JUDGMENT OF THE COURT (Fifth Chamber)
10 April 2003 *

In Joined Cases C-20/01 and C-28/01,

Commission of the European Communities, represented by J. Schieferer, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by H.-J. Prieß, Rechtsanwalt,

defendant,

* Language of the case: German.

supported by

United Kingdom of Great Britain and Northern Ireland, represented by R. Magrill, acting as Agent, and R. Williams, Barrister,

intervener,

APPLICATIONS for declarations that:

— by failing to invite tenders for the award of the contract for the collection of waste water in the Municipality of Bockhorn (Germany) and to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil 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 (OJ 1992 L 209, p. 1);

— at the time of the award of a public service contract, the Federal Republic of Germany failed to fulfil its obligations under Article 8 and Article 11(3)(b) of Directive 92/50 by virtue of the fact that the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior

publication of a contract notice, although the criteria laid down by Article 11(3) for an award of a contract by privately negotiated procedure without a Community-wide invitation to tender had not been met,

THE COURT (Fifth Chamber),

composed of: W. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M.-F. Contet, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2002,

gives the following

Judgment

1 By applications lodged at the Court Registry on 16 and 23 January 2001 respectively, the Commission of the European Communities brought two actions under Article 226 EC for declarations that:

— by failing to invite tenders for the award of the contract for the collection of waste water in the Municipality of Bockhorn (Germany) and to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil 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 (OJ 1992 L 209, p. 1);

— at the time of the award of a public service contract, the Federal Republic of Germany failed to fulfil its obligations under Article 8 and Article 11(3)(b) of Directive 92/50 by virtue of the fact that the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met.

Legal context

2 Article 8 of Directive 92/50 provides that:

'Contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI.'

3 Title V (Articles 15 to 22) of Directive 92/50 deals with common advertising rules. Under Article 15(2) of the directive contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11 of the directive, negotiated procedure, make known their intention by means of a notice.

4 Article 11(3)(b) of Directive 92/50 provides that:

'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'.

5 Article 16(1) of Directive 92/50 provides that:

'Contracting authorities who have awarded a public contract or have held a design contest shall send a notice of the results of the award procedure to the Office for Official Publications of the European Communities.'

Facts and pre-litigation procedure

Case C-20/01

6 The Municipality of Bockhorn in Lower Saxony concluded a contract for the collection of its waste water — for a term of at least 30 years from 1 January 1997 — with the energy distribution undertaking Weser-Ems AG (hereinafter 'EWE').

7 By letter of 30 April 1999, the Commission gave the Federal Republic of Germany formal notice to submit observations on whether the provisions of Directive 92/50 should have been applied in that instance.

8 In its reply of 1 July 1999, the German Government conceded that the contract concluded by the Municipality of Bockhorn should have been awarded in accordance with Community rules. In addition, it pointed out that the Ministry of Internal Affairs of the *Land* of Lower Saxony would take the opportunity to call on local authorities to give a firm reminder to bodies in their area that they must comply strictly with Community legislation on the award of public contracts.

9 On 21 March 2000, the Commission sent a reasoned opinion to the Federal Republic of Germany, in which it asserted that the provisions of Directive 92/50 should have been applied, and that it was irrelevant in law that the infringement of the provisions of Community law had been acknowledged by Germany. The Commission also called on Germany to remind the authorities concerned without delay of the relevant requirements and to urge them to comply with the abovementioned provisions in the future.

10 In a letter of 12 May 2000, the German Government once again acknowledged the breach of obligations complained of. It explained that on the basis of its intervention following the Commission's letter of formal notice, the Ministry of Internal Affairs of Lower Saxony, by decree of 21 June 1999, had instructed all local authorities in the *Land* to take appropriate measures to ensure that contracting authorities complied strictly with the Community provisions on the award of public contracts. In response to the reasoned opinion, the Government of Lower Saxony had insisted that those provisions must be complied with.

