OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 28 November 2001 [1]

I — Introduction

1. In these two sets of infringement proceedings, the Commission seeks a declaration by the Court that Germany has failed to comply with certain obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [2] (hereinafter 'the Directive'). It is alleged that the Municipality of Bockhorn and the City of Braunschweig awarded contracts for the treatment of waste water and refuse disposal without first having published a Community-wide notice.

2. The German Government does not dispute that Community law on the award of contracts ought to have been complied with in the two invitations to tender concerned, but contends that the actions brought by the Commission are inadmissible. It states that, when the time-limits laid down in the reasoned opinions expired, it had already admitted the infringements, which, moreover, no longer existed, since it had taken steps to bring them to an end. As against that view, the Commission argues that the consequences of the infringements are still appreciable. The contracts concluded are still being applied and the obligations entered into extend over a period of more than 30 years.

3. The main point at issue in both cases is therefore whether the Commission still has a legal interest in bringing proceedings. Another question which arises in this connection is whether the Treaty infringement procedure provided for in Article 226 EC must also be used to prevent systematic infringements of the procedural rules laid down in the Directive. Furthermore, Case C-28/01 is significant in terms of the application of environmental criteria in the interpretation of the Directive.

II — Legal framework

4. Article 8 of the Directive provides that contracts which have as their object services listed in Annex IA are to be awarded in accordance with the provisions of Titles III to VI.

1 — Original language: Dutch.
2 — OJ 1992 L 209, p. 1.

5. Title V (Articles 15 to 22) contains common rules on advertising. Under Article 15(2) of the Directive, contracting authorities that wish to award a public service contract by open, restricted or, under conditions laid down in Article 11, negotiated procedure, are to make known their intention by means of a notice.

6. Article 11(3) of the Directive reads:

'Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

...

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider;

...'.

7. Under Article 16(1) of the Directive, contracting authorities which have awarded a public contract are to send a notice of the results of the award procedure to the Office for Official Publications of the European Communities.

III — Facts and procedure

A — *Facts and pre-litigation procedure in Case C-20/01*

8. The Municipality of Bockhorn, situated in the Land of Lower Saxony, concluded with the energy distribution undertaking Weser-Ems-Aktiengesellschaft (hereinafter 'EWE') a contract for the treatment of waste water. The contract entered into force on 1 January 1997 and is to last for a period of at least 30 years.

9. On 30 April 1999, the Commission, in accordance with the procedure under Article 226 EC, sent the Federal Republic of Germany a letter of formal notice. It stated that the German authorities had failed to comply with the provisions of the Directive when awarding the aforementioned contract.

10. In its reply of 1 July 1999, the German Government conceded that the contract concluded by the Municipality of Bockhorn ought to have been awarded in accordance with the provisions of Community law. It pointed out that the authorities of the Land of Lower Saxony had once again expressly called on the district authorities to comply strictly with the relevant Community provisions.

11. In its reasoned opinion of 21 March 2000, the Commission stated that the provisions of the Directive ought to have been applied, and that it was irrelevant in law that the infringement of the provisions of Community law had been acknowledged by the German Government. In addition, it called on the German Government forthwith to remind the authorities concerned of the legal position, and to oblige them to comply with the relevant provisions on the award of public contracts in future.

12. In a communication of 12 May 2000, the German Government once again acknowledged the infringement. It pointed out that, on the basis of the letter of formal notice and the intervention of the federal Government, the Ministry of Internal Affairs of the Land of Lower Saxony, by decree of 21 June 1999, had urged all district authorities in the Land to ensure in an appropriate manner that contracting authorities complied strictly with the Community provisions on the award of public contracts.

13. The German Government also stated that, under German law, it was virtually impossible to put an end to the infringement itself, as a legally valid contract had existed between the Municipality of Bockhorn and EWE since 1 January 1997, which could not be terminated without substantial compensation's being payable to EWE. The costs of such a termination of the contract would be disproportionately high.

B — *Facts and pre-litigation procedure in Case C-28/01*

14. In this case, the City of Braunschweig, in Lower Saxony, and Braunschweigische Kohlebergwerke (hereinafter 'BKB') concluded a contract under which the City of Braunschweig entrusted to BKB the thermal treatment of refuse for a period of 30 years from June/July 1999.

15. The competent authorities of the City of Braunschweig have not denied that the Directive was applicable to that transaction, but have contended that the transaction fell within the scope of the derogation provided for in Article 11(3) of the Directive. In its letter of formal notice of 20 July 1998 the Commission rejected that interpretation.

