OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 13 March 1991 *

Mr President,
Members of the Court,

A — Facts

1. In these proceedings the Commission seeks a declaration that the Portuguese Republic has failed to fulfil its obligations under the Treaty. It asserts that, pursuant to the provisions of Directive 77/62/EEC,[1] the tendering procedure organized by the firm Aeroportos e Navigação Aérea ('ANA-EP') on 29 August 1987 for the supply and assembly of a telephone exchange for Lisbon airport should have been published in the *Official Journal of the European Communities.*

2. Portugal maintains that the application is inadmissible: since ANA-EP is a legal person governed by public law empowered to act autonomously in administrative and financial matters and in regard to its assets, its conduct cannot be attributed to the State; failure to transpose the directive was an infringement of the general obligation imposed by the directive, which should be distinguished from the specific requirement in Article 9 that certain tendering procedures be published in the *Official Journal of the European Communities.*

3. Portugal claims that the reasoned opinion delivered in the pre-litigation procedure was inadequate. A reasoned opinion, it contends, must contain a clear position on all the arguments put forward by the defendant Member State. Moreover, there was a contradiction between the reasoned opinion and the application: the latter extended the subject-matter of the dispute, which was not permitted.

4. The Portuguese Government was misled: it was able to assume that the legislative change which it had proposed in regard to the State's supervisory powers over supply contracts for public undertakings would cure the Treaty infringement at least for the future. It was only in the application that the Commission first contended that the proposed change was incapable of curing the infringement.

5. Portugal argues finally that the reasoned opinion gave no indication of what action the Commission believed should have been taken in order to cure the infringement.

6. The Portuguese Government further maintains that ANA-EP is excluded from the scope of the directive, since, as a body which administers transport services, it is covered by the exception contained in Article 2(2) of the directive. Accordingly the supply contract in question was not a supply contract within the meaning of the directive since it was awarded under private law. Nor

* Original language: German.

1 — Council Directive of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1, amended by Directive 88/295/EEC, OJ 1988 L 127, p. 1.

should the firm be regarded as a contracting authority within the meaning of the directive, since the tendering procedure in question was not subject to control by the State.

7. The *Commission* claims that the Court should:

1. Declare that, by failing to send to the Official Publications Office of the European Communities for publication in the *Official Journal of the European Communities* a notice of the open tendering procedure for the supply and assembly of a telephone exchange for Lisbon airport, the Portuguese Republic has failed to fulfil its obligations under Title III, in particular Article 9, of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts;

and

2. Order the Portuguese Republic to pay the costs of the proceedings.

8. The *Portuguese Government* contends that the Court should:

1. Declare its objection of inadmissibility well founded, and accordingly dismiss the application;

in the alternative,

hold that it has not failed to fulfil its obligations under the Treaty, and dismiss the application accordingly;

2. Order the applicant to pay the costs of the proceedings.

9. For the parties' factual and legal submissions I refer to the Report for the Hearing. I shall advert to them below only where the reasoning so requires.

B — Opinion

1. *Admissibility*

10. In considering whether the application is admissible it is necessary to examine whether ANA-EP's failure to publish a notice of the tendering procedure in the *Official Journal of the European Communities* can be attributed to the Portuguese State. At the material time, 29 August 1987, Directive 77/62 had still not been implemented in Portuguese law, and there was accordingly no national implementing measure obliging ANA-EP to act in accordance with the requirements of the directive.

11. Since Portugal was not a Member State of the European Communities at the time Directive 77/62 was adopted, a duty to implement the directive could only arise subsequently, on Portuguese accession.

12. Article 392 of the Act of Accession provides:

'Upon accession, the new Member States shall be considered as being addressees of and as having received notification of Directives and Decisions within the meaning of Article 189 of the EEC Treaty..., provided that those directives, recommendations and decisions have been notified to all present Member States.'

Article 395 of the Act of Accession reads:

'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of Directives and Decisions within the meaning of Article 189 of the EEC Treaty..., unless a time-limit is provided for in the list of Annex XXXVI or in any other provisions of this Act.'

13. The aforementioned transitional provisions in the Act of Accession are construed by the Commission as meaning, in relation to the present case, that the directive should have been implemented at the date of accession, 1 January 1986.

