarded

over a period of over six weeks. In so far as the contracts concluded during that period were valid and not yet performed on 3 March 1996, the infringement subsisted and the Commission was entitled to require cancellation of the contracts. That demand does not seem unreasonable, moreover, since the Austrian authorities expressly acted 'at their own risk'. [33] Acting 'at one's own risk' can hardly mean creating a *fait accompli* to which no penalty can be attached.

77. When the Austrian Government argues before the Court that it is impossible to cancel contracts at issue, the nature of that impossibility, whether it is original or subsequent, in law or in fact, matters. In so far as it is subsequent impossibility on factual grounds, because the construction project has in the meantime been carried out, that circumstance cannot in any way alter the situation with regard to obligations as at 7 March 1996. Moreover, the Court has held that a Member State may not rely on a *fait accompli* which it itself created so as to escape Treaty infringement proceedings. [34]

78. The argument based on the initial impossibility of cancelling the contracts concerned because of the urgency of continuing with the construction work must also be assessed against that background. The Commission's demand that the contracts be cancelled was made only with regard to those contracts which were concluded at the contracting authority's own risk in the knowledge that they were possibly contrary to Community law. The Member State could have avoided such a demand if it had, without delay, taken steps, in the form of a decision such as that adopted on 6 February 1996, in order to prevent a *fait accompli.*

79. This approach is supported by a consideration underlying Directive 93/37. Article 7(3)(c) of the directive entitles the contracting authorities to award their public works contracts by negotiated procedure when, for reasons of extreme urgency, the time-limit laid down cannot be kept. However, the reasons invoked must be attributable to events unforeseen by the contracting authorities in question.

80. Although the foregoing considerations are valid with respect to alleged cases of *de facto* impossibility, the consequences of *de jure* impossibility are still uncertain. The assessment under Community law comes up against a limitation here. As the Commission rightly states, and as has already been touched upon in the examination of admissibility, any cancellation of contracts falls within the competence of the Member State. The legal bases and extent of any cancellations are governed by national law and therefore cannot be established bindingly here.

33 — See order of the President of the Court of Justice in Case C-87/94 R *Commission* v *Belgium* [1994] ECR I-1395, at paragraph 34, on which the Austrian Government expressly relies.

34 — See the judgment in Case 39/72 *Commission* v *Italy* [1973] ECR 101, at paragraph 10; see also the Advocate General's Opinion in Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3670, at point 36; see also the order in Case C-87/94 R, cited in footnote 33, at paragraph 40.

81. The Austrian Government's submissions are therefore of vital importance. They contain a series of reasons explaining why contract cancellation after the event is impossible, yet at no stage is it maintained that this was a case of absolute initial impossibility on legal grounds. Since the Austrian Government has also consistently expressed the view before the Court that the Commission's demand for contracts to be cancelled was unjustified, it can be assumed that it certainly made no attempt to comply with the demand at the time.

82. For the remainder of this examination it must be assumed that the impossibility of cancelling contracts was in any case not absolute. Even if there had been only *one* possibility, the Commission's demand would not have sought something which was impossible. It must therefore be assumed that the Commission's demand entailed a legal obligation to act.

83. The Austrian Government then contends before the Court that contract cancellation was unreasonable because of the legitimate expectations of the parties to those contracts, which takes precedence over the Commission's demand. That argument is mistaken. The Austrian Government is relying on third parties' legal positions which were illegally created by the contracting authority. As far as the fundamental situation regarding a Member State's obligations towards the Community is concerned, a Member State may not successfully rely on the consequences of its illegal conduct in order to call into question the legal obligation as such. To what extent contract cancellation was reasonable in this particular case is not, as has already been shown, a matter for the Court to assess.

84. Finally, it is necessary to examine the Austrian Government's argument that the practical effect of the directives could no longer be ensured once the contracts had been awarded. It is submitted that competitive positions had been affected in such a way that the situation which existed before the contracts were awarded could no longer be restored. The tenderers who had originally participated would always have retained a competitive advantage over any subsequent tenderers. That line of argument may be relevant in point of fact. However, it cannot invalidate any attempt to put an end to illegal conduct. If necessary, a new invitation to tender issued on a Community-wide basis, for example, would have enabled undertakings to participate which, under the circumstances, simply had no knowledge of the original invitation to tender. Those potential tenderers cannot — after the event — be individually identified, so that they will never be able to make any claims for damages.

85. It must therefore be concluded that, on 7 March 1996, the Commission's demand entailed an obligation to take action, the objective initial impossibility of which it has not been possible to establish.

86. Finally, it is necessary to return once again to the question concerning the legal interest in bringing proceedings, which could not be answered in the context of

the examination of admissibility. Since it may be assumed that an abstract obligation to act existed but that the Austrian Government has consistently disputed it, a legal interest in bringing proceedings must, for that reason alone, be acknowledged. Moreover, a declaratory judgment in the present proceedings may play a part in any litigation concerning any claims for damages, so that for that reason also a legal interest in bringing these proceedings must be acknowledged.

Costs

87. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Austrian Government has been unsuccessful in its arguments and submissions, it must be ordered to pay the costs.

C — Conclusion

88. In the light of the foregoing I propose that the Court:

(1) Declare that, in connection with the construction of a new administrative and cultural centre for the *Land* of Lower Austria at St Pölten, the Republic of Austria has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 and Council Directive 89/665/EEC of 21 December 1989 and under Article 30 of the EC Treaty in awarding contracts which were awarded after the initiation of proceedings for failure to fulfil obligations under the Treaty and before 6 February 1996 but which, on 7 March 1996, had not yet been performed or could reasonably have been cancelled.

(2) Order the Republic of Austria to pay the costs.