

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 14 September 2006¹

I — Introductory remarks

1. This action for failure to fulfil obligations, like another such action brought in parallel,² relates to the question of what requirements can be inferred from primary law as regards the transparency of award procedures. In particular, the present case concerns the obligations that can be derived from the fundamental freedoms and general principles of law for ‘non-priority’ services, that is to say for services in respect of which Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts,³ replaced in the meantime by the ‘legislative package’, prescribes a special set of less stringent rules.

2. In addition, the present case concerns the interpretation and further development of the Court’s case-law in *Telaustria*⁴ and *Coname*.⁵

II — Legal context

3. The 21st recital in the preamble to Directive 92/50 states:

‘... full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised; ... contracts for other services need to be monitored for a certain period before a decision is taken on

1 — Original language: German.

2 — See my Opinion, also delivered today, in Case C-532/03 *Commission v Ireland*.

3 — OJ 1992 L 209, p. 1.

4 — Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745.

5 — Case C-231/03 [2005] ECR I-7287.

the full application of this Directive; ... the mechanism for such monitoring needs to be defined; ... this mechanism should at the same time enable those interested to share the relevant information’.

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

5. In Title II, Directive 92/50 provides for a ‘two-tier application’. Pursuant to Article 8, contracts which have as their object services listed in Annex I A are to be awarded in accordance with the provisions of Titles III to VI, that is to say in accordance with Articles 11 to 37. On the other hand, Article 9 provides that only Articles 14 and 16 are to be complied with in the case of contracts which have as their object services known as ‘non-priority services’, that is to say services listed in Annex I B.

6. Annex I B lists a series of categories of services. Category No 27 is ‘Other services’.

7. Article 14 contains provisions on technical specifications which are to be given in the general documents or the contractual documents relating to each contract.

8. Article 16 states:

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

...

3. In the case of public contracts for services listed in Annex I B, the contracting authorities shall indicate in the notice whether they agree on its publication.

4. The Commission shall draw up the rules for establishing regular reports on the basis of the notices referred to in paragraph 3, and for the publication of such reports, in accordance with the procedure laid down in Article 40(3).

...’

III — Facts, pre-litigation procedure and proceedings before the Court

9. On 4 December 1992, without prior advertising, the Irish Minister for Social Welfare concluded a contract with An Post, the Irish postal service, under which persons entitled to social welfare benefits could collect their payments from post offices.

10. The original term of the contract was from 1 January 1992 until 31 December 1996. In May 1997 the contract was extended to 31 December 1999. The competent Irish authorities had a prior information notice concerning the planned award of a contract published in the *Official Journal of the European Communities* of 16 February 1999. Nevertheless, it was decided in May 1999 to extend the contract with An Post to 31 December 2002. This decision was subsequently suspended.

11. Prompted by a complaint, the Commission began an exchange of correspondence with the Irish authorities in October 1999.

12. As a result of the Commission's intervention, Ireland has not formally extended the contract. An Post continues, however, to

provide the services, albeit on an ad hoc basis, so as to ensure continuity of social welfare payments.

13. In the Treaty infringement procedure initiated by the Commission under Article 226 EC, Ireland failed, in the Commission's view, to propose any solution to the problems raised. In light of the replies given by Ireland to the letter of formal notice of 26 June 2002 and the reasoned opinion of 17 December 2002, the Commission took the view that Ireland's approach with regard to renewal of the contract was contrary to the EC Treaty and it therefore brought the present action.

14. In its action the Commission claims that the Court should:

1. declare that, in deciding to entrust the provision of services to An Post without undertaking any prior advertising, Ireland has failed to comply with its obligations under the Treaty;

2. order Ireland to pay the Commission's costs.

15. Ireland contends that the Court should:
- 1. dismiss the Commission's application;
 - 2. order the Commission to pay Ireland's costs.

which contains a general obligation on contracting authorities to avoid all discrimination between service providers. This obligation is incumbent on the Irish authorities in respect of Annex I B services just as much as in respect of Annex I A services.

IV — Submissions of the principal parties and the interveners

A — The Commission

16. According to the Commission, the fact that the contract in question falls within the scope of Directive 92/50 does not preclude application of the obligations developed by the Court's case-law which are derived from the fundamental freedoms laid down in the Treaty and from the general principles which are given specific expression in those fundamental freedoms.

17. The obligation on Member States to comply with general principles is confirmed, within the directive itself, by Article 3(2),

18. The Commission's analysis is the only one which is consistent with the 'internal market logic of the Treaty'. The Court's case-law clearly holds that the Treaty provisions on freedom of establishment and freedom to provide services impose obligations on the Member States in respect of the award of public contracts outside the scope of the directives. This applies both to types of contracts (such as service concessions) that are not specifically covered and also to contracts of types that are covered but whose value falls below the thresholds set in the various directives.

19. It would therefore run directly counter to the logic of the internal market if, although Community law requires an appropriate level of advertising in such situations even if the contract falls outside the scope of the directives because of its structure or value, it were nevertheless open to the Member States not to advertise in any way

contracts (whose value is above the financial thresholds) solely on the ground that the services to which they relate fall within the scope of Annex I B to the directive.

20. National measures are to be assessed in the light of the provisions of a directive, and not also those of the EC Treaty, only where the directive brings about exhaustive harmonisation.

21. The Commission submits with regard to the argument that the objective which it pursues is attainable only by means of legislation that a directive cannot derogate from primary law. Obligations flowing from primary law overlie those deriving from directives. Secondary law is intended to supplement primary law and to facilitate achievement of the objectives laid down therein.

22. Finally, the Commission stresses that primary law imposes requirements far less strict than those of the directive. Contrary to the interveners' understanding, the Commission is not requiring a call for tenders in every case. Nor is the Commission demanding that Ireland must apply to non-priority services the rules applicable to priority services.

23. As regards legal certainty, the Commission points out that observance of limits imposed by primary law is nothing unusual in procurement matters.

B — *Ireland*

24. Ireland disputes that the Commission's submissions are correct. First, it argues that the Court's case-law cited by the Commission is not relevant, and supports that with a commentary on the individual cases and on the line of argument put forward by the Commission in relation to each of them. Second, given that Directive 92/50 is applicable, measures adopted by Ireland are to be assessed by reference to that directive and not the fundamental freedoms too.

25. In addition, the Commission's approach infringes the principles of transparency, the protection of legitimate expectations and legal certainty. Instead of putting forward a proposal for appropriate amendment of the directive, which it would have been obliged to do under Article 43 thereof, the Commission pursues 'nebulous concepts'. Moreover, the Commission did not include a corres-

pending amendment in its proposal which led in 2004 to the adoption of Directive 2004/18/EC.

the principle of legal certainty are to be noted; this principle would be infringed by the wide interpretation put forward by the Commission. In this context it was also pointed out that the breach of procedural provisions could result in an obligation for contracting authorities to pay damages.

26. The Commission is seeking to persuade the Court to act as legislature in the Council's stead. Its aim is to impose obligations on Ireland that are expressly ruled out by Directive 92/50. Thereby the Commission also harms the institutional balance. If the Commission can derive an obligation to advertise from the principle of equality, the question arises as to what purpose is served by the directive.

29. According to the Danish Government, an obligation to conduct a specific award procedure cannot be derived from Article 3 of the directive or from Articles 12 EC, 43 EC and 49 EC. To make non-priority services subject to detailed procedural provisions would, moreover, infringe the principles of proportionality and subsidiarity.

C — *The interveners*

27. The Kingdom of Denmark, the Republic of Finland, the French Republic and the Kingdom of the Netherlands have intervened in the proceedings in support of Ireland.

30. National measures are to be assessed by reference only to harmonising provisions and not primary law too. Furthermore, on its view of the law, the Commission should consequently have called the directive's validity into question.

28. In the submission of the Danish, Finnish, French and Netherlands Governments, Articles 14 and 16 of the directive alone apply to the services at issue. Other provisions relating to notices therefore do not apply to non-priority services. Nor can an obligation to advertise in all cases be derived from the Court's case-law. Also, the requirements of

31. The interveners refer to the history of Directive 92/50 and its objective. They also point out — partly with reference to the obligation of review under Directive 92/50 — that, in its proposal for amendment of the procurement directives, which *inter alia* led

to the adoption of Directive 2004/18, the Commission itself did not take up any modification of the system, under which a less stringent set of rules continues to apply to non-priority services.

of Community law are to be used as criteria of assessment. In a direct action such as an action for failure to fulfil obligations, the criteria of assessment are determined in accordance with the claims of the applicant — here, therefore, the Commission.

V — Appraisal

A — *Subject-matter of the present action for failure to fulfil obligations*

32. As regards the subject-matter of the present action, a number of points are not in dispute between the parties. That is true, first, of the fact that the supply of services that is at issue falls within Class 913 of the CPC (Central Product Classification). It is covered by Category No 27 ('Other services') in Annex I B to Directive 92/50. The services are thus to be classified as 'non-priority services'. It is also an undisputed fact that in the case in point the relevant threshold value under Article 7(1)(a) of Directive 92/50 has been exceeded.

33. Thus, while the question whether the supply of services at issue falls within the scope of Directive 92/50 and whether it is, in this regard, subject to a special set of rules can be answered with relative ease, it remains to be settled what other provisions

34. As is apparent from the application, the Commission claims that the Court should find a dual infringement. First, it complains that fundamental freedoms, in particular Articles 43 EC and 49 EC, have been infringed. Second, it complains that general principles of Community law, in particular the principles of transparency and of equality (non-discrimination), have been infringed.

35. In addition, a further provision has been discussed in the proceedings before the Court, namely Article 3(2) of Directive 92/50, under which contracting authorities are to ensure that there is no discrimination between different service providers.

36. The Commission seeks to deduce from this provision a requirement that applies to services of all kinds and therefore also to those at issue here, that is to say non-priority services.

37. The Commission has failed though to include Article 3(2) of Directive 92/50 in the form of order sought by it. It is true that the Commission refers to this provision of the directive as well in its application,⁶ but that is not sufficient. By that reference, the Commission seeks to prove only that the directive itself expressly lays down a prohibition of discrimination. The Commission would appear to regard that as confirmation that the Member States have to observe corresponding general principles of law. Moreover, in the reasoned opinion too the Commission complained of infringement of Articles 43 EC and 49 EC only.

38. The alleged infringement of general principles of law, on the other hand, is dealt with by the Commission not only in its legal assessment of the situation but also in the passage in the application where it summarises, by way of conclusion, the provisions which it considers to have been breached (paragraph 56). That is also true of the complaint that Articles 43 EC and 49 EC have been infringed.

39. The question as to what effects Article 3(2) of Directive 92/50 has with regard to 'non-priority services' is therefore not to be examined in detail.

B — *Can the directives be supplemented by primary law?*

40. The present proceedings do not concern the applicability of primary law outside the procurement directives, an issue that has been settled at least in principle, as under the Court's case-law⁷ the provisions of primary law apply if the award is not covered by any of the directives. The present case, on the other hand, concerns the question whether requirements of primary law apply also to situations which fall within the directives.

41. However, this legal problem is also not entirely novel. The Court's case-law should be recalled under which rules of primary law, in particular fundamental freedoms, also apply to procurement which is covered by the procurement directives.

42. The Court thus held in an action for failure to fulfil obligations, which also related to Ireland, that 'by allowing the inclusion in the contract specification for tender for a public works contract of a clause stipulating ... , Ireland [had] failed to fulfil its obligations

6 — Paragraph 43.

7 — *Coname* (cited in footnote 5), paragraph 16, and Case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32.

under Article 30 of the EEC Treaty'.⁸ The Court made a similar declaration in another action for failure to fulfil obligations, finding, in the case concerning the Storebælt, that Articles 30, 48 and 59 of the EEC Treaty had been infringed.⁹

43. In addition, a recent judgment in an action for failure to fulfil obligations should be mentioned, where the Court declared that Article 49 EC had been infringed. This case, like the case concerning the Storebælt, concerned the content of tendering specifications, in particular sub-criteria for the award of contracts.¹⁰

44. The principle under which the directives are, in their interpretation, to be completed or supplemented by primary law has, however, been confirmed by the Court in other situations too.

45. Valuable guidance is provided by the judgment in *HI*, where the Court held that 'even though, apart from the duty to notify the reasons for the withdrawal of the invitation to tender, Directive 92/50 contains no specific provision concerning the substantive or formal conditions for that deci-

sion, the fact remains that the latter is still subject to fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services'.¹¹

46. Paragraph 47 of that judgment is couched by the Court in more general terms: 'even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, ...'.

47. The principle under which primary law is to be taken into account supplementarily has been confirmed by the Court in a further decision.¹² The fact the Court chose to give that decision in the form of an order shows that it at least considers this legal question to be settled.

48. Similarly, the Court held in *Makedoniko Metro* that 'even if the Community directives on public procurement *do not contain specifically applicable provisions*, the general

8 — Case 45/87 *Commission v Ireland* [1988] ECR I-4929, paragraph 27.

9 — Case C-243/89 *Commission v Denmark* [1993] ECR I-3353.

10 — See the judgments of 27 October 2005 in Case C-158/03 *Commission v Spain*, not published in the ECR, and in the parallel preliminary reference proceedings, Case C-234/03 *Contse and Others* [2005] ECR I-9315.

11 — Case C-92/00 [2002] ECR I-5553, paragraph 42.

12 — Order in Case C-244/02 *Kauppatalo Hansel* [2003] ECR I-12139, paragraphs 31 and 33.

principles of Community law ... govern procedures for the award of public contracts'.¹³

49. While the judgment in *Unitron*,¹⁴ which has been discussed in the present proceedings, admittedly also concerns transparency, that case, however, concerned the prohibition of discrimination on grounds of nationality and not the requirement of equal treatment as a general principle of law, that is to say the principle of equality.

50. It can therefore be stated that the principle under which primary law also applies to awards which fall within the procurement directives has been confirmed by the Court. The scope of this principle must, however, be examined. Under the principle that informs the relationship between primary and secondary law, application of primary law is precluded in so far as the situation is governed by exhaustive provisions of secondary law.¹⁵ Community law therefore imposes limits on the application of primary law to supplement the directives.

13 — Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, paragraph 69 (emphasis added).

14 — Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 30 et seq.

15 — Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64.

51. While it has also been made clear in the meantime by the Court's case-law that the procurement directives do not regulate exhaustively the content of award criteria and the procedure for withdrawal, it remains to be considered how the rules relating to the obligation of transparency in respect of non-priority services are to be assessed.

C — Is the obligation of transparency in respect of non-priority services regulated exhaustively in Directive 92/50?

52. An essential feature of the present proceedings is that they relate to the applicability of primary law in connection with an award that is subject to a special set of rules under a procurement directive.

53. The category constituted by non-priority services is, incidentally, not the only category of awards for which a special set of rules is laid down in the procurement directives. Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts¹⁶ lays down a less stringent regime for public works concessions. Similarly to Article 9 of Directive 92/50, Article 3(1) of

16 — OJ 1993 L 199, p. 54.

that directive lays down which of the directive's provisions are to be applied. In contrast to the rules in Directive 92/50 concerning non-priority services, Directive 93/37 does, however, make public works concessions also subject to the obligation to have a notice published with a certain minimum content (Article 11).

54. It should be made clear that the present proceedings are not concerned with whether the obligations which Directive 92/50 lays down for priority services also have effect in the case of non-priority services, that is to say whether those obligations are to be applied directly or at least by analogy.

55. It must also be noted that the issue is not whether the entire directive is to be classified as an exhaustive harmonising measure but whether the relevant aspect is regulated exhaustively. In Community law it is in fact typical for directives to contain exhaustive rules for certain situations and not others.¹⁷ The Court thus held with regard to one of the procurement directives that it did not lay down a uniform and exhaustive body of

Community rules and that the Member States had to comply with all the relevant provisions of Community law.¹⁸

56. Requirements under primary law are applicable to the award of contracts for non-priority services in so far as there is, *in that connection*, no exhaustive harmonisation. It is not, on the other hand, a precondition that Directive 92/50 must not be an exhaustive harmonising measure in respect of non-priority services in their entirety. In these proceedings it is to be examined only whether the rules in Directive 92/50 on the obligation of transparency are exhaustive, as Ireland, France and the Netherlands submit. Should that not be the case, the Court's case-law set out above on award criteria and withdrawal could be applied.

57. Furthermore, in this context the judgment in *Contse* is to be mentioned, where the Court proceeded on the basis that fundamental freedoms are applicable to non-priority services. It may be noted here merely in passing that, pursuant to Article 9 of Directive 92/50, not even the rules in the directive requiring to be supplemented on award criteria apply to non-priority services.

17 — See, for example, Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, paragraphs 55 and 56, and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 53 et seq.

18 — That was held, with regard to the directive adopted in 1971 on the coordination of procedures for the award of public works contracts, in Joined Cases 27/86, 28/86 and 29/86 *CEI and Others* [1987] ECR 3347, paragraph 15.

58. However, the present proceedings concern neither the drawing up of award criteria nor withdrawal, but a quite specific aspect of transparency, namely prior advertising of a contract. The question whether Directive 92/50 exhaustively harmonises the aspect of the obligation of transparency relevant here is, according to the Court's case-law, to be determined in the light of the wording of the relevant provision, the context in which it occurs and the objectives of the rules of which it is part.¹⁹

59. As the Court has already held, the starting point for the interpretation is the 21st recital in the preamble to Directive 92/50 and Article 9 thereof.²⁰

60. The 21st recital states that application of the directive in full must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-border trade to be realised, the contracts for other services during that period being subject only to monitoring.

19 — *Compassion in World Farming* (cited in footnote 17), paragraph 49 et seq., and Case C-128/94 *Hönig* [1995] ECR I-3389, paragraph 9.

20 — Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, paragraphs 46 and 47.

61. The wording of the central provision, that is to say of Article 9 of Directive 92/50, makes it clear that contracts for non-priority services are to be awarded in accordance with provisions that are expressly referred to. Those provisions are Articles 14 and 16. While Article 14 lays down 'Common rules in the technical field', Article 16 regulates *certain* aspects of transparency. With regard to transparency in respect of non-priority services, the Community legislature thus referred not to the whole of Title V of the Directive, which is headed 'Common advertising rules', but only to a part of the title.

62. The Community legislature thus made a conscious decision to lay down only certain obligations of transparency as regards non-priority services. Article 16(1) for example requires the results of award procedures to be sent to the Office for Official Publications.

63. The decision of the Community legislature not to refer also to the important Article 11 is, however, central to the present action for failure to fulfil obligations. This provision lays down, inter alia, the conditions under which a contracting authority may opt for a negotiated procedure without publication of a contract notice. This allows an award by private treaty (a direct award), that is to say an award without advertising. Those requirements were thus not applied to non-priority services.

64. Article 16(2) states that Articles 17 to 20 apply only to priority services. Those provisions essentially lay down the models to be used for notices and the time-limits to be observed.

65. The Commission is therefore correct in its view that Articles 14 and 16 of the directive specifically do not regulate the aspect at issue in the present case. However, the Commission draws the premature conclusion that this is in itself sufficient to bring primary law into play. It must be examined first whether it is to be concluded from the fact that only certain aspects are expressly regulated that there is no exhaustive harmonisation.

66. That question is preliminary to the question whether, while the strict requirements of Directive 92/50 admittedly do not have to be observed as regards non-priority services, less strict requirements of primary law must be at least.

67. The answer to this preliminary question must be to the effect that Directive 92/50 does not contain exhaustive rules on transparency in relation to the award of contracts for non-priority services, and instead primary law is to be taken into account supplementarily.

68. The effect of the contrary view would be that awards that fall entirely outside Directive 92/50, for example service concessions, would be subject to stricter requirements, namely those under *Telaustria* and *Coname*, than non-priority services. An alternative solution would of course be to lower the standard, that is to say the degree of transparency, for awards falling outside the directive and to apply to non-priority services that lower standard or one slightly higher.

D — Specific content of the provision alleged to have been infringed

69. In order to be able to declare that Community law has been infringed, the Court must first ascertain the content of the provision whose infringement is alleged. If the criterion of assessment is not clearly defined, it is not possible to appraise the conduct of the Member State in question.

70. In a direct action such as the present Treaty infringement proceedings, the applicant — here, therefore, the Commission —

must specify what the obligation owed by the defendant Member State involved.

has frequently been referred to in the proceedings. The most recent leading decision of the Court on the problem in point, the judgment in *Coname*, also yields only generally adhered to principles, but no concrete obligations.

71. In the written procedure, the Commission admittedly did not simply refer to the existence of the obligations resulting from Articles 43 EC and 49 EC and from certain principles, but submitted at least that according to the Court's case-law on those rules of primary law an appropriate degree of transparency must be ensured. However, the Commission essentially left it at that.

72. The Commission cites in this context a judgment²¹ on two actions for failure to fulfil obligations. It is to be observed in this regard that there was a clear obligation in those actions, namely an obligation under Directive 93/37. That directive contained an express obligation to publish a contract notice, whose minimum content was indeed prescribed in certain models.

73. In the present proceedings, such requirements of Community law are just lacking. The directive applicable in this case does not prescribe any prior notice. That is also true of the case-law on the fundamental freedoms and general principles of law which

74. If the present action for failure to fulfil obligations concerned the compatibility of national public-procurement legislation with Community law, a more tolerant view could be taken with regard to the burden of proof on the applicant. However, the action is concerned with proceeding against specific conduct, that is to say against a specific supply. The Commission's submissions should be correspondingly specific.

75. While it is true that, as a matter of law, the present action relates to one particular instance, it is nevertheless concerned with a legal problem of general practical importance. How should the numerous individual contracting authorities that award contracts and concessions in the Member States structure their practices in relation to procurement if the legal framework is so ill-defined and not even the Commission, which the Member States face in actions for failure to fulfil obligations, including in the prior administrative procedure, is able or wishes to state in specific terms what particular requirements are to be observed? The fact that, in the absence of an interpretative communication on the matter, it

²¹ — Judgment of 27 October 2005 in Joined Cases C-187/04 and C-188/04 *Commission v Italy*, not published in the ECR.

has been unclear until the last few weeks precisely what attitude the Commission takes must not operate to the detriment of the affected Member States. This very fact should have prompted the Commission to indicate more specifically the content of the obligation which it alleges to have been infringed.

76. From this angle, the following statement of Advocate General Jacobs in another procurement case is also true of the Commission in the present case: 'It did not however specify in what concrete ways those requirements could be fulfilled.'²²

77. The principle requiring an appropriate degree of transparency thus entails as a rule the publication of a (contract) notice (a call for tenders). This rule is, however, subject to a series of exceptions and grounds of justification, which I have already addressed in detail in my Opinion in *Coname*²³ and in my Opinion delivered today in the action before the Court (C-532/03) parallel to the present action for failure to fulfil obligations.²⁴ It must therefore be examined below whether one of those exceptions or grounds of justification is applicable in the present proceedings. Since the Court does not

consider that of its own motion, the following remarks are limited to the relevant arguments put forward in the proceedings.

78. It must be stated at the outset that the defendant Member State has been unable to prove the presence of a ground of justification expressly provided for in the Treaty or one recognised by case-law. The same is true as regards the application by analogy of one of the exceptions laid down in the directives.²⁵

79. It cannot be ruled out that in some cases an award procedure may be conducted without a prior contract notice, that is to say without advertising. However, such circumstances were not present in the case in point or at least have not been proved.

80. Even the fact that the degree of transparency depends on the specific circumstances of the award, such as its subject-matter and value, does not mean in the case in point that the obligation to conduct some advertising could be dispensed with.

81. It is also necessary to consider Ireland's submission that the Commission's actions infringe the principles of the protection of

22 — Opinion of Advocate General Jacobs of 21 April 2005 in Case C-174/03 *Impresa Portuale di Cagliari* (case removed from the register by order of 23 March 2006), not published in the ECR, paragraph 77.

23 — Opinion in *Coname*, cited in footnote 5, point 58 et seq.

24 — Point 86 et seq.

25 — For example, Article 11(3) of Directive 92/50 and Article 31 of Directive 2004/18.

legitimate expectations and of legal certainty. In this regard, reference must be made to a circumstance not discussed in the proceedings. The defendant Member State adopted the measure which the Commission criticises in May 1999, whereas the judgment in *Telaustria*, where the principle of transparency under primary law was presented, was not, however, delivered until 2000.

84. Overall, examination of the process complained of by the Commission has thus shown that there were no circumstances which would have allowed the services at issue to be provided without any advertising being undertaken.

82. However, it is to be remembered that judgments interpreting Community law which are delivered on orders for references under Article 234 EC in principle have retroactive effect. No exception to this principle is made in the judgments in *Telaustria* and *Coname*. In actions for failure to fulfil obligations under Article 226 EC, such a possibility is not provided for.

VI — Costs

85. 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 Ireland is unsuccessful, and the Commission has applied for Ireland to pay its costs, Ireland should accordingly be ordered to pay the Commission's costs.

83. Questions of law concerning the appraisal of Court judgments declaring the Member States to owe obligations which had not hitherto been anticipated might perhaps be settled in a second action for failure to fulfil obligations under Article 228 EC, but here only if the judgment in the present action is not complied with. That circumstance could then be taken into account when determining the financial penalty.

86. The Kingdom of Denmark, the Republic of Finland, the French Republic and the Kingdom of the Netherlands have intervened in the proceedings. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the interveners should bear their own costs.

VII — Conclusion

87. In accordance with all of the foregoing, I propose that the Court should:

- (1) declare that, in deciding to entrust the provision of services to An Post without a prior notice, although there were no circumstances which would have allowed no advertising at all, Ireland has failed to comply with its obligations under the Treaty;
- (2) order Ireland to pay the Commission's costs;
- (3) order the Kingdom of Denmark, the Republic of Finland, the French Republic and the Kingdom of the Netherlands to bear their own costs.