14. However, even assuming that the duty to act to implement the directive only arose on 1 January 1986, and that the Portuguese Republic should be allowed as much time to transpose it as were the other Member States — 18 months, pursuant to Article 30 — it would have had to be implemented in national law by the end of June 1987 at the latest.

15. At the time of the tendering procedure, on 29 August 1987, the defendant Member State was unquestionably in default. Failure to act on the part of a Member State is a precondition for a directive being directly applicable, always providing that it contains a clear and unambiguous obligation. The obligation contained in Article 9 of the directive requiring publication in the Official Journal is indeed clear and unambiguous.

16. However, a distinction must be made between the situation of a directive being directly applicable in favour of an individual on whom it confers subjective rights the assertion of which cannot be eluded by a Member State pleading its own infringement of Community law, and the question of whether the conduct of independent legal persons may be attributed to a Member State and hence deemed to constitute an infringement of the Treaty. In the former case an individual may rely on the directive against organizations which are subject to control by the State, or which possess special powers by comparison with the rules which are applicable to relations between individuals.[2] Accordingly a body falls to be regarded as a State body, regardless of its legal form, if it has been entrusted, by legislation, with the provision of a public service under the authority of the State and if, to that end, special powers have been conferred on it.[3]

17. It is consequently quite possible for an organization to be deemed to be 'the State', even if, in formal terms, it does not

2 — Judgment in Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313, paragraphs 16 and 18.

3 — Judgment in *Foster*, above.

constitute part of the State.[4] Thus if a formally independent authority is dependent on the public authorities in personnel, material or financial terms, it may be appropriate to deem it to be a State body within the meaning of the provision.

18. The above abstract description of a State body in the broadest sense of the term is not sufficient, in Treaty infringement proceedings, to justify attributing the specific conduct complained of to the Member State concerned. The latter must be in some way legally responsible for the conduct. Such responsibility may arise at a number of levels. A Member State might create or support a body in order to promote commercial practices incompatible with Community law;[5] or initiate a financial benefit which infringes Community law and which moreover only became definitive when approved by the State concerned.[6] The essential feature is thus dependence on the State: that is the criterion whereby legally significant actions on the part of the body concerned may be attributed to the Member State.

19. ANA-EP is a legal person governed by public law, empowered to act autonomously in regard to its administration, finances and assets. The mere fact that ANA-EP can be classified as a public undertaking as a result of the State's dominant influence over appointments to its organs does not suffice for actions on the part of the undertaking to be automatically attributed to the State. For that, public authorities would need to be able to influence matters related to the directive — i.e., the award of supply contracts, as contemplated by the directive.

20. A consideration of whether State control existed in a manner such as to permit the State to influence the award of supply contracts presupposes an examination of Portuguese law, in particular the general provisions applicable to all public undertakings, and the specific rules setting up ANA-EP and establishing its constitution.

21. The parties disagree on how those provisions should be interpreted. That question merges moreover with the question of ANA-EP's status as a contracting authority within the meaning of the Directive. According to the definition of a contracting authority in Portugal contained in Annex 1 to the directive and common to all language versions, the essential characteristic is that the award of public supply contracts should be subject to State control.

22. I shall therefore leave the question of State control and influence open at present, and address questions of Community law.

23. The Portuguese Government finds further objections to the admissibility of the application in the form and content of the reasoned opinion and in the Commission's conduct in the pre-litigation procedure. In point of fact all the objections relate to the

4 — Judgment in Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635, at paragraph 11.

5 — Judgment in Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, and judgment in Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4083.

6 — Judgment in Case 290/83 *Commission* v *France* [1985] ECR 439 and judgment in Case 78/76 *Steinike and Weinlig* v *Federal Republic of Germany* [1977] ECR 595.

legislative change proposed by the Portuguese Government in the pre-litigation procedure, whereby restrictions on the control of public undertakings were to be introduced in the general legislation governing all public undertakings. The Government maintains that as a result of the Commission's conduct it was allowed to believe that the proposed amendment to the law would cure the Treaty infringement at least as to the future. In the reasoned opinion the Commission did not advert to that proposal, nor did it indicate any action which the Portuguese Government ought to take. In the application, however, the Commission stated that an amendment to the law such as that described could not cure the infringement of the Treaty.