11 Moreover, the German Government contended that, under German law, it was virtually impossible to put an end to the infringement of Directive 92/50, since there had been a valid contract between the Municipality of Bockhorn and EWE since 1 January 1997 which could not be terminated without substantial compensation being paid to EWE. The cost of terminating the contract was disproportionate in relation to the Commission's objective.

12 The City of Braunschweig, also in Lower Saxony, and Braunschweigsche Kohlebergwerke (hereinafter 'BKB') concluded a contract under which BKB was made responsible for residual waste disposal by thermal processing for a period of 30 years from June/July 1999.

13 The competent authorities of the City of Braunschweig took the view that Directive 92/50 applied but relied on Article 11(3) thereof to release them from their obligation to publish a contract notice, and awarded the contract by a negotiated procedure.

14 The Commission challenged that interpretation by letter of formal notice of 20 July 1998.

15 By letters of 4 August, 19 October and 15 December 1998, the German Government replied to the letter of formal notice, arguing that the conditions on which Article 11(3)(b) of Directive 92/50 applied were met, since for technical reasons thermal treatment of waste could be entrusted only to BKB. It had been an essential criterion of the award of the contract that the incineration facilities were close to the City of Braunschweig in order to avoid transport over longer distances.

16 By letter of 16 December 1998, the German Government admitted that the Braunschweig authorities had infringed Directive 92/50 by applying the negotiated procedure without publishing a contract notice when there were no grounds for doing so.

17 On 6 March 2000, the Commission sent the Federal Republic of Germany a reasoned opinion in which, in particular, it called upon Germany to remind the authorities concerned without delay of the relevant rules and to urge them to comply with the applicable provisions in the future.

18 In a letter of 17 May 2000, the German Government admitted the infringement complained of. It also pointed out that the Government of Lower Saxony had instructed all local authorities to comply with the provisions on the award of public contracts. As in Case C-20/01, it stated that it would not be possible to put an end to the infringement of Directive 92/50 by terminating the contract. Moreover, such termination would oblige the City of Braunschweig to pay large sums by way of compensation to the other party to the contract. The cost of terminating the contract was therefore disproportionate.

19 By order of the President of the Court of 15 May 2001, Cases C-20/01 and C-28/01 were joined for the purposes of the written and oral procedure and judgment.

20 By order of the President of the Court of 18 May 2001, the United Kingdom was granted leave to intervene in support of the forms of order sought by the defendant.

Admissibility of the application

Pleas in law and arguments of the parties

21 The German Government argues, first, that the actions are inadmissible, since there is no ongoing breach of obligations which must be brought to an end by the defendant Member State. The Community legislation on the award of public contracts consists solely of procedural rules. The effects of breach of those rules are exhausted as soon as the breach is committed. Once the Federal Republic of Germany had admitted the breach, there was no longer any objective interest in bringing infringement proceedings.

22 As regards the need for such an objective interest, the German Government submits that proceedings for failure by a Member State to fulfil its obligations can be likened to an action for failure to act under Article 232 EC. The latter is inadmissible when the institution concerned, having been called upon to act, has defined its position. According to the Court's case-law, even the admission that there has been an unlawful failure to act removes the objective interest in obtaining a declaration that there has been such a failure.

23 Nor does the need to establish the basis of liability of the Member State concerned give rise in this instance to an objective interest in obtaining a declaration that that State has failed to fulfil its obligations. In particular, liability to individuals is not at issue, since no individual appears to have suffered loss as a result of the contracts concluded by the Municipality of Bockhorn and the City of Braunschweig.

24 The German Government, supported by the United Kingdom Government on this point, submits that the contracts concluded by the contracting authorities are protected by Community law by virtue of being established rights. The principle *pacta sunt servanda* is enshrined in 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 (OJ 1989 L 395, p. 33). By allowing national law to limit the powers of the bodies responsible for review procedures concerning the award of public contracts to awarding damages to any person harmed by an infringement of Community law on public procurement, Article 2(6) of Directive 89/665 specifically refrains from imposing a requirement that contracts which have been properly formed should be terminated or not complied with.