16. By letters of 4 August, 19 October and 15 December 1998, the German Govern-

ment submitted observations on the letter of formal notice, arguing in particular that, in accordance with Article 11(3) of the Directive, it had, for technical reasons, been possible to award the contract only to BKB. The geographical proximity of the treatment plant to the city was an essential criterion in the award of the contract in order to avoid shipment over longer distances.

17. By letter of 16 December 1998, the German Government nevertheless admitted to the Commission that the City of Braunschweig had infringed the Directive in this case by applying the negotiated procedure without official publication.

18. The Commission responded by sending to the Federal Republic of Germany a reasoned opinion dated 6 March 2000 in which, in particular, it called upon the Federal Republic of Germany to remind the authorities concerned of the legal position without delay, and to urge them to comply with the relevant provisions on the award of public contracts in future.

19. In a communication of 17 May 2000, the purport of which was the same as that of the communication of 12 May 2000 referred to above in connection with Case C-20/01, the German Government acknowledged the infringement but pointed out that it was not possible in practice to terminate the contract concluded.

C — *Procedure before the Court and forms of order sought*

20. The applications brought by the Commission in Case C-20/01 and C-28/01 were lodged at the Court Registry on 16 January and 23 January 2001 respectively. The cases were joined by order of the President of the Court on 15 May 2001.

21. In Case C-20/01, the Commission seeks a declaration by the Court that, by failing to invite tenders for the contract for the treatment of waste water in the Municipality of Bockhorn and to arrange for notice of the results of the procedure for the award of the contract to be published in the S Series of the *Official Journal of the European Communities*, the Federal Republic of Germany has failed to comply with its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of the Directive.

22. In Case C-28/01, it seeks a declaration that, by virtue of the fact that the City of Braunschweig awarded a contract for refuse disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in the Directive for an award by negotiated procedure without a Community-wide invi-

tation to tender were not fulfilled, the Federal Republic of Germany has failed to comply with its obligations under Article 8 and Article 11(3)(b) of the Directive.

IV — Pleas in law and main arguments

23. The Federal Republic of Germany contends that the actions should be dismissed as inadmissible or, in the alternative, as unfounded.

24. By order of the President of the Court of 18 May 2001, the United Kingdom was granted leave to intervene in support of the form of order sought by the German Government. The United Kingdom Government proposes first that Cases C-20/01 and C-28/01 be joined. Secondly, it contends that the actions brought by the Commission should be upheld in so far as they both seek a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the Directive by failing to comply with Community law on the award of public contracts. Thirdly, it contends that the remainder of the applications should be dismissed.

25. A hearing was held on 10 October 2002.

26. In its application in Case C-20/01, the Commission claims that the Directive was applicable in this case. In its view, it is immaterial that the German Government conceded that, in accordance with the Directive, the contract concluded by the City of Bockhorn ought to have been the subject of a Community-wide invitation to tender. The fact that the Land government instructed the district authorities to comply strictly with the provisions of Community law when awarding public service contracts did not eliminate the Treaty infringement itself. The City of Bockhorn, it submits, is still infringing Community law by maintaining the contract for the treatment of waste water and continuing to apply it as before. Since the unlawful conduct persists, the defendant has not taken all the measures necessary to comply with the Directive within the period laid down in the reasoned opinion.

27. In Case C-28/01, the Commission claims that, by awarding the contract for refuse disposal to BKB without prior publication of a contract notice within the meaning of the Community provisions on the procedure for awarding public service contracts, the City of Braunschweig failed to comply with the Directive. The criteria laid down in Article 11(3)(b) of the Directive for an award by negotiated procedure are not fulfilled in this case. The City of Braunschweig is still infringing Community

law in so far as it maintains and continues to apply the contract with BKB. Here too the unlawful conduct persists and the Federal Republic of Germany has not taken all the measures necessary to comply with the Directive within the period laid down in the reasoned opinion.

28. In both cases, the German Government starts by raising a plea of inadmissibility. Essentially, it takes the view that the actions brought by the Commission are inadmissible since there is no ongoing infringement of the Treaty which must be brought to an end by the Member State concerned. The purpose of the infringement procedure is to restore a situation which is in conformity with the Treaty. No such purpose is served where the Member State has put an end to the infringement before the period laid down by the Commission in the reasoned opinion expires. In this case, the infringements of the procedural rules in the Directive were exhausted on their commission.