24. I shall deal with these objections together, considering first the charge that the reasoned opinion was not supported by an adequate statement of reasons, and that it should contain an unambiguous response to all the arguments put forward by the defendant Member State.

25. Certainly the reasoned opinion in the pre-litigation procedure, like the whole preliminary procedure in proceedings under Article 169, is intended to permit a dispute to be settled amicably. The Member State in question must therefore be given an opportunity to justify its position,[7] and, where appropriate, to amend its conduct. To that end the form of the reasoned opinion must be such as to 'contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty'.[8]

26. In a reasoned opinion the Commission may specify the extent of the Member State's obligations.[9] It may also, in the course of the dialogue which the pre-litigation procedure is intended to facilitate, indicate to the Member State what action would be appropriate in order to cure the infringement.

27. However, the Commission is not under a duty to indicate all the measures which it regards as being capable of eliminating the infringement in question. That is particularly clear where there are a number of possible solutions, the Member State being free to select which means to use.

28. On the other hand, if a Member State is clearly working to eliminate a problem, but the Commission believes that the measures contemplated are inappropriate, the latter would be guilty of bad faith if it failed to make that view known. In such circumstances the pre-litigation procedure cannot fulfil its role of enabling a dispute to be settled amicably.

29. The Commission's reasoned opinion which preceded these Treaty infringement proceedings is a document of several pages

7 — Judgment of 18 March 1986, Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, at paragraph 11.

8 — Judgment in Case 274/83 *Commission* v *Italy* [1985] ECR 1077, at paragraph 21; likewise, previously, the judgment in Case 7/61 [1961] ECR 699.

9 — Judgment in Case 70/72 *Commission* v *Germany* [1973] ECR 813, at paragraph 13.

that sets out the facts and the points at issue in a coherent and comprehensible way. The Commission relates the facts to the relevant provisions of the directive, leaving no doubt as what it is that the Member State in question stands accused of: failure to publish notice of the tendering procedure throughout the Community. The parties' differences of opinion on the law as it relates to the case likewise emerge clearly from the reasoning.

30. It is true that no way of remedying the infringement is mentioned in the reasoned opinion. It is, however, clear that at *an early stage* there was disagreement over the legal appraisal of the facts. The Portuguese Government did not endorse the Commission's view of the law; it considered that the Treaty had not been infringed.

31. While the Court's case-law requires the obligations which a Member State must fulfil to be indicated precisely in the reasoned opinion,[10] that does not necessarily include the measures needed to eliminate the infringement. The obligation which, the Commission believes, the defendant Member State should have fulfilled was publication of the tendering procedure in the *Official Journal of the European Communities.* That is conveyed unmistakeably in the reasoned opinion; that opinion was therefore adequately reasoned.

32. If, in the pre-litigation procedure, the Portuguese Government did indeed intimate its desire to preclude any infringement of the Treaty in the future by amending the law, and if the Commission was indeed convinced that such a course of action would fail to achieve the desired end, then it was unhelpful to refrain from informing the Portuguese Government of that view, thereby obstructing a constructive resolution of the dispute. Yet even if such conduct does run counter to the purpose of the pre-litigation procedure, it cannot make the Treaty infringement action inadmissible since the defendant Member State has refused to admit that any infringement occurred.

33. There is no conflict between the reasoned opinion and the application, since the issue remains the failure to publish a notice of the tendering procedure in the *Official Journal of the European Communities.* The Commission's contention in the application that the legislative amendment proposed by the Portuguese Government was not capable of curing the infringement does not represent a broadening of the subject-matter of the proceedings. The substantive charge remained the same in the pre-litigation procedure and in the application; only the legal arguments were amplified.

34. A separate issue is whether there is a legal interest in bringing Treaty infringement proceedings in the case of a past Treaty infringement which has been terminated. Whether an interest in bringing the present action exists would appear to be questionable inasmuch as the contract was awarded on the basis of the tendering procedure of 29 August 1987 without that tendering procedure having been published in conformity with the directive. The award of the contract cannot now be undone; consequently, there is no longer any possibility of influencing a situation which was conclusively determined by events in the past.