25 The German Government explains that a feature of national law is the principle that a contract entered into by a contracting authority in breach of the provisions on public procurement may be terminated only for a serious reason, which does not include the circumstances leading up to conclusion of the contract. Furthermore, provision is made for such a contract to be void only in exceptional, restrictively defined, cases, which do not concern the contracts concluded in this instance. However, national law incorporates the provisions necessary to enable persons harmed to claim damages.

26 The Commission argues that it does not have to demonstrate that there is a specific interest in bringing an action under Article 226 EC for failure to fulfil obligations. The Court has considered whether such an interest exists only in cases in which a Member State complied with the Commission's reasoned opinion after the end of the period laid down in the opinion. In the Commission's submission, such an interest could, however, consist not only of establishing the basis of the liability of the Member State concerned but also of clarifying essential points of Community law and avoiding the risk of further infringements.

27 In this case, the Commission considers that the effects of the alleged breach of obligations were not entirely exhausted in a procedural defect and that the breach is continuing. First, general instructions to local authorities could not have resulted in cessation of the specific infringements. Second, a Member State cannot, in order to avoid legal proceedings brought by the Commission, plead a *fait accompli* perpetrated by itself.

28 Furthermore, although it is true that the Court has dismissed as inadmissible an action for failure to fulfil obligations in the sphere of public procurement on the ground that the infringement had ceased to exist at the end of the period laid down in the reasoned opinion, that outcome arose as a result of the particular circumstances of the case. The present cases are different in that the contracts concluded in breach of Community law will continue to have effects for decades. The German Government has thus not put an end to the infringement. The fact that it is impossible to terminate the contracts concerned does not affect the admissibility of the action, since it is incumbent on the Member States to select the appropriate way of making good an infringement.

Findings of the Court

29 It is settled case-law that in exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15; Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 21; and Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855, paragraph 38).

30 Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations (*Commission* v *Germany*, cited above, paragraph 22, and Case C-471/98 *Commission* v *Belgium* [2002] ECR I-9861, paragraph 39).

31 The German Government submits, however, that in this instance, the failure to fulfil obligations consisted of breaches of procedural rules, whose effects were entirely exhausted before the end of the periods laid down in the reasoned opinions and that the Federal Republic of Germany admitted before that date that it had failed to fulfil its obligations.

32 It is true that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13; Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 10; and Case C-29/01 *Commission* v *Spain* [2002] ECR I-2503, paragraph 11).

33 The Court did indeed find an action for failure to fulfil obligations in the sphere of public procurement inadmissible, but it was on the ground that all the effects of the contract notice at issue had been exhausted by the end of the period laid down in the reasoned opinion (*Commission* v *Italy*, cited above, paragraphs 11 to 13).

34 By contrast, the Court dismissed an objection of inadmissibility based on a claim that the alleged infringement had ceased in a situation in which the procedures for the award of contracts had been conducted entirely before the date on which the period laid down in the reasoned opinion expired, since the contracts had not been fully performed by that date (Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraphs 43 to 45).

35 Furthermore, although Directive 92/50 contains essentially procedural rules, it was nevertheless adopted with a view to eliminating barriers to the freedom to provide services and therefore is intended to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (see, *inter alia*, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32).

36 Therefore the adverse effect on the freedom to provide services arising from the infringement of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach thereof.

37 In this instance, the contracts allegedly concluded in breach of Directive 92/50 will continue to produce effects for decades. It cannot therefore be maintained that the alleged breaches of obligations came to an end before the periods laid down in the reasoned opinions expired.

38 That conclusion is not affected by the fact that the Member States are able, pursuant to Article 2(6) of Directive 89/665, to limit the powers of the body responsible for review procedures, after the conclusion of a contract following its

award, to awarding damages to any person harmed by an infringement of Community law on public procurement.