29. In addition, the validity of the obligations entered into, in accordance with the principle *pacta sunt servanda*, is consistent with Community law and national law. According to the German Government, in the case of Community law, this may be inferred from Council Directive 89/665/EEC of 21 December 1989 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. [3] According to that provision, the contracts concluded by the contracting authorities may remain valid. [4] Under German law and under the relevant clauses of the contracts in question, there is no possibility of terminating the obligations in these cases, or that possibility exists only at the cost of a disproportionately high risk of liability.

30. In the alternative, the German Government calls into question the substance of the two alleged infringements of the Treaty. It submits that, in both applications, for the same reasons as those given in connection with the question of admissibility, the Commission's claims are unfounded. The German Government refers in this respect to the adage principles *impossibilium nulla est obligato* (there is no obligation to perform the impossible) and the principle *pacta sunt servanda*. Moreover, in Case C-28/01, it contends that the City of Braunschweig's decision to opt for the thermal treatment of waste and, consequently, to award the contract to BKB — the only undertaking in the Braunschweig area which had the necessary infrastructure to dispose of waste by thermal means — was unavoidable, and was justified under Community law, having regard to the principle of proximity.

3 — OJ 1989 L 395, p. 33; amended by Directive 92/50.

4 — Article 2(6) of Directive 89/665 reads: '[t]he effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement'.

31. The United Kingdom Government points out in its statement in intervention that it calls into question not the admissibility of the actions but — in part — their merits. In the light also of Directive 89/665, it submits that the question whether it is possible to terminate a contract for which, wrongfully, no invitation to tender was issued, in breach of Community law, is always a matter which falls within the competence of the Member State concerned. There is no legal interest in continuing proceedings aimed exclusively at obtaining a court decision which would be impossible to enforce because it would be contrary to the domestic law concerned.

32. In its observations on the statement in intervention, the German Government contests the admissibility of the intervention of the United Kingdom Government.

V — Assessment

33. The Commission's objectives in these infringement proceedings are not in themselves very ambitious. It claims that Germany has infringed Community law by failing to comply with the rules of the Directive when awarding two contracts. In Case C-20/01, it more specifically seeks a finding against the defendant for infringement of Article 8 in conjunction with Articles 15(2) and 16(1) of the Directive, and, in Case C-28/01, a finding against the defendant for infringement of Article 8 and Article 11(3)(b) of the Directive.

34. The German Government does not deny that the Directive was applicable in both cases, and that public tendering procedures were necessary. That acknowledgement forms part of the plea of inadmissibility. The discussion of admissibility must therefore proceed on the assumption that public invitations to tender ought to have been issued (Section B). As regards, next, the merits of the actions brought, I shall examine in particular the defence plea concerning the principle of proximity, which was raised in the alternative in Case C-28/01 (Section C). To begin with, however, consideration must be given to the admissibility of the intervention of the United Kingdom, a remarkable matter arising in these proceedings (Section A).

A — *Admissibility of the United Kingdom's intervention*

35. The German Government was no doubt astonished by the written observations of the United Kingdom Government, which, as intervener, formally endorsed the form of order sought by the Federal Republic of Germany but, in substance, largely supported the form of order sought by the Commission and contested by Germany.

36. In its observations on the United Kingdom's statement in intervention, the defendant therefore called into question the admissibility of the intervention in so far as, in the second head of the form of order it sought, the United Kingdom contended that the Court should declare that the Federal Republic of Germany has failed to fulfil its obligations under the Treaty by failing in these cases to comply with the provisions of the Directive on the award of public service contracts. In the view of the German Government, while it is true that the intervener's submissions need only partly support the form of order sought by one of the parties, Article 93(5)(a) of the Rules of Procedure nevertheless precludes the intervener from also opposing the party it is supporting. The intervention must be unambiguous, and must therefore, because of its partiality, either support or oppose the position of only one of the parties. In this respect, intervention in infringement proceedings differs from intervention, under Article 20 of the Rules of Procedure, in preliminary ruling proceedings, where an intervening Member State takes on the role of *amicus curiae*.

37. In its observations on the statement in intervention, the Commission points out also that the form of order it sought by its actions is precisely the same as the second head of the form of order sought by the United Kingdom in its statement in intervention. The third head, that the remainder of the application should be dismissed, is incomprehensible in itself.