35. Initially it might well have been possible to repeat the tendering procedure while

10 — Case 85/85 [1986] ECR 1149, at paragraph 11.

complying with the publication provisions laid down in Community law. However, that would have presupposed an admission of wrongful conduct. At no time has the Portuguese Government accepted that its conduct was contrary to the Treaty. Its defence before this Court continues to be that the tendering procedure concerned was not covered by Directive 77/62. Similar conduct in the future cannot be ruled out in the absence of an acknowledgement that it was at fault.

36. The mere fact that there is still a dispute about whether or not a Treaty infringement occurred constitutes a reason for concluding that there is a legal interest in bringing proceedings, in order to obviate similar cases in the future.[11] It is also appropriate to point out that a Member State may not rely on a *fait accompli* for which it is responsible in order to elude an application against it.[12]

37. The Commission's application should be ruled admissible, subject to a review of the degree of State control over supply contracts of the type described above.

2. *Merits*

38. The Portuguese Government argues that the supply contract awarded by ANA-EP does not fall within the ambit of Directive 77/62. First, ANA-EP is covered by the sectoral exception for transport operators contained in Article 2 of the Directive. Secondly, the directive was not applicable to the supply contract in question, since the contract had to be concluded according to the formal requirements of private law, whereas the Directive only covers supply contracts awarded under public law. Lastly, ANA-EP cannot be regarded as a contracting authority within the meaning of the directive.

39. (a) Article 2 of Directive 77/62 contains a sectoral exception in respect of public supply contracts awarded by bodies which administer transport services. The Commission argues that ANA-EP cannot be regarded as a body which administers transport services within the meaning of the Directive. In support of its case it refers to the Commission's Guide to the Community Rules on Open Government Procurement,[13] a manual on the application and interpretation of the public procurement directives. It contains the following passage:

'In the transport sector the exception covers organizations actually undertaking the carriage of passengers or goods, but not, for example, those running ports or airports, which are covered by the directive.'

40. In support of its views the Commission also refers to the amendment to the exception effected by Directive 88/295. Since that reformulation in 1988 the exception relating to the transport sector has read as follows:

11 — Opinion of Advocate General Lenz in Case 199/85 *Commission* v *Italy* [1987] ECR 1047; see also paragraphs 7 to 9 of the judgment in the same case, at p. 1039.

12 — Judgment of 7 February 1973 in Case 31/72 *Commission* v *Italy* [1973] ECR 101; Opinion of Advocate General Mancini in Case 303/84 *Commission* v *Federal Republic of Germany* [1986] ECR 1171 at pp. 1172 and 1173.

13 — OJ 1987 C 358, p. 1.

'This directive shall not apply to:

(a) public supply contracts awarded by carriers by land, air, sea or inland waterway; . . . '

41. The Commission's view is that this is no more than a clarification involving no substantive change to the scope of the exception.

42. The first point to bear in mind is that it is immaterial to the question before the Court whether the reformulation actually changed the substance of the exception, since at the time of the tendering procedure, August 1987, the original version of Article 2(2)(a) of Directive 77/62 was still in force. As to the reformulation of the exception by Directive 88/295, I shall merely point out that the recitals refer — at least in the German version — to a new definition of the sectoral exceptions, which suggests that the scope of the rules on exceptions was indeed changed.

43. Whether ANA-EP comes within the scope of the directive in its original version can only be determined after an examination of the exception in its legislative context. The words 'body which administers transport services' suggest that the whole sector was covered. ANA-EP's task, consisting in the administration of several Portuguese airports, is indissolubly linked to the pure transport function — the carriage by air of passengers and goods. Air transport is inconceivable without the provision of the requisite infrastructure and airport organization.

44. Directive 90/531, which has since been adopted, concerns the public procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,[14] and affords some insight into the legislative methodology of the directives on the award of public contracts (supply contracts and building contracts), and on the sectors excluded from their scope. The sectors now covered by Directive 90/531 were excluded *ab initio* from the scope of the directive on the award of public contracts. The underlying idea was to avoid impairing the competitive position of the undertakings concerned vis-à-vis private undertakings, and to prevent unequal treatment ensuing from the variety of legal forms of the bodies providing public services in Member States. The new directive placed the sectors which had initially been excluded under significantly less stringent rules for tendering procedures for public contracts.

45. The foregoing view of the legislative context is underpinned by the preamble to Directive 90/531. These state, for example:

14 — Council Directive of 17 September 1990, OJ 1990 L 297, p. 1.

'... the White Paper on the completion of the internal market ... contains ... sectors which are currently excluded from ... Directive 77/62 ...

... among such excluded sectors are those concerning the provision of water, energy and transport services ...

... the main reason for their exclusion was that entities providing such services are in some cases governed by public law, in others by private law'.

46. ANA-EP is unquestionably covered by the new directive on the excluded sectors. This is apparent from Article 2, which states:

'(1) This directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...

(2) Relevant activities for the purposes of this directive shall be:

...

(b) the exploitation of a geographical area for the purpose of:

...

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

...

(6) The contracting entities listed in Annexes I to X shall fulfil the criteria set out above. ...'

In Annex VIII of the new Directive, ANA-EP is expressly mentioned under Portugal.

47. The fact that ANA-EP is covered by Directive 90/531 prompts the logical inference that it was previously excluded from the scope of Directive 77/62. That conclusion is not negated by the Commission's claim that transport undertakings such as ANA-EP were originally covered by the more stringent provisions of Directive 77/62, and only subsequently made subject to the less stringent rules of the new directive. That line of argument runs counter to the scheme and purpose of the directives on the award of public supply contracts.

48. Indeed, the amendment to Directive 77/62 introduced by Directive 90/531

confirms that view. Its purpose is to enable a clear line to be drawn between the fields covered by the two directives. Article 35 of Directive 90/531 provides that:

'(1) Article 2(2) of Directive 77/62/EEC is hereby replaced by the following:

"(2) This directive shall not apply to:

(a) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Council Directive 90/531/EEC . . . or fulfilling the conditions in Article 6(2) of the said directive;" '.

49. Thus the sectoral exception in Directive 77/62 is defined as covering the contracting authorities covered by the new Directive and the bodies still not covered even by the new Directive.

50. It follows from the foregoing considerations that at the material time ANA-EP did not fall within the scope of the Directive and that the present action is unfounded.

51. (b) I now turn to the Portuguese Government's argument that ANA-EP's supply contract for the supply and assembly of a telephone exchange for Lisbon Airport was not covered by the directive on account of the legal form of the contract concerned. In support of that argument the Portuguese Government relies on the Portuguese version of the text of Annex I to the directive coordinating procedures for the award of public supply contracts. That version defines contracting authorities as

'Legal persons governed by public law whose supply contracts *governed by public law* are subject to State control'.[15]

52. The parties are in dispute over the question of which language version was binding. Precisely which form of words in which language the parties regarded as decisive in the pre-litigation procedure is not a question on which the outcome of these proceedings will turn. The question to settle is an objective one: which is the binding form of words on the basis of which the legal question falls to be decided?

53. Of course, Directive 77/62 was adopted before Portugal became a Member of the European Communities; obligations under the directive could only arise on the occasion of Portuguese accession.

15 — My emphasis.

Accordingly the Act of Accession contains adjustments to Directive 77/62 and transitional provisions relating thereto; thus 'contracting authority' is defined as follows in Annex I to the Directive:

'XIII. In Portugal:

legal persons governed by public law whose public supply contracts are subject to State control'. [16]

54. The content of Point XIII of Annex I to the directive is the same in all Community languages. The form of words relied on by the Portuguese Government was first incorporated in the directive by Directive 88/295/EEC. It is noteworthy that the linguistic variation is only to be found in the Portuguese text. Whatever the reasons for it — whether it was a mere oversight or a translator's error — an attempt must be made to construe the provision concerned in a uniform way. The Court has consistently held that the necessity for uniform application and accordingly interpretation make it impossible to consider one version of a text in isolation, but require it to be interpreted on the basis of the intention of its author and the aim pursued, in the light of all language versions. [17]

55. Accordingly the Portuguese Government's view that only the Portuguese text is binding must be firmly rejected. Nor is it likely that the particular form of words in Portuguese was included in the directive intentionally: were that indeed the case, a contracting authority covered by the directive might *elude* the rules contained therein *simply by selecting a particular legal form* for its contract with the prospective supplier. Moreover, the supply contracts covered by the directive are defined at Article 1(a), whereas Annex I specifies the 'contracting authorities' defined in Article 1(b): that militates against the view that characteristics of the supply contracts dealt with by the directive may be inferred from Annex I.

56. The question whether the words 'contracts governed by public law' may be disregarded need not be finally resolved, since at the time of the tendering procedure for the telephone exchange contract, the version of Annex I to Directive 77/62 that was in force was none other than that resulting from the Act of Accession.

57. The Portuguese Government's objection that the contract could not have come within the scope of the directive because it had to be concluded under private law must therefore be rejected.

58. (c) The Portuguese Government finally raises the objection that ANA-EP is not a contracting authority within the meaning of the directive. Apart from the fact that ANA-EP is in any case excluded from the

16 — OJ 1985 L 302, p. 217.

17 — Judgment in Case 29/69 *Erich Stauder* v *City of Ulm* [1969] ECR 419; judgment in Case 30/77 *Pierre Bouchereau* [1977] ECR 1999; judgment in Case 9/79 *Marianne Koschniske* v *Raad van Arbeid* [1979] ECR 2717; and judgment in Case 55/87 *Alexander Moksel* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1988] ECR 3845.

scope of the directive because it belongs to the transport sector, the question of whether or not it is a 'contracting authority' falls to be determined by Article 1 in conjunction with Annex I to Directive 77/62. Article 1(b) states: '"contracting authorities" shall be the State, regional or local authorities and the legal persons governed by public law or . . . bodies corresponding thereto as specified in Annex I'. Once again Point XIII of Annex I is of relevance. The version which, for the reasons set out above, is relevant to the present proceedings reads 'other corporate bodies governed by public law subject to a procedure for the award of contracts'.

59. In my view, in determining whether an undertaking is covered by the above definition one must look at the facts of the situation. Thus the issue is not whether an undertaking is subject to some form of State control since, as the Portuguese Government rightly points out, all public undertakings are subject to some form of State control. Even the theoretical possibility of State control in the case of supply contracts is not sufficient. What is required is that, under the terms of the relevant legislation, the contract in question be open to State control in such a way as to enable the public authorities to influence the conclusion of the contract.

60. Whether or not ANA-EP is a legal person governed by public law whose awards of public supply contracts are subject to State control is a question to be determined under the relevant provisions of Portuguese law. ANA-EP was set up under Decree-Law No 246/79 of 20 July 1979, to which its constitution is annexed. No direct control on the part of State bodies over the award of supply contracts of the order of magnitude in question can be inferred from those provisions; however, the general rules governing all public undertakings might well be applicable. These are set out in Decree-Law No 260/76 of 6 April 1976, amended by Decree-Law No 29/84 of 20 January 1984. Article 13 of the Decree-Law states that transactions the value of which exceeds ESC 50 000 000 require approval by the Minister responsible. The possibility of amending that provision was also discussed in the pre-litigation exchanges.

61. The Portuguese Government has submitted that the aforesaid general legislation does not apply to ANA-EP's transactions since the Decree-Laws in question rank equally in the hierarchy of legislation, with Decree-Law No 246/79, which set up ANA-EP, taking precedence as the more specific enactment. Moreover, Decree-Law No 29/84 had provided that the constitutions of public undertakings were to be brought into line with the general rules within a given period. Since no such adjustments had been made, Decree-Law 246/79 and the constitution of ANA-EP remained in force unchanged.

62. I do not wish to embark here on a detailed examination of Portuguese law. However, it seems to me, on the basis of the general theory of laws, that the mere passing of a deadline by which legislation was due to have been amended cannot itself effect a change in the law. However, that would mean that the supply contract for the

Lisbon Airport telephone exchange which fell to be awarded in August 1987 was not subject to State control; ANA-EP would then not be a contracting authority within the meaning of the directive; and the application would have to be dismissed on the basis of that — secondary — consideration.

Costs

63. The decision on costs is governed by Article 69 of the Rules of Procedure of the Court. Article 69(2) states that the unsuccessful party shall be ordered to pay the costs where these have been applied for.

C — Conclusion

64. For the reasons set out above I propose that the Court rule as follows:

1. The application is dismissed;

2. The Commission shall bear the costs of the proceedings.