39 Although Article 2(6) permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate interests of the parties thereto, its effect cannot be, unless the scope of the Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following conclusion of such contracts.

40 Furthermore, the admissibility of these actions is not affected either by the fact that the German Government, during the pre-litigation procedure, admitted the breaches of obligations complained of by the Commission or by that government's contention that a claim for damages may be made under national law even where the Court of Justice has not made a declaration that there has been a failure to fulfil obligations.

41 The Court has already held that it is responsible for determining whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognises that any individuals who have suffered damage because of it have a right to compensation (Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 30).

42 Since the finding of failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom (Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 30), the Federal Republic

of Germany may not rely on the fact that no third party has suffered damage in the case of the contracts concluded by the Municipality of Bockhorn and the City of Braunschweig.

43 Given that the alleged breaches of obligations alleged have continued beyond the date set in the reasoned opinions and notwithstanding the Federal Republic of Germany's admission of those breaches, the latter may not base any argument on either a comparison with the action for failure to act provided for in Article 232 EC or on the circumstances in which the Court considers that a failure to act has been brought to an end.

44 In the light of the foregoing, the actions brought by the Commission must be held to be admissible.

Substance

Pleas in law and arguments of the parties

45 In Case C-20/01, the Commission argues that Directive 92/50 applied to the contract concerned, which should have been the subject of an invitation to tender in accordance with the provisions of Articles 8 and 15(2) of the directive, read together. The results of the award procedure should have been published in accordance with Article 16 of the directive.

46 In Case C-28/01 the Commission submits that the contract in question also falls within the scope of Directive 92/50. In its submission, the criteria allowing a negotiated procedure to be used without publication of a prior contract notice, as provided for in Article 11(3)(b) of Directive 92/50, were not met. Neither the location of the undertaking selected, on account of its proximity to the place where the services were to be provided, nor the fact that award of the contract was urgent, provides a basis for the application of that provision in this instance.

47 The principle, provided for in Article 130r(2) of the EC Treaty (now, after amendment, Article 174 EC), that environmental damage should as a priority be rectified at source, should be read in the light of that provision as a whole, according to which environmental protection requirements must be integrated into the definition and implementation of other Community policies. Article 130r(2) does not provide that Community environmental policy is to take precedence over other Community policies in the event of a conflict between them. Nor, in the context of a procedure for the award of public contracts, can ecological criteria be used for discriminatory ends.

48 Furthermore, the contracting authority justifies its choice of the award procedure at issue by an argument based on the guarantee that waste would be disposed of. In the Commission's submission, that argument refutes the argument that the procedure had been chosen on account of environmental considerations and the proximity of the waste disposal facility.

49 The German Government, which presents its arguments on substance only as an alternative plea, argues that the actions brought by the Commission are in any event unfounded, since the effects of the alleged breaches of Directive 92/50 had been exhausted at the time when the breaches were committed and were not continuing on the date on which the period laid down in the reasoned opinions expired.

50 In Case C-28/01, the German Government adds that only BKB was in a position to satisfy the quite lawfully selected criterion that the waste disposal facility should be close to the relevant region. The criterion was not automatically discriminatory, since it was not impossible that undertakings established in other Member States would be able to meet the requirement.

51 In general, a contracting authority is entitled to take account of environmental criteria in its considerations relating to the award of a public contract when it determines which type of service it is proposing to acquire. The German Government submits that, for that reason too, termination of the contract entered into between the City of Braunschweig and BKB cannot be required, given that, in the context of a further award, the contract would again have to be awarded to BKB.

Findings of the Court

Case C-20/01

52 As regards Case C-20/01, it is not disputed that the conditions on which Directive 92/50 applies were met. As the Advocate General observes at point 65 of his Opinion, the treatment of waste water is a service within the meaning of Article 8 and Annex IA, category 16, of the directive. The construction of certain facilities was ancillary to the main purpose of the contract which the Municipality of Bockhorn entered into with EWE. The value of the contract far exceeds the threshold laid down in Article 7 of the directive.