38. I share the amazement of the Federal Republic of Germany and the Commission. The United Kingdom sought and was granted leave to intervene in support of the form of order sought by the Federal Republic of Germany. However, a comparison of the respective forms of order sought shows that the second head of the form of order sought by the United Kingdom is the same as the orders sought by the Commission in both applications. Both the United Kingdom and the Commission seek a finding against the Federal Republic of Germany to the effect that it has failed to comply with the Directive. The fact that the intervener then contends that the remainder of the application be dismissed can perhaps be explained by the emphasis it lays in its submissions on the effects of a judgment finding that there has been a failure to comply with the rules on the procedure for awarding public service contracts. To that extent, its assessment concurs with the view of the German Government. Nevertheless, the German Government's submissions in this regard form part of its defence plea alleging inadmissibility, while the United Kingdom does not expressly call the admissibility of the action into question at all.

39. It is permissible for the form of order sought by one of the parties to be supported only in part, rather than in full. [5] The United Kingdom had the choice of supporting the German Government's contention that the action be dismissed either as regards both the admissibility and the merits of the action or as regards the merits alone. It decided to support the contention regarding the merits of the action.

5 — See, for example, the judgment in Case C-156/93 *Parliament* v *Commission* [1995] ECR I-2019, paragraphs 14 and 15.

40. However, the question is whether, as the German Government claims, the intervention must be declared inadmissible in so far as the United Kingdom's submissions on the substance contradicts the German Government's submissions concerning admissibility.

41. In my opinion, this question must be answered in the affirmative. After all, the wording of the Statute and the Rules of Procedure is clear. According to the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. That provision also forms the basis of Article 93(1)(e) of the Rules of Procedure, which states that the application to intervene must contain the form of order sought in support of which the intervener is applying for leave to intervene. On that basis, the President or the Court decides whether leave to intervene is to be granted. Article 37 of the EC Statute of the Court of Justice is developed further in Article 93(5) of the Rules of Procedure, which lays down requirements as to the content of the statement in intervention. According to Article 93(5)(a), inter alia, this must contain 'a statement of the form of order sought by the intervener in support of *or* opposing, in whole or in part, the form of order sought by *one* of the parties'. [6]

42. Clearly, the stipulation that an intervener in adversarial proceedings should take sides was quite deliberate and the purpose of the intervention is not that the intervener should support the Community judicature by submitting written statements of case or written or oral observations in the manner of an *amicus curiae*, as is the case under Article 20(2) of the EC Statute and Article 104(4) of the Rules of Procedure. The rules of procedure applicable to the preliminary ruling procedure under Article 234 EC do not contain any restrictions in this regard.

43. Even though the Court of Justice has not as yet expressly commented on this question, its case-law provides further support for the view that the form of order sought by the intervener must not be at odds with that sought by the party it is supporting. Although the Community judicature is willing to allow the intervener to introduce new submissions in the proceedings, those submissions must either support or oppose the form of order sought by one of the parties. [7] Adding new forms of order or requesting in the statement in intervention that the Court should rule on other issues renders the intervention inadmissible. [8] The same applies to submissions by the intervener which, although intended to support the form of order sought by one of the parties, are based on grounds entirely unconnected with those on which the form of order sought by the party supported is based. [9] It follows from this that the intervener is not at liberty to deviate at will from the form of order sought by the party it is formally supporting.

6 — My emphasis.

7 — According to the Court's case-law, the intervention procedure would otherwise be deprived of all meaning (see, for example, the judgment in Case 30/59 *De gezamenlijke Steenkolenmijnen in Limburg* [1961] ECR 18).

8 — See the judgment in Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, paragraph 9.

9 — Judgment in Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraph 24.

44. The intervener is certainly not at liberty to intervene in the dispute by opposing the form of order sought by the party it supports. In its application of 17 April 2001, the United Kingdom requested leave to intervene in support of the form of order sought by the Federal Republic of Germany, and by order of 18 May 2001, the President of the Court expressly granted leave to intervene in support of the form of order sought by the defendant. [10] The second head of the form of order sought in the statement in intervention, that a declaration be made to the effect that the Federal Republic of Germany has failed to comply with the procedural rules laid down in the Directive, is contrary to the order of the President of the Court.

45. In the light of the foregoing, I consider the second head of the form of order sought by the intervener to be inadmissible. [11]

B — *Admissibility of the actions brought by the Commission*

46. The German Government bases its view that both actions are inadmissible on the fact that the infringements of the Treaty had already ceased to exist when the time-limits laid down in the reasoned opinions expired. In its submission, the conclusion of the contracts with EWE and BKB respectively also ended the acknowledged infringements of the provisions of the Directive. According to the national law applicable, which is compatible with Community law — Article 2(6) of Directive 89/665 —, an infringement of the procedural rules contained in the directive does not affect the validity of the contracts in question, which can therefore remain in force. Consequently, the Commission no longer has an objective interest in continuing the proceedings, especially as the German Government has for its part taken the measures necessary to prevent any repetition of the infringements committed.

47. In my opinion, this view must be rejected. On the one hand, it fails to take into account the nature and scope of the legal obligations incumbent on Member States under the Directive, and, on the other, it disregards the possible legal consequences of infringements of the Directive, even if those infringements cannot as such affect the validity of the contracts in question.

48. The Directive imposes a threefold obligation on Member States. First, they must ensure that the Directive is transposed into national law in such a way that it can produce the legal effects it was intended to have. Secondly, the Member States must see to it that the public contracting auth-

10 — One of the consequences of leave to intervene is that the intervener must receive a copy of every document served on the parties, unless the President, on application by one of the parties, omits secret or confidential documents (see Article 93(3) of the Rules of Procedure).

11 — For the sake of completeness, it may be pointed out that the first head of the form of order sought in the statement in intervention of 17 September 2001, that Cases C-20/01 and C-28/01 be joined, had already been made redundant by the order of the President of 15 May 2001.

orities actually comply with the relevant provisions of the Directive. Thirdly, they must take action to prevent threatened infringements of those provisions.

49. If it appears, on the basis of actual circumstances, that a Member State has failed to fulfil or has not adequately fulfilled that threefold duty of care, the ensuing situation is incompatible with the result which the Directive seeks to achieve. Freedom to provide services is then no longer guaranteed. [12]

50. In that regard, the Commission has an objective legal interest in obtaining a judgment from the Court to the effect that, in the context of the relevant contracts awarded by the Municipality of Bockhorn and the City of Braunschweig, the Federal Republic of Germany has failed to fulfil its obligations. Such a finding against the defendant extends beyond those two individual cases, since it also shows that Germany, the addressee of the Directive, has not done everything necessary to ensure that it is enforced.

51. The implicit assertion by the German Government that, by reprimanding the district authorities, it has fulfilled its legal obligations at least for the future is in my view unsatisfactory. The Court has consistently held that the Member States remain fully responsible for ensuring compliance with the Directive in their spheres of territorial competence. They cannot evade responsibility for any future infringements of the Directive by taking the matter up with the local authorities.

52. The point made by the Commission at the hearing that it has received further complaints concerning infringements of the directive in question, some of which likewise relate to refuse, makes clear the ongoing nature of the duty of care incumbent on Member States in the transposition and application of the Directive. The purpose of the Directive means that the question whether the duty of care has been fulfilled usually has to be determined on the basis of individual breaches of that duty. In my opinion, that in itself renders untenable the German Government's view that the action brought by the Commission in this case is inadmissible.

53. However, the view adopted by the German Government is also clearly open to question from another angle. Ultimately, it would mean that proceedings under Article 226 EC against infringements of Community law which have ceased to exist and which are irreversible would be impossible in future. This would open the

12 — The purpose of coordinating the procedures for awarding public contracts at Community level is to eliminate barriers, inter alia, to the freedom to provide services and therefore to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (cf., for example, the judgment in Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32. See also the 20th recital in the preamble to the directive.)

way to systematic infringements of the Directive committed by means of long-term contracts which are legally unassailable. In the case of certain types of economic activity carried on under the responsibility of the public authorities, such as refuse disposal or highway maintenance, the internal market for services would thus be geographically compartmentalised. It need hardly be said that such a consequence is contrary to the main aims of the Directive.

54. It must therefore by open to the Commission in individual cases, to obtain an order from the Court to the effect that a Member State is systematically failing to comply with its obligations under the Directive, or is in danger of failing to do so.

55. Seen against that background, a finding as to the existence of two actual infringements of the Directive goes further than the interest involved in obtaining such a finding. The purpose of the infringement procedure under Article 226 EC is not only to put an end to the infringement itself, but also to bring about a change in behaviour on the part of the recalcitrant State and prevent any repetition. [13] That result could no longer be achieved if the view of the German Government were accepted.

56. The German Government's view would have a similar effect on the power of the Court under Article 228(2) EC to impose a penalty payment on Member States which fail to comply with judgments. If, as the German Government considers, the Court were required to declare inadmissible actions brought by the Commission to obtain a declaration on infringements of the Directive which have become 'definitive', the Court of Justice would be left with no means of coercion under the aforementioned article in the event of repeated infringements of the Directive. The Community would then be powerless in the face of systematic infringements of the Directive, with no legal remedy at its disposal.

57. The continuation of the infringement proceedings, even if confined to the two cases pending, makes very good sense. The Commission has rightly pointed out that the alleged infringements will continue to produce legal effects, since they led to the conclusion of long-term contracts. The award of the contracts has therefore not yet produced all its legal effects. [14] Nor is there here a situation which is inherently unrectifiable.

58. The contracts in question came into existence as a result of unlawful conduct, a fact which has a bearing on the legal position of the parties to those contracts

13 — Judgment in Case C-276/99 *Germany* v *Commission* [2001] ECR I-8055, paragraphs 24, 25 and 32.

14 — Judgment in Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraphs 11 and 12. In that judgment, the Court deemed an action for failure to fulfil obligations to be inadmissible on the ground that, when the time-limit laid down in the reasoned opinion expired, the alleged infringement had produced all its legal effects and therefore no longer existed.

whose interests could have been adversely affected by those infringements of the law. An infringement of the procedural rules contained in the Directive can give rise to claims on the part of individuals, including claims for damages, which must be pursued in accordance with the relevant procedures under national law. [15] The assertion by the German Government that no third parties suffered any damage in these cases is irrelevant, since that fact cannot affect the admissibility of an action brought under Article 226 EC. [16] Moreover, that argument is open to question in so far as, according to the documents before the Court, the Commission investigated the alleged irregularities following complaints.

59. A finding of failure to fulfil obligations in these cases would clarify and strengthen the legal position of third parties and thus provide individuals with an effective legal remedy. [17] An effective action for damages in turn serves to safeguard the effectiveness of the Directive, since it urges the Member State to comply with the procedural rules in future. From that point of view, a finding by the Court that a Member State has failed to fulfil its obligations also serves the interests of ensuring that the Directive is effectively implemented in national law.

60. In view of the foregoing, the remainder of the German Government's submissions can be quickly dealt with.

61. The maxim *pacta sunt servanda* is not relevant here, since the Commission has not denied that the contracts concluded can, as such, continue to exist. However, that does not affect the aforementioned possibility of claims for damages as an alternative remedy. Nor is that possibility altered by the fact that, as the German Government argues, the national liability laws are adequate and an action for damages based on Community law would be unnecessary. For the purposes of deciding whether an action for failure to fulfil obligations under the Directive is admissible, the state of the national liability laws is not decisive in any event.

62. Moreover, it is of course for the Court to determine whether or not there has been an infringement of the Treaty, even if the Member State in question does not deny the infringement. [18] The argument which the defendant draws from Article 232 EC, to the effect that recognition of the fact that there has been an infringement of the Treaty makes a finding to that effect by the Court superfluous because there is no longer any objective interest in such a finding, is incorrect, since, in this case, there is most definitely an objective interest in so doing.

15 — See, for example, the judgment in Case C-92/00 *HI* [2002] ECR I-5553, paragraphs 26 and 27.

16 — See the judgment in Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraph 57.

17 — In an action for damages before the national court, a finding that a Member State has failed to fulfil an obligation establishes the infringement of Community law as being legally effective (see, for example, the judgment in Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 24).

18 — See, for example, the judgment in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 30.

63. The German Government also contends that the action brought by the Commission breaches the principle *ne ultra petita* and is therefore inadmissible. This argument must be rejected for the simple reason that the forms of order sought in the applications are the same in substance as the complaints raised by the Commission in the pre-litigation procedure and, in particular, in the reasoned opinion. [19] In both cases, the Commission seeks a declaration that, in the invitations to tender in question, Germany has infringed the same procedural rules of the Directive.

64. In view of the foregoing, I consider that in both cases there is a legal interest in bringing proceedings and that the actions brought by the Commission are admissible.

C — *Substance*

1. Case C-20/01

65. In Case C-20/01, the Commission is, in my view, right to state that all the conditions for application of the Directive were satisfied in this case. The treatment of waste water is a service within the meaning of Article 8 and Annex IA, category 16 ('sewage and refuse disposal services; sanitation and similar services'). Even though EWE gave the Municipality of Bockhorn an undertaking that, as well as actually disposing of the waste water, it would also install certain sewerage facilities, the execution of those works was without question incidental to the main object of the contract, namely the treatment of waste water. Despite the mixed character of the contract, works, in so far as they are incidental to, rather than the object of, the contract, do not justify treating the contract as a public works contract within the meaning of the Directive on the award of public works contracts. [20] Even if the contract is confined to the part relating to the treatment of waste water in the narrow sense, its value far exceeds the maximum value of EUR 200 000 for the entire contract laid down in Article 7 of the Directive.

66. The Municipality of Bockhorn was therefore required, under Articles 8 and 15(2) of the Directive, to award contracts for the treatment of waste water by means of an award procedure and, under Article 16(1), to send a notice of the results

19 — See, for example, the judgment in *Commission* v *Austria* (cited in footnote 16, paragraph 40).

20 — See the 16th recital in the preamble to Directive 92/50. Cf. also the judgment in Case C-331/92 *Gestión Hostelera Internacional* [1994] ECR I-1329, paragraphs 26 and 27.

of the award procedure to the Office for Official Publications of the European Communities.

67. Moreover, the complaints raised by the Commission in Case C-20/01 are not in fact challenged by the German Government. In its reply, the German Government refers entirely, as regards the merits of the case, to its submissions on the plea of inadmissibility. Those, however, are clearly untenable.

2. Case C-28/01

68. In this case, it is common ground that, when awarding the contract in question to BKB, the City of Braunschweig clearly proceeded on the assumption that the Directive was applicable. The parties are in dispute as to whether the conditions for awarding a contract by negotiated procedure under Article 11(3) of the Directive were fulfilled. According to that provision, public service contracts may be awarded without prior publication of a contract notice, inter alia, in the case of services which, for technical reasons, may be entrusted only to a particular service provider.

69. The German Government justifies the failure to issue an invitation to tender on the ground that, in view of the circumstances of the case, the refuse disposal contract could be awarded only to BKB, which was already established in Braunschweig. The City of Braunschweig opted for a method of treating waste locally which made it possible to avoid the shipment of waste over longer distances. The proximity of the refuse disposal facility was therefore an essential condition for the performance of the contract in question. The criterion of the proximity of the processing facilities and the short shipping distance is thus consistent, according to the German Government, with the principle that environmental damage should as a priority be rectified at source. That principle is laid down in Article 174(2) EC (formerly Article 130r(2) of the EC Treaty), and has been clarified by the Court of Justice in its case-law.[21] In view of the facilities available at its headquarters, BKB was the only undertaking in a position to carry out the refuse treatment using the desired thermal procedure. At the time when the contract was concluded, no other undertaking had the waste disposal facilities required in the Braunschweig area, as was shown by a market analysis conducted by the City of Braunschweig. If new industrial plant had had to be built, the deadlines laid down for comprehensive refuse disposal could not have been met.

70. The Commission points out first of all that the derogation provided for in Article 11(3) of the Directive, being an

21 — The German Government refers, by way of example, to the judgment in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431.

exception to the general principle, must be interpreted restrictively. Only if the contract in question can indeed, for the reasons expressly stated in that provision, be performed by only one particular undertaking, may it be awarded by negotiated procedure. No evidence has been adduced, however, to show that the contract in this case could be performed only by BKB.

71. The Commission submits that, whatever significance is attached to environmental criteria in the award of public contracts, they may never be applied in a discriminatory manner. That is what, in its view, has happened here. Geographical proximity was the only criterion used, whilst other environmental issues were disregarded. For example, outside undertakings could have proposed the use of other procedures for disposing of non-hazardous refuse. Moreover, in the event of conflicting interests, the proximity principle laid down in Article 174(2) EC does not take precedence over other Community objectives, but is to be taken into account, as appropriate, only in the implementation of Community policy.

72. It must be pointed out first of all in this respect that the Commission has rightly stated that the scope of Article 11(3) of the Directive, as a derogation from the rule that contracts covered by the Directive are to be awarded in accordance with the Community procedure, must be interpreted restrictively. This means that the person seeking to rely on that derogation must prove that the exceptional circumstances justifying it actually exist. [22]

73. The option given by Article 11(3) of the Directive to contracting authorities to award public contracts without prior publication of a notice is justified by the fact that, in these cases, there is only one suitable source of procurement. In those circumstances, the obligation to issue a public invitation to tender would lead to an unnecessary procedure. In order for that provision to be successfully relied on, it must therefore be irrefutably established that there really is only one undertaking capable of performing the contract in question.

74. In a recent judgment in *Concordia Bus Finland*, the Court of Justice held that environmental protection criteria are also among the criteria for the award of contracts which may be taken into account by the contracting authority under Article 36(1)(a) of the Directive. [23] In the light of that case-law, it is in my opinion conceivable that principles relating to the environment should also be taken into account in the context of the application of Article 11(3) of the Directive, when determining whether there is only one source of procurement. However, the judgment in *Concordia Bus Finland* also shows that reliance on environmental criteria in

22 — Cf., to that effect, the judgment in Case C-318/94 *Commission* v *Germany* [1996] ECR I-1949, paragraph 13.

23 — Judgment in Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 57.

the award procedure must be carefully examined and must not constitute a licence to circumvent the fundamental objective of the Community Directives on the award of public contracts, namely to achieve the internal market and eliminate unequal treatment. [24]

75. In particular, there is an intrinsic danger of indirect discrimination in the application of Article 11(3) of the Directive, since that derogating provision is, by definition, premissed on unequal treatment and preference for an individual contractor. The view taken by the German Government means that tenderers established in Braunschweig are given priority, and sources of procurement located elsewhere are excluded right from the start. That makes it all the more necessary to adduce convincing evidence where use is made of the derogation under Article 11(3).

76. In my opinion, the German Government has not succeeded in providing convincing evidence that BKB was indeed the only conceivable source of procurement which the City of Braunschweig could reasonably commission to provide (thermal) refuse disposal services. Leaving aside the question whether the report produced for the City of Braunschweig and cited by the German Government is reliable, it is inconceivable that a contract to be concluded for a term of no less than 30 years should not have attracted several serious contenders. After all, (thermal) refuse disposal is not such a unique and unusual economic activity that it can be carried on only by one undertaking.

77. Even though the City of Braunschweig has opted for a particular form of refuse disposal, the contracting authority can none the less be expected to provide convincing evidence, when relying on the derogation provided for in Article 11(3) of the Directive, that the same result — refuse disposal — could not have been achieved just as effectively from the point of view of environmental technology through the use of other techniques. That evidence can be supplied if the criteria on which the decision to use that form of refuse disposal was based are objective and transparent. In these proceedings, Germany has failed to substantiate, or has substantiated inadequately, its assertion that a solution which did not take account of shipping distances would be unwise from an ecological point of view. Moreover, it has not in any way been shown to be the case that shipment of the refuse in question over longer distances would in any event pose a threat to the environment or, as the case may be, to public health. [25]

24 — Judgment in *Concordia Bus Finland* (cited in footnote 23, paragraphs 59 to 64, with references to earlier decisions).

25 — In this connection, see also the judgment in Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraphs 46 and 47. That case concerned the question whether the recycling of oil filters in other Member States and their shipment over a greater distance for the purposes of being exported would pose a threat to the health and life of humans within the meaning of the present Article 30 EC. Not only did the documents before the Court show that the recycling of filters was comparable in the two Member States concerned, but it was not established before the Court that the shipment of oil filters posed a threat to the environment or to the life and health of humans.

78. In this case a public invitation to tender within the meaning of this Directive was essential. The action brought by the Commission must therefore be upheld.

VI — Conclusion

79. In view of the foregoing, I propose that the Court should rule as follows:

in Case C-20/01:

(1) Declare that, by failing to invite tenders for the award of the contract for the treatment of waste water in the Municipality of Bockhorn and to arrange for notice of the results of the procedure for the award of the contract to be published in the S Series of the *Official Journal of the European Communities*, the Federal Republic of Germany has failed to comply with its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

(2) Order the Federal Republic of Germany to pay the costs;

in Case C-28/01:

(1) Declare that, by virtue of the fact that the City of Braunschweig awarded a contract for refuse disposal by negotiated procedure without prior publication of a contract notice, notwithstanding that the criteria laid down in Directive 92/50 for an award by negotiated procedure without a Community-wide invitation to tender were not fulfilled, the Federal Republic of Germany has failed to comply with its obligations under Article 8 and Article 11(3)(b) of Council Directive 92/50/EEC;

(2) Order the Federal Republic of Germany to pay the costs.