53 Under Article 8 and Article 15(2) of Directive 92/50, the contract should consequently have been awarded in accordance with the provisions of the directive. It is established, and the German Government does not deny, that the Municipality of Bockhorn did not award the contract in that way.

54 The Federal Republic of Germany's defence on the substance refers essentially to the arguments put forward to challenge the admissibility of the action. For the reasons set out at paragraphs 29 to 43 of this judgment, those arguments must be rejected.

55 It follows that the Commission's action in Case C-20/01 is founded.

Case C-28/01

56 In Case C-28/01 Directive 92/50 was evidently applicable and was indeed applied by the City of Braunschweig. However, the latter, relying on Article 11(3)(b) of the directive, used a negotiated procedure without prior publication of a contract notice.

57 Although it admitted during the administrative procedure that the conditions on which Article 11(3)(b) applies were not met, the German Government argues that BKB was actually the only undertaking to which the contract could be awarded and that a further award procedure would not affect that outcome.

58 In that regard, it should be stated at the outset that the provisions of Article 11(3) of Directive 92/50, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in relation to public service contracts, must be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (Case C-318/94 *Commission* v *Germany* [1996] ECR I-1949, paragraph 13).

59 Article 11(3)(b) of Directive 92/50 cannot apply unless it is established that for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, only one undertaking is actually in a position to perform the contract concerned. Since no artistic reason, nor any reason connected with the protection of exclusive rights, has been put forward in this instance, it is appropriate solely to ascertain whether the reasons relied on by the German Government are capable of constituting technical reasons for the purposes of Article 11(3)(b).

60 A contracting authority may take account of criteria relating to environmental protection at the various stages of a procedure for the award of public contracts (see, as regards the use of such criteria as criteria for awarding a contract relating to the management of the operation of a route in the urban bus network, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 57).

61 Therefore, it is not impossible that a technical reason relating to the protection of the environment may be taken into account in an assessment of whether the contract at issue may be awarded to a given supplier.

62 However, the procedure used where there is a technical reason of that kind must comply with the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, *Concordia Bus Finland*, paragraph 63).

63 The risk of a breach of the principle of non-discrimination is particularly high where a contracting authority decides not to put a particular contract out to tender.

64 In this instance, the Court notes, first, that in the absence of any evidence to that effect the choice of thermal waste treatment cannot be regarded as a technical reason substantiating the claim that the contract could be awarded to only one particular supplier.

65 Second, the German Government's submission that the proximity of the waste disposal facility is a necessary consequence of the City of Braunschweig's decision that residual waste should be treated thermally is not borne out by any evidence and cannot therefore be regarded as a technical reason of that kind. More specifically, the German Government has not shown that the transport of waste over a greater distance would necessarily constitute a danger to the environment or to public health.

66 Third, the fact that a particular supplier is close to the local authority's area can likewise not amount, on its own, to a technical reason for the purpose of Article 11(3)(b) of Directive 92/50.

67 It follows that the Federal Republic of Germany has not established that the use of Article 11(3)(b) of Directive 92/50 was justified in this instance. Consequently, the Commission's application in Case C-28/01 must also be upheld.

68 In the light of the foregoing, the Court finds that:

— since the Municipality of Bockhorn failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Directive 92/50;

— since the City of Braunschweig awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive.

Costs

69 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission sought an order for costs against the Federal Republic of Germany and the latter has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the United Kingdom is to bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that since the Municipality of Bockhorn (Germany) failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award**

of that public service contract, failed to fulfil 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. Declares that since the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive;

3. Orders the Federal Republic of Germany to pay the costs;

4. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Wathelet Edward La Pergola

Jann Rosas

Delivered in open court in Luxembourg on 10 April 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber