OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 28 March 2007 [1]

I — Introduction

1. The basis for the present case is an action brought by the Commission pursuant to the second paragraph of Article 228(2) EC against the Federal Republic of Germany for its failure to fulfil obligations. By its action the Commission is seeking a declaration from the Court of Justice of the European Communities that the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, inasmuch as it has not taken the necessary measures to comply with the judgment of the Court of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* regarding the award of a contract for the collection of waste water by the municipality of Bockhorn and of a contract for waste disposal by the City of Brunswick. [2]

2. In that judgment, the Court of Justice declared that the Federal Republic of Germany had disregarded the Community provisions concerning the award of public contracts. It considered it to be established, first, that the municipality of Bockhorn had failed to invite tenders for the award of the contract for the collection of its waste water and had 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*, as prescribed by Article 8 in conjunction with Articles 15(2) and 16(1) of Directive 92/50/EEC. [3] The Court further declared that the City of Brunswick had 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 that directive for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met.

3. The dispute currently pending before the Court focuses on the conclusions that the Federal Republic of Germany should have drawn from the judgment of 10 April 2003 in order to fulfil its obligation to ensure that compliance with Community law was restored. While the Commission takes the

1 — Original language: Slovenian.

2 — Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609.

3 — 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).

view that the contracts under private law initially concluded for a minimum term of 30 years should have been rescinded, the Federal Republic denies that it is under such a legal obligation, essentially citing Article 2(6) of Directive 89/665/EEC,[4] under which Member States are entitled to limit the powers of the body responsible for review procedures to the award of damages.

II — Legal background

4. Article 228 EC provides:

'1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

...'

5. Article 2(6) of Directive 89/665/EEC provides:

'The 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

4 — 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 for the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

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.'

III — Background

A — The judgment in Joined Cases C-20/01 and C-28/01

6. At points 1 and 2 of the operative part of its judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* the Court:

'1. Declare[d] 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. Declare[d] 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;'.

7. For a detailed presentation of the facts and procedure, I refer to the judgment mentioned above.[5]

B — The pre-litigation procedure in Case C-503/04

8. By letter of 27 June 2003, the Commission requested the German Government to notify to it the measures taken to comply with the judgment in *Commission* v *Germany*. In its letter of 7 August 2003, the German Government replied that the Federal Republic of Germany had always acknowledged the infringements and had taken all measures

5 — Judgment in *Commission* v *Germany*, cited in footnote 2, at paragraphs 6 to 20.

necessary to prevent the re-occurrence of such infringements in future. It maintained, however, that the Federal Republic of Germany was not obliged to terminate the two contracts at issue in the case.

9. By letter of 17 October 2003, the Commission called on the German authorities to submit their observations within two months.

10. In its letter of 23 December 2003, the German Government reiterated that the Federal Republic of Germany had always acknowledged and regretted the infringements and had taken all measures necessary to prevent a re-occurrence of such infringements in future. In early December 2003, it had also urgently requested the *Land* Government of Lower Saxony by letter to comply with the public procurement legislation in force and had called on it to give an account of the measures intended to help prevent similar infringements in future. The German Government referred in addition to Paragraph 13 of the Vergabeverordnung (Public Procurement Regulations), which had entered into force on 1 February 2001, under which a contract concluded by a contracting authority is invalid if the unsuccessful tenderers have not been informed of the conclusion of that contract 14 days at the latest prior to its award. It also reiterated its view that Community law did not require the two contracts to be terminated, as had been stated in *Commission* v *Germany*.

11. By letter of 1 April 2004, the Commission sent a reasoned opinion to the Federal Republic of Germany. In it, the Commission expressed its conviction that it was not sufficient to prevent infringements of that kind in future procurement procedures as the contracts complained of would continue to produce effects for decades. It was essential to introduce measures to end the Treaty infringement in the cases involving procurement law dealt with in the judgment of 10 April 2003 in order to comply with that judgment. It laid down a period for compliance of two months from receipt of that letter. The Federal Republic of Germany replied by letter of 7 June 2004, reaffirming the view it had previously expressed.

12. Since it took the view that the Federal Republic of Germany had failed to take the necessary measures to comply with the judgment in *Commission* v *Germany*, the Commission brought the present action on 7 December 2004.

IV — Proceedings before the Court of Justice

13. According to its original wording, the Commission's application was aimed, first, at

obtaining a declaration that the Federal Republic of Germany had failed to fulfil its obligations under Article 228(1) EC, inasmuch as it had not taken the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* regarding the award of a contract for the collection of waste water by the municipality of Bockhorn and of a contract for waste disposal by the City of Brunswick. The application was aimed, secondly, at obtaining an order that the Federal Republic of Germany pay into the Commission's 'own resources account of the European Community' a penalty of EUR 31 680 for each day of delay in implementing the measures necessary to comply with the judgment in respect of the award of a contract for the collection of waste water by the municipality of Bockhorn, and of EUR 126 720 for each day of delay in implementing the measures necessary to comply with the judgment in respect of the award of a contract for waste disposal by the City of Brunswick. The Commission further claimed that the Federal Republic of Germany should be ordered to pay the costs of the proceedings.

14. In the course of the written procedure in the case, the disputed contracts were rescinded. In its defence of 14 February 2005, registered at the Court on 15 February 2005, the Federal Republic of Germany stated that a contract rescinding the contract for the collection of waste water had been concluded on 3 January 2005 between the municipality of Bockhorn and the relevant undertaking. In its defence it also claimed that the action should be dismissed, or, in the alternative, that the effect of a judgment upholding the application should be limited to the future and that the Commission should be ordered to pay the costs of the proceedings.

15. In its reply of 26 April 2005, the Commission stated that it no longer sought to pursue the action as a whole or the specific claim for the imposition of a penalty payment in respect of that part of the action.

16. In its rejoinder of 28 July 2005, the Federal Republic of Germany advised that a contract cancelling the previous contract had also been concluded in the meantime (on 4 and 5 July 2005) by the City of Brunswick, and claimed that the proceedings should be discontinued in their entirety in accordance with Article 92(2), in conjunction with Article 91(3) and (4), of the Rules of Procedure of the Court and that an order should be issued for the case to be removed from the register, or, in the alternative, that the action as a whole should be dismissed as inadmissible. The Federal Republic of Germany argued, for the sake of completeness, that an order to pay a lump sum was no longer possible on procedural and substantive grounds.

17. As a result of that information supplied by the Federal Republic of Germany, the Commission declared in its observations of 6 December 2005 that it would henceforth pursue its original action only for the purposes of obtaining a declaration that the

Federal Republic of Germany had failed to comply by the relevant date with the judgment of the Court regarding the contract concluded by the City of Brunswick. Furthermore, in the light of the subsequent rescission of that second contract, it no longer considered it necessary to seek the imposition of a periodic penalty payment. In those observations, the Commission pointed out that although it was still possible to impose a lump sum penalty, it did not consider a claim to that end to be appropriate in the circumstances.

18. By order of the President of the Court of Justice of 6 June 2005, the Kingdom of the Netherlands, the French Republic and the Republic of Finland were granted leave to intervene under Article 93(1) of the Rules of Procedure in support of the form of order sought by the Federal Republic of Germany.

19. The Commission, the Federal Republic of Germany and the French Republic took part in the hearing held on 7 December 2006.

V — Pleas in law and main arguments

20. The Federal Republic of Germany raises a number of pleas of inadmissibility and considers the action also to be unfounded on substantive grounds.

A — *Whether the action is admissible*

1. Whether the procedure is lawful

21. The German Government first claims that the Commission does not have an interest in bringing the proceedings as it failed to apply for interpretation of the judgment pursuant to Article 102 of the Rules of Procedure of the Court of Justice. The dispute over the consequences ensuing from the judgment in *Commission* v *Germany* should have been resolved by making such an application rather than by bringing an action under Article 228 EC. It also claims, that by bringing an action immediately for the imposition of a periodic penalty payment without first making an application for interpretation, the Commission is offending against the principle of proportionality.

22. In support of its action, the Commission maintains that the Federal Republic of Germany did not take the necessary measures to comply with the judgment of 10 April 2003, although it was obliged to do so under Article 228(1) EC. In that judgment, the Court had acknowledged the Commission's authority to obtain declarations, by means of infringement proceedings, that Member States have failed to fulfil their obligations under Community law — for instance, by concluding long-term service contracts in

disregard of public procurement law — for the purpose of bringing such infringements to an end.

23. The Commission objects to the view that the dispute could have been resolved by an application for interpretation of the judgment under Article 102 of the Rules of Procedure. In the proceedings under Article 226 EC which led to the judgment of 10 April 2003, the Court had established a failure to fulfil obligations. A judgment upholding the application could have done no more than that, given that it does not fall to the Court to rule in such judgments on the measures which a Member State has to take to comply with that judgment.

2. Disappearance of the subject-matter of the proceedings

24. The German Government proposes that the proceedings should be discontinued pursuant to Article 92(2) of the Rules of Procedure, since it considers the conditions of that provision to be met. The contract awarded by the municipality of Bockhorn for the collection of waste water and the contract awarded by the City of Brunswick for waste disposal, the continued existence of which had prompted the Commission to bring the proceedings, have both been rescinded. As a result, the action has now become devoid of purpose and there is no need to adjudicate on it.

25. The German Government contends in the alternative that the action must be dismissed as inadmissible on the ground that there is no interest in bringing the proceedings because, the contracts at issue having been rescinded, there is no longer any cause to implement the Court's judgment in Joined Cases C-20/01 and C-28/01. In assessing whether there continues to be an interest in bringing proceedings, the crucial factor to be borne in mind in the context of an action under Article 228(2) EC is the date of the last hearing and not, for instance, the expiry of the period prescribed in the reasoned opinion.

26. The Netherlands Government concurs with the observations made by the German Government and proposes that the Court should dismiss the action as inadmissible on the ground that there is no interest in bringing proceedings, because they have become devoid of purpose on account of the fact that the waste disposal contract concluded by the City of Brunswick has in the meantime been cancelled.

27. The Commission takes the view that, in proceedings under Article 228(2) EC, just as in proceedings under Article 226 EC, a failure to fulfil obligations must have occurred by the date of expiry of the period imposed on the Member State in the reasoned opinion for the action to be admissible. If the Member State has not taken the necessary measures to comply with the judgment of the Court within that period, the Commission may bring an action before the Court. Once an action is admissible, it argues, it cannot become inadmissible as a result of subsequent events.

28. The Commission maintains that it has an interest in clarifying whether the Federal Republic of Germany had already complied with the judgment in Joined Cases C-20/01 and C-28/01 by the relevant date, when the contract concluded by the City of Brunswick still existed. It had not done so, in its view, because an obligation to rescind that contract arose out of that judgment. Thus, the action must be upheld.

B — *The merits*

29. In its reasoning on the merits of the action the Commission refers essentially to its observations on admissibility. It takes the view that the Federal Republic of Germany did not take sufficient measures to comply with the judgment mentioned above, since it did not cancel the waste disposal contract concluded by the City of Brunswick before expiry of the period prescribed in the reasoned opinion. A Member State's obligation to bring an end to the infringement established by the Court and the Commission's powers to ensure that that obligation is performed are laid down in Article 228 EC, that is to say, in primary Community law. As a provision of secondary Community legislation, Article 2(6) of Directive 89/665 cannot in any way alter the implications of that obligation. Moreover, the review procedure provided for in Directive 89/665 pursues a more specific purpose than infringement proceedings.

30. The German Government, on the other hand, considers the action to be unfounded, as it regards the measures mentioned in its letter of 23 December 2003 as sufficient to comply with the judgment in question. The necessary and, in its view, sufficient measures had consisted in express instructions at national and *Land* level to comply strictly with the provisions of public procurement law.

31. It further takes the view, supported by the Netherlands, French and Finnish Governments, that a declaration of a failure to fulfil obligations under Article 226 EC cannot give rise to an obligation to rescind a contract resulting from an award procedure. Such an interpretation is, above all, contrary to Article 2(6) of Directive 89/665, which permits the Member States, after the conclusion of a contract, to limit the powers of the body responsible for the review procedures to awarding damages to any person harmed by the improper conduct of the contracting authorities. Under that provision, the contracts concluded by the contracting authorities can thus continue to be effective. Since the Federal Republic of Germany has availed itself of that possibility, Community law does not mean that the contractual obligations undertaken are unlawful. Furthermore, an obligation to

rescind the contracts would be contrary to the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda*, Article 295 EC, the fundamental right to property and the case-law of the Court on the temporal limitation of the effects of a judgment in damages.

32. The German Government further points out that, under German law and on the basis of the relevant provisions of the contracts at issue in this case, the contracts could not be rescinded or could be rescinded but only at the expense of incurring a disproportionately high risk of being found liable in damages.

VI — Legal assessment

33. As mentioned at the start of this Opinion, the central issue in the present dispute is the conclusions that the Federal Republic of Germany should have drawn from the judgment of 10 April 2003 in order to fulfil its obligation to ensure that compliance with Community law was restored.

34. However, that unduly straightforward presentation of the subject-matter of the dispute belies its complexity from a legal point of view, especially as it raises points of law directly concerning both the admissibility and the merits of the action.

A — *Whether the action is admissible*

1. Whether the procedure is lawful

35. The first point concerns the complaint made by the German Government regarding the admissibility of infringement proceedings brought by the Commission pursuant to the second subparagraph of Article 228(2) EC. In its view, the Commission should have first made an application for interpretation of the judgment in Joined Cases C-20/01 and C-28/01 in accordance with Article 102 of the Rules of Procedure of the Court. In addition, the fact that the action for the imposition of a periodic penalty payment was brought immediately without a prior application for interpretation offends against the principle of proportionality.

36. In my view, no legal basis for that view of the law can be found in the Treaties, nor is it compatible with Community procedural law. On the contrary, that view seems to be based on a false understanding of the nature of

infringement proceedings under the second subparagraph of Article 228(2) EC, and it is consequently essential that the matter be clarified.

37. It must first be noted in this regard that the procedural law of the Community does not accord any precedence to the application for interpretation of a judgment over proceedings brought under the second subparagraph of Article 228(2) EC. By the same token, procedural law does not require the Commission to make such an application before it may bring an action. The separate procedures before the Court differ in their criteria and objectives; thus they must be regarded in principle as independent of one another and can take priority over other types of procedure only where regard is had to their specific purpose in a particular case.

38. In accordance with Article 102 of the Rules of Procedure, for an application for interpretation of a judgment to be admissible, it must concern the operative part of the judgment in question, and the essential grounds thereof, and seek to resolve an obscurity or ambiguity that may affect the meaning or scope of that judgment, in so far as that judgment was intended to resolve the particular case before the Court. According to the case-law of the Court, an application for interpretation of a judgment is therefore inadmissible where it relates to matters not decided upon by the judgment concerned or seeks to obtain from the Court in question an opinion on the application, implementation or consequences of its judgment. [6]

39. In these proceedings the Commission and the German Government are in dispute as to whether a legal obligation on the part of the Federal Republic of Germany to terminate the contracts for the provision of services can be inferred from the judgment of 10 April 2003. In such a case, the Commission's application can be construed only as a claim seeking a declaration from the Court, binding on both parties, regarding the application and implementation or, as the case may be, the consequences of the judgment delivered. The subject-matter of the proceedings is, after all, the practical implementation of a judicial decision by the Federal Republic of Germany and not, for instance, an obscurity or ambiguity involving that decision. On the basis of the criteria developed by the case-law, any application under Article 102 of the Rules of Procedure would therefore have to be regarded as inadmissible in the absence of any decision which might properly be the subject of interpretation.

40. I should like in addition to refer to Advocate General Geelhoed's remarks in

6 — Judgments in Case 5/55 *Assider* v *High Authority* [1955] ECR 135; Case 70/63 A *High Authority* v *Collotti and Court of Justice* [1965] ECR 275; and Case 110/63 A *Willame* v *Commission of the EAEC* [1966] ECR 287; Orders in Case 9/81 INT *Court of Auditors* v *Williams* [1983] ECR 2859; Case 206/81 A *Alvarez* v *Parliament* [1983] ECR 2865; Case 25/86 *Suss* v *Commission* [1986] ECR 3929; Joined Cases 146/85 and 431/85 INT *Maindiaux and Others* v *Economic and Social Committee and Others* [1988] ECR 2003; and Case T-22/91 INT *Raiola-Denti and Others* v *Council* [1993] ECR II-817, paragraph 6.

Commission v *France*, that any obligation to comply with a ruling of the Court may involve questions as to the precise content of that ruling. Where necessary, they must be resolved by having recourse to the procedure laid down under Article 228 EC.[7] That comment by the Advocate General can be adopted without any difficulty in my view, especially as the infringement procedure is a procedure the exclusive aim of which, restricted by its declaratory nature, is to secure a declaration from the Court of a failure to fulfil obligations.[8]

41. Because the Court is restricted to declaring a failure to fulfil obligations, it can be difficult in some cases for the Member States concerned to determine which particular measures they must take in order to put an end to the infringement complained of. In such cases, the Court endeavours to lay down a framework in the grounds of the judgment within which the contested measure may continue to be regarded as consistent with the Treaty.[9] The Court can also provide assistance as to interpretation in the operative part of the judgment by defining the failure to fulfil obligations which has been established either broadly or narrowly.[10] Thus, while the powers of the Court in infringement proceedings are limited, that does not mean in any way is that it is prevented in general from referring in the judgment itself to the manner and extent of the possibilities available for rectifying the infringement in the circumstances of the case. The wording of Article 228 EC, which expressly refers to the Member State concerned being required to take the necessary measures to comply with the judgment, confirms that of such a course of action is permissible.[11]

42. Accordingly, the scope of the obligation on the Member State concerned to take steps to apply the judgment can be determined by the parties to the proceedings in an individual case simply by interpreting the judgment establishing the failure to fulfil obligations, without there being any need for an application for interpretation pursuant to Article 102 of the Rules of Procedure.

43. It is apparent from all the foregoing that infringement proceedings under Article 228 EC are indeed the correct procedure for clarifying any issues concerning the obligation of a Member State to implement a judgment of the Court.[12] Their specific nature means that those proceedings over-

7 — Opinion of Advocate General Geelhoed in Case C-177/04 *Commission* v *France* [2006] ECR I-2461, point 43.

8 — Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraphs 25 and 26; Opinion of Advocate General Reischl in Case 141/78 *France* v *United Kingdom* [1979] ECR 2923. Schütz, H.-J., Bruha, T., König, D., *Casebook Europarecht*, Beck, Munich, 2004, p. 333; Cremer, W., in Calliess/Ruffert (Ed.), *Kommentar zu EU-Vertrag und EG-Vertrag*, on Article 228(1) EC, and Karpenstein, P., Karpenstein, U., in Grabitz/Hilf (Ed.), *Das Recht der Europäischen Union*, Vol. III, Art. 228 EC, paragraph 6, each point out that, as a declaratory judgment, the ruling is neither an instrument for enforcement nor does it modify the legal position. As a result of the finding that a Member State has failed to fulfil its obligations, that State is obliged under Article 228(1) EC to bring an end to that infringement. However, the Court may not itself set aside the measure which gave rise to the infringement or order the defaulting Member State to correct the infringement.

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

10 — Burgi, M., in *Handbuch des Rechtsschutzes der Europäischen Union (Ed. Rengeling/Middeke/Gellermann)*, Second edition, Beck, Munich, 2003, Section 6, paragraph 49.

11 — Karpenstein, P., Karpenstein, U., in Grabitz/Hilf (Ed.), *Das Recht der Europäischen Union*, Vol. III, Art. 228 EC, paragraph 6.

12 — See Fernández Martín, J. M., *The EC Public Procurement Rules: A Critical Analysis*, Clarendon Press, Oxford, 1996, p. 220.

ride all other types of procedure, including applications for interpretation of a judgment, and consequently a discussion on the proportionality of such an action is superfluous.

2. The relationship of the proceedings under Article 228(2) EC to the correction procedure laid down under Article 3 of Directive 89/665

44. In so far as the German Government objects to the Commission taking action against the presumed continuation of an infringement of Community law in the form of an action under Article 228(2) EC, and relies on its national review measures and penalties and on the correction procedure available to the Commission under Article 3 of Directive 89/665/EEC, that submission is to be interpreted primarily as a plea of inadmissibility as regards the action.

45. The answer to that plea must be that measures taken by the Commission pursuant to Article 226 EC remain unaffected by the approximation of the respective laws of the Member States to the provisions of Directive 89/665.[13] Where it believes that a contracting authority has infringed Community law, the Commission may, of its own motion, bring infringement proceedings under Article 226 EC against the Member State concerned, irrespective of the national measures taken to transpose Directive 89/665.[14] Not only the precedence of primary law over the provisions of secondary legislation contained in Directive 89/665/EEC, but also the differing function of the review mechanisms laid down therein mean that infringement proceedings cannot be excluded as a relevant cause of action.[15]

46. It is true that Article 2(6) of Directive 89/665/EEC empowers the Member States to limit national legal protection, after the conclusion of a contract, to the awarding of damages to the persons harmed by such an infringement. However, that does not mean that the conduct of a contracting authority is to be regarded in every case as being in compliance with Community law.[16] On the contrary, it is for the Court alone to establish in infringement proceedings whether the alleged infringement has arisen.[17]

47. In addition, the Court held in its judgment in *Commission* v *Ireland* that the procedure set out in Article 3 of Directive

13 — Frenz, W., *Handbuch Europarecht, Vol. 3, Beihilfe- und Vergaberecht*, Springer-Verlag, Berlin/Heidelberg, 2007, paragraph 3399, p. 1016.

14 — Seidel, I., in Dauses (Ed.), *Handbuch des EU-Wirtschaftsrechts*, Issue IV, paragraph 173.

15 — Bitterich, K.,'Kein "Bestandsschutz" für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Artikel 226 EG', *Europäisches Wirtschafts- und Steuerrecht*, Vol. 16, 2005, Book 4, p. 164.

16 — Case C-125/03 *Commission* v *Germany* [2004] ECR I-4771, paragraph 15.

17 — Case C-125/03 *Commission* v *Germany*, cited in footnote 16, at paragraph 15.

89/665/EEC, under which the Commission can take action against a Member State if it considers that a clear and manifest infringement of Community provisions on the award of public contracts has been committed, is a preventive measure, which can neither derogate from nor replace the powers of the Commission under Article 226 EC. [18]

48. The correction procedure under Article 3 of Directive 89/665/EEC serves to afford the Member States an opportunity to prevent foreseeable infringements of public procurement law and in so doing to clarify in advance situations that are straightforward from a legal viewpoint, also saving the Commission work. As a result, lengthy and burdensome infringement proceedings are avoided in unambiguous cases. [19]

49. In view of the special function they have in the system for reviewing the legality of procurement procedures, the two sets of proceedings again differ in the criteria essential for their institution: unlike the correction procedure, infringement proceedings do not presuppose the existence of a clear and manifest infringement; [20] they merely require that there be a failure to fulfil an obligation under Community law. [21] For that reason, the individual stages of the procedures are also not interchangeable, although they have a parallel structure: the reasoned opinion under Article 226 EC and the Member State's observations on it cannot be replaced by measures under Article 3 of Directive 89/665; instead they must be effected separately as a preliminary stage to bringing proceedings before the Court of Justice. Conversely, a correction procedure under Article 3 of the directive does not detract from the Commission's powers under Article 226. [22]

50. It should also be borne in mind that the correction procedure is not an instrument which enables proceedings to be brought before the Court of Justice. Since, however, the safeguarding of Community law requires in every case that review procedures before the Court of Justice be available, it cannot have been the aim of the Community

18 — See Case C-353/96 *Commission* v *Ireland* [1998] ECR I-8565, paragraph 22, and Opinion of Advocate General Alber in that case, at point 18; Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraph 57; Case C-359/93 *Commission* v *Netherlands* [1995] ECR I-157, paragraph 13; and Case C-79/94 *Commission* v *Greece* [1995] ECR I-1071, paragraph 11.

19 — Seidel, I., in Dauses (Ed.), *Handbuch des EU-Wirtschaftsrechts*, Issue IV, paragraph 164, and Frenz, W., *Handbuch Europarecht, Vol. 3, Beihilfe- und Vergaberecht*, Springer-Verlag, Berlin/Heidelberg, 2007, paragraph 3407, p. 1019. That is apparent from the eighth recital in the preamble to Directive 89/665, according to which the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contracting authority concerned so that appropriate steps are taken for the rapid correction of any alleged infringement.

20 — Under Article 3(1) of Directive 89/665 the Commission may invoke the procedure for which that article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305 and 77/62.

21 — *Commission* v *Netherlands*, cited in footnote 18, at paragraph 14.

22 — Opinion of Advocate General Tesauro in *Commission* v *Netherlands*, cited in footnote 18, point 4 et seq.

legislature to exclude such review by eliminating recourse to infringement proceedings.

51. As regards the powers of the Commission, it should be recalled that, by virtue of its role as guardian of the Treaty, the Commission is not obliged to have recourse primarily to the correction procedure. On the contrary, it is free to bring proceedings before the Court if it considers that a Member State has failed to fulfil an obligation under the Treaty and has not complied with its reasoned opinion. [23]

52. The same conclusions can be drawn, in my view, in relation to the procedure under Article 228(2) EC. That procedure, absorbed into the primary law of the Community by virtue of the Maastricht Treaty, is, from a procedural viewpoint, modelled on the procedure under Article 226 EC. It now affords the Court the option of no longer only making a finding of failure to comply with the first judgment, but also of imposing on the Member State concerned payment of a lump sum or periodic penalty payment. The procedure under Article 228(2) EC is therefore a procedure the purpose of which is to encourage the recalcitrant Member State, by means of financial penalties, to comply with a judgment establishing a breach of obligations. [24] By contrast, the review measures which the Commission may take pursuant to Directive 89/665 have the function of preventing infringements of Community law at the earliest possible stage. The mechanisms of primary and secondary law therefore are not mutually exclusive; instead they complement each other with a view to everything that the Member States conduct themselves in a manner which is lawful. [25]

53. Thus, the German Government cannot raise a plea of inadmissibility on the basis of the review and penalty mechanisms set out in Directive 89/665.

3. Absence of an interest in bringing proceedings and disappearance of the subject-matter of the proceedings

54. In its rejoinder the German Government claims that, there is no longer an interest in bringing proceedings as regards the part of the subject-matter of the dispute that is left outstanding by the Commission's reply of 26 April 2005, because the Federal Republic of Germany, as the Member State concerned, no longer needs to be prompted through the imposition of a periodic penalty payment or

23 — In connection with failures to fulfil the obligation to transpose directives, see Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 22; Case C-471/98 *Commission* v *Belgium* [2002] ECR I-9681, paragraph 39; and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, cited in footnote 2, paragraph 30.

24 — Opinion of Advocate General Colomer in Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, point 58.

25 — Kalbe, P., 'Kommentar zum Urteil des Gerichtshofs vom 10. April 2003 in den verbundenen Rechtssachen C-20/01 und C-28/01', *Europäisches Wirtschafts- und Steuerrecht*, 2003, p. 566, refers to the twin-track nature of the system of legal protection in respect of infringements of the EC procurement directives.

a lump sum to alter its conduct, since the waste disposal contract between the City of Brunswick and the Braunschweigische Kohlebergwerke ('BKB') has in the meantime been rescinded. It contends that the proceedings should be discontinued, or, in the alternative, the action dismissed as inadmissible, since now that the contracts at issue have been rescinded, no further encouragement to enforce the Court's ruling in Joined Cases C-20/01 and C-28/01 is necessary. In support of the form of order sought, it maintains that, in assessing whether there is still an interest in bringing proceedings, the crucial factor in an action under Article 228(2) EC is the date of the last hearing.

55. Those arguments cannot be accepted. It is settled case-law that, when 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 Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration as regards any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end. [26]

56. Furthermore, it is for the Commission to determine whether it is expedient to take action against a Member State, what provisions the Member State has infringed, and to choose the time at which it will bring an infringement proceedings; the considerations which determine that choice cannot affect the admissibility of the action. [27]

57. Lastly, while the bringing and continuation of infringement proceedings is a matter for the Commission in its entire discretion, it is for the Court to consider whether there has been a failure to fulfil obligations as alleged, without its being part of its role to take a view on the Commission's exercise of its discretion. [28]

58. In the light of all the foregoing, the plea of inadmissibility based on the Commission's lack of interest in bringing proceedings must be dismissed.

59. Under Article 92(2) of the Rules of Procedure, the Court may of its own motion declare that the substance of the action has become devoid of purpose if it comes to the conclusion that there is no longer any need

26 — Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 65; Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 23; Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraphs 14 and 15; Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15; and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, cited in footnote 2, paragraph 29.

27 — *Commission* v *Luxembourg*, cited in footnote 26, paragraph 66; Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039, paragraph 4; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 27; and *Commission* v *France*, cited in footnote 26, paragraph 24.

28 — *Commission* v *Luxembourg*, cited in footnote 26, paragraph 67, which incorporate a reference to Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293, paragraph 25.

to adjudicate on the action. It may also be invited to do so by the parties.[29] However, an invitation of that kind is not essential: the Court may bring an end to the proceedings even without an application to that effect, by way of a judgment discontinuing the action. I shall consider below whether an event justifying a decision not to give a ruling has occurred.

60. First, it should be noted that, inasmuch as the contract between the City of Brunswick and the BKB rescinding the previous contract was concluded on 7 July 2005, the Federal Republic of Germany has met the requirement to withdraw the contract for services complained of, as originally imposed by the Commission in its reasoned opinion of 30 March 2004.[30] The infringement complained of was therefore corrected after the two-month period prescribed in the reasoned opinion had expired, but at a time at which the written procedure before the Court was not yet completed.

61. Seen from a procedural point of view, the fact that, under the settled case-law of the Court, 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 means that it cannot be held that there is no need to adjudicate. Consequently, the Court will not take account of any subsequent correction of the infringement and such a correction has no impact on the question whether the action is admissible.[31]

62. This is apparent not only indirectly from the wording of Article 226 EC but also from the purpose of that stage in the pre-litigation procedure, which is to afford the infringing Member State a final opportunity to rectify the infringement before any action is brought. However, it is uncertain whether those principles also apply to the procedure under Article 228(2) EC. The German Government's position that the date of the last hearing should be the basis for assessing whether or not there is a need to adjudicate on the action seems in essence to correspond with the view adopted by Advocate General Ruiz-Jarabo Colomer in *Commission* v *Greece*. In his Opinion, the Advocate General stated that the purpose of the procedure under Article 228(2) EC was not to obtain a further declaration of failure to fulfil obligations but to encourage the recalcitrant Member State to comply with a judgment establishing a breach of obligations. Since the hearing or, failing that, the end of the written procedure is the last opportunity for the

29 — Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraphs 49 to 65.

30 — See p. 4 of the Commission's reasoned opinion of 30 March 2004, issued in accordance with Article 228 EC, addressed to the Federal Republic of Germany for failing to take measures to comply with the judgment of the Court of Justice of the European Communities of 10 April 2003 in Joined Cases C-20/01 and C-28/01 concerning the award of a contract for the collection of waste water by the municipality of Bockhorn and of a contract for waste disposal by the City of Brunswick.

31 — Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraphs 27 and 28; Case C-29/01 *Commission* v *Spain* [2002] ECR I-2503, paragraph 11; Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26; Case C-119/00 *Commission* v *Luxembourg* [2001] ECR I-4795, paragraph 14; Case C-384/99 *Commission* v *Belgium* [2000] ECR I-10633, paragraph 16; Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15; Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 20; and Case C-302/95 *Commission* v *Italy* [1996] ECR I-6765, paragraph 13.

defendant State to submit observations as to the level of compliance it has achieved, and for the Commission to make submissions regarding the amount and form of the financial penalty which it is appropriate to impose, it is that date which should to be taken as the basis for assessment. [32]

63. I concur with that view of the law, but only inasmuch as it concerns the assessment of the need to impose a penalty payment on an infringing Member State in the case in point. However, as regards the application for a declaration of non-compliance with a judgment establishing an infringement, the essential reference point should still be the date of expiry of the period prescribed in the reasoned opinion. It is clear that the Court proceeded on the same assumption in its recent judgment in Case C-119/04 *Commission* v *Italy*, when it assessed the two claims independently of one another and in so doing took as the basis of assessment the date relevant in each separate case. [33]

64. Accordingly, the rescission of the waste disposal contract at issue subsequent to its conclusion cannot be regarded as an event rendering the action devoid of purpose for the purposes of Article 92(2) of the Rules of Procedure. On that basis, this plea of inadmissibility must also be dismissed.

B — *The merits of the action*

1. The continuing effects of the infringement of public procurement law

65. An action under Article 228(2) EC is well founded if the Member State found by a judgment of the Court to be in breach of an obligation under the Treaty has failed to take the necessary measures to comply with that judgment. Under Article 228(1) EC, it is required to bring the infringement of Community law to an end. That obligation to act also applies to the organs of all local and regional authorities of the State against which the judgment was given. [34]

66. As regards the procedural allocation of the duty to adduce evidence and the burden

32 — Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Greece*, cited in footnote 24, points 57 to 59.

33 — Case C-119/04 *Commission* v *Italy*, cited in footnote 31. The Court first declared that, on the date of expiry of the period prescribed in the reasoned opinion, the Italian Republic still had not taken all the measures necessary to comply with the judgment of 26 June 2001 in Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923 (paragraphs 27 to 32). The Court subsequently assessed whether the criteria had been met for imposing a periodic penalty payment, and in particular whether the alleged breach of obligations had continued until its examination of the facts (paragraphs 33 to 46). See also Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraphs 30 and 31, and Case C-177/04 *Commission* v *France*, cited in footnote 7, paragraphs 20 and 21.

34 — Case 199/85 *Commission* v *Italy* [1987] ECR 1039, paragraph 16.

of proof, it must first be pointed out that, according to settled case-law, it is for the Commission to provide the Court, in the course of the proceedings, with the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its obligations. [35] Moreover, where the Commission has adduced sufficient evidence to show that the breach of obligations has persisted, it is for the Member State concerned to challenge in substance and in detail the information produced and its consequences. [36]

67. The Commission takes the view that the Federal Republic of Germany has not complied with its obligation to end the Treaty infringements established in the judgment of 10 April 2003. It considers the express instructions of the German Government, at federal and *Land* level alike, that public procurement law should be strictly complied with to be insufficient. It adopts the position that the breach of obligations has persisted by means of the continued existence of the waste disposal contract between the City of Brunswick and the BKB. It bases its reasoning essentially on the Court's observations at paragraphs 36 and 37 of its judgment. It therefore considers the rescission of that contract to be the only measure capable of eliminating the consequences of the infringement of public procurement law.

68. As far as the interpretation of those two paragraphs of that judgment is concerned, I must concur with the Commission. In its observations the Court, in my view, admits of no doubt that the effects of an infringement of Community law persist as long as a contract concluded in breach of public procurement law is being performed. [37]

69. That interpretation is also consistent with the prevailing case-law of the Court according to which, in the award of public contracts, the infringement of a directive ceases to exist only if, on the date of expiry of the period laid down by the Commission in

35 — Case C-119/04 *Commission* v *Italy*, cited in footnote 31, paragraph 41, and *Commission* v *Greece*, cited in footnote 24, paragraph 73.

36 — Case C-119/04 *Commission* v *Italy*, cited in footnote 31, paragraph 41, together with the Opinion of Advocate General Poiares Maduro in that case (point 24), and *Commission* v *France*, cited in footnote 33, paragraph 56. According to Advocate General Ruiz-Jarabo Colomer in his Opinion in *Commission* v *Greece*, cited in footnote 24, at point 77, in proceedings under Article 228 EC it is for the Member State to prove that it has duly complied with the judgment establishing an infringement of the Treaty.

37 — See also Heuvels, K., 'Fortwirkender Richtlinienverstoß nach De-facto-Vergaben', *Neue Zeitschrift für Baurecht und Vergaberecht*, Vol. 2, 2005, Book 1, p. 32; Bitterich, K., 'Kein 'Bestandsschutz' für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Artikel 226 EG', *Europäisches Wirtschafts- und Steuerrecht*, Vol. 16 (2005), Book 4, p. 164; Bitterich, K., 'Kündigung vergaberechtswidrig zu Stande gekommener Verträge durch öffentliche Auftraggeber', *Neue Juristische Wochenschrift* 26/2006, p. 1845; Prieß, G., 'Beendigung des Dogmas durch Kündigung: Keine Bestandsgarantie für vergaberechtswidrige Verträge', *Neue Zeitschrift für Baurecht und Vergaberecht*, 2006, p. 220; Kalbe, P., 'Kommentar zum Urteil des Gerichtshofs vom 10. April 2003 in den verbundenen Rechtssachen C-20/01 und C-28/01', *Europäisches Wirtschafts- und Steuerrecht*, 2003, p. 567; Griller, S., 'Qualifizierte Verstöße gegen das Vergaberecht — Der Fall St. Pölten', *ecolex*, 2000, p. 8; Hintersteininger, M., 'Fehlerhafte Anwendung des EG-Vergaberechts am Beispiel St. Pölten — Zum Urteil des EuGH vom 28.10.1999', *Österreichische Juristen-Zeitung*, 2000, p. 634.

its reasoned opinion, all effects of the contract notice at issue are exhausted. [38] Those effects cannot be considered to be exhausted while the contracts concluded in breach of Community law continue to produce effects, in other words, while those contracts continue to be performed. [39]

70. Since the waste disposal contract concluded for a term of 30 years was still valid until the date relevant for legal assessment in these proceedings, it can be concluded that the infringements held to exist in the original judgment continued to produce effects. [40] The German Government does not, in the final analysis, actually dispute that the private-law contract at issue has continued to produce legal effects after the judgment given on 10 April 2003. However, it rejects any obligation to rescind the contract, referring to the authority provided for in Article 2(6) of Directive 89/665 to limit the powers of the body responsible for the review procedures, once a contract has been concluded, to awarding damages to any person harmed by an infringement. [41]

2. The maintenance of rights acquired under the contract in breach of public procurement law

71. It is necessary to examine below whether the Federal Republic of Germany was obliged by law to terminate the contract concerned or whether it should instead have resorted to other measures in order to fulfil its obligations under Article 228(1) EC.

72. It should be made clear first of all that the measures cited by the German Government, namely the express instructions, at federal and *Land* level alike, that the provisions of public procurement law should be strictly complied with and the request to notify the measures introduced and implemented by its authorities, have the sole aim of preventing future infringements and are therefore incapable of putting an end to a

38 — See Case C-125/03 *Commission* v *Germany*, cited in footnote 16, paragraph 12, which incorporates a reference to Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, cited in footnote 2, paragraphs 34 to 37, and to *Commission* v *Austria*, cited in footnote 18, paragraph 57; and Case C-362/90 *Commission* v *Italy* [1993] ECR I-2353, paragraphs 11 and 13.

39 — Case C-125/03 *Commission* v *Germany*, cited in footnote 16, paragraph 12 et seq., and, for previous case-law on the matter, in *Commission* v *Austria*, cited in footnote 18, paragraph 44.

40 — See the Opinion of Advocate General Geelhoed in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, cited in footnote 2, point 57.

41 — The Federal Republic of Germany availed itself of that authority by adopting the first sentence of Paragraph 114(2) of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition), in the version published on 15 July 2005 (BGBl. I, p. 2114), as most recently amended by Paragraph 132 of the Regulation of 31 October 2006 (*BGBl.* I p. 2407). Under that provision, a contract which has already been awarded may not be cancelled. An undertaking harmed by an infringement of a provision of public procurement law that affords protection is entitled under Paragraph 126 of that Law to compensation for the damage caused by the infringement of the principle of the protection of legitimate expectations.

continuing infringement of Community law that has already begun and continues, as in this case. Since the German Government has not informed the Court of any further measures, it now remains only to determine whether an obligation to terminate exists.

73. In my view, it is necessary to note at the outset that a Member State is required to take all necessary measures to remedy its default and may not impose any obstacle of any kind this being achieved. According to the well-established case-law of the Court, a Member State may not, in particular, plead national problems in the exercise or transposition of a Community rule. Nor may it do so in respect of any provisions, practices or circumstances existing in its legal system. [42] The Federal Republic of Germany may not therefore plead that public procurement in its legal system, unlike in other Member States, has civil-law features and, therefore, that the contracting authority is bound, as a party having a status equivalent to that of the contractor, by a contract under private law. [43] Recognising certain Member States' special status on account of special features of national law would be contrary to the need for a uniform application of Community law across the Member States of the European Union.

74. Inasmuch as the German Government argues that terminating the contract would be unreasonable because of the legitimate expectations of the parties to the contract, it must be countered that it relies on legal rights of third parties which were created unlawfully by the contracting authority. As explained by Advocate General Alber in his Opinion in Case C-328/96 *Commission* v *Austria*, as far as a Member State's fundamental obligations towards the Community are concerned, that State may not successfully rely on the consequences of its illegal conduct in order to call into question the legal obligation as such. [44] The *pacta sunt servanda* principle can therefore be replied on only if Community law expressly accepts that rights acquired under contracts concluded in breach of public procurement law are to be protected.

75. Thus far the Court has not expressly addressed the question whether there is an obligation to bring such contracts to an end. However, if the judgment of 10 April 2003 is considered in the light of the Court's case-

42 — Case 239/85 *Commission* v *Belgium* [1986] ECR 3645, paragraph 13, Case 42/80 *Commission* v *Italy* [1980] ECR 3635, paragraph 4, and Case C-383/00 *Commission* v *Germany* [2002] ECR I-4219, paragraph 18.

43 — In Member States with a Roman-law tradition, procurement in its entirety is subject to public law. Thus, in France, Spain and Portugal award procedures and contracts between contracting authorities and contractors are subject to public law. Only the administrative courts or the Council of State of the relevant country can, on that basis, settle disputes arising out of award procedures and contracts. The award is therefore an administrative act. Conversely, the award under German procurement law is the civil-law acceptance of an offer. The award is made mostly in the form of a notice of award or confirmation letter (Seidel, I., in, Dauses (Ed.), *Handbuch des EU-Wirtschaftsrechts*, Book IV, paragraphs 8 and 9).

44 — Opinion in *Commission* v *Austria*, cited in footnote 18, point 83.

law mentioned above, under which all effects of contract awards contrary to Community law must be exhausted, everything suggests that the Court would uphold the principle of the existence of an obligation to bring the contract to an end.[45]

76. No other conclusion can be drawn from the notion of *effet utile* in the sense of the broadest possible effectiveness of the procurement directives. Effectiveness is a central principle of Community law, the special relevance of which in public procurement law becomes clear only on closer consideration of the legislative purpose of the procurement directives.[46] The Court of Justice does not merely recognise in the procurement directives formal arrangements laying down the basis on which contracts are to be awarded; it also highlights their purpose of putting into effect the free movement of services and goods.[47] Therefore, an infringement of the directives is not exhausted upon conclusion of the contract; on the contrary, it persists until the contract has been performed completely or ends in some other way. If this case-law is not to deprived of all practical effect, an infringement established in an action for failure to fulfil obligations must consequently be corrected by bringing the contract to an end.[48]

77. An obligation to bring to an end contracts that are contrary to public procurement law is also necessary from the point of view of deterrence, in order to guarantee careful compliance with the procurement directives with a view to ensuring the effective implementation of Community

45 — In his comments on the judgment of the Court of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Kalbe, P., 'Kommentar zum Urteil des Gerichtshofs vom 10. April 2003 in den verbundenen Rechtssachen C-20/01 und C-28/01', *Europäisches Wirtschafts- und Steuerrecht*, 2003, p. 567, takes the view that, in the infringement proceedings under Article 226 EC, the fate of the contested contracts was not the decisive factor in declaring and describing the Treaty infringement. Accordingly, no express position was adopted in the judgment as regards the fate of the contracts. The judgment nevertheless clearly explains that the infringement at issue can be rectified only by rescinding the contracts and issuing a new invitation to tender; see also Gjørtler, P., 'Varemærker og udbud', *Lov & ret*, June 2003, p. 33, which infers a corresponding obligation to terminate from the principle of Community loyalty laid down in Article 10 EC.

46 — Leffler, H., 'Damages liability for breach of EC procurement law: governing principles and practical solutions', *Public Procurement Law Review*, No 4, 2003, pp. 152 and 153; Pachnou, D., 'Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness', *Public Procurement Law Review*, No 2, 2000, p. 69.

47 — According to the second recital in the preamble to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), the aim of the secondary legislation on public procurement is to ensure effective implementation of the fundamental freedoms of undertakings. The same can be inferred from the recitals in the preamble to Directives 92/50 and 89/665 applicable in this case. The procurement directives are therefore to be construed as giving expression to the fundamental freedoms. They were adopted to guarantee the effectiveness of the fundamental freedoms and the opening-up of public procurement to competition across the Community. The Court of Justice also made it clear at an early stage that the aim of the procurement directives — and therefore of procurement law per se — is to ensure actual implementation of the fundamental freedoms. See Case 199/85 *Commission* v *Italy*, cited in footnote 34, at paragraph 12; Case 76/81 *Commission* v *Luxembourg* [1982] ECR 417, paragraph 7; Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; and Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32.

48 — Bitterich, K., "Kein „Bestandsschutz" für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Artikel 226 EG', *Europäisches Wirtschafts- und Steuerrecht*, Vol. 16 (2005), p. 165; Frenz, W., *Handbuch Europarecht, Vol. 3, Beihilfe- und Vergaberecht*, Springer-Verlag, Berlin/Heidelberg, 2007, paragraph 3394 et seq., p. 1015. Griller, S., 'Qualifizierte Verstöße gegen das Vergaberecht — Der Fall St. Pölten', *ecolex*, 2000, p. 8, takes the view that a corresponding obligation to rescind contracts that are contrary to public procurement law can arise in certain circumstances, but only where the contractual relations with the successful tenderer allow such termination in that way.

law. Member States which circumvent the provisions of public procurement law might be inclined in certain circumstances, in the absence of an appropriate penalty, to adopt a policy of *fait accompli.* [49] That would, as a result, perpetuate the infringement of Community law.

78. That measure is also proportionate in the case in point if account is taken of the 30-year term originally envisaged for the waste disposal contract. Because of the length of that period, such a contractual relationship was capable of creating a *fait accompli.* Thus, only by rescinding the contract was it possible to counter a situation where the breach of Community law would be perpetuated.

79. Article 2(6) of Directive 89/665/EEC does not preclude such an obligation to bring the contract to an end. First, as an item of secondary legislation, that directive cannot restrict the fundamental freedoms. Secondly, on no account can it be inferred from the protection of other tenderers afforded by Article 2(6) of the directive to contracts which infringe Community law that Community law does not in general exclude any obligation to put an end to contracts that are contrary to public procurement law. Rather, that provision means that a tenderer who brings proceedings before the review body cannot rely on Article 228(1) EC to support a claim that the tenderer a Member State is under an obligation to bring to an end contracts in breach of public procurement law. [50] Thus, that provision is only relevant as regards the arrangements for individual legal protection against unlawful procurement decisions in the Member States. [51] It makes no reference to protection of the Community interest, which must be clearly distinguished from the individual interest of unsuccessful tenderers. [52] The position could not be otherwise, as primary law, which ranks ahead of it, already lays down exhaustive rules in that regard. That Community system of legal protection against unlawful procurement decisions by national authorities has been carefully thought through and differentiated in order to take account of the various interests involved. On the one side, there is the review procedure, which seeks to protect individual interests, and on the other, the procedure, for failure to fulfil obligations and the objection procedure, which are designed to serve the Community interest

49 — Fernández Martín, J. M., *The EC Public Procurement Rules: A Critical Analysis*, Clarendon Press, Oxford, 1996, p. 157, on the risks of an irreversible infringement of Community law where a Member State creates a *fait accompli* through its own action; Arrowsmith, S., 'Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts', *Remedies for enforcing the public procurement rules*, 1993, p. 16, takes the view that the absence of such a possibility to bring the contract concerned to an end might render the authorities less willing to comply with procurement law. There is a risk that contracts may be concluded in breach of the obligation to notify, in order to discourage tenderers and to restrict their legal remedies.

50 — Bitterich, K., 'Kündigung vergaberechtswidrig zu Stande gekommener Verträge durch öffentliche Auftraggeber', *Neue Juristische Wochenschrift*, 26/2006, p. 1846.

51 — Pachnou, D., 'Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness', *Public Procurement Law Review*, No 2, 2000, pp. 57 and 58.

52 — Hintersteininger, M., 'Fehlerhafte Anwendung des EG-Vergaberechts am Beispiel St. Pölten — Zum Urteil des EuGH vom 28.10.1999', *Österreichische Juristen-Zeitung*, 2000, Vol. 55, Book 17, pp. 633 and 634, construes Article 2(6) of Directive 89/665 as presenting an option for limiting State liability, which is relevant only to the relationship between Member State and unsuccessful tenderer. That provision must therefore be regarded as an exception. Moreover, as a mere instrument of secondary legislation, the directive is not capable of restricting the fundamental obligation of Member States to create a situation which complies with Community law.

in creating or restoring a lawful situation. As already stated at the outset, because of their specific purpose, infringement proceedings override the correction procedure. Since, by bringing an action under Article 226 EC, the Commission is defending the public interest exclusively, the provisions on the review procedure, including Article 2(6) of Directive 89/665, must be regarded as irrelevant to this case.

80. Irrespective of that point, rescinding a contract and subsequently launching a new invitation to tender with a view to implementing procurement law as effectively as possible should generally prove to be the best solution for taking account of the individual interests of unsuccessful tenderers. First, it is often more advantageous for a tenderer to have a contract concluded and the primary claim under civil law satisfied than to file a claim for damages against the contracting authority.[53] Secondly, in bringing an action before the national courts for enforcement of a claim for damages a tenderer will find itself facing difficulties, because it will have to prove not only that it has suffered harm but also that it had submitted the best tender. To that falls to be added the fact that it is frequently difficult to assess the damage caused.[54]

81. Furthermore, it is not apparent why a contract concluded in breach of public procurement law, which of its nature will give rise to a continuing infringement of the fundamental freedoms, should be exempted a priori from the measures necessary to comply with a judgment establishing a failure to fulfil obligations.[55]

82. Consequently, that submission by the German Government must also be rejected. It must therefore be concluded that the possibilities available under national law for ending the contract must be utilised and

53 — Fernández Martín, J. M., *The EC Public Procurement Rules: A Critical Analysis*, Clarendon Press, Oxford, 1996, p. 213, and Pachnou, D., 'Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness', *Public Procurement Law Review*, No 2, 2000, p. 65, refer to the award of damages as the second-best alternative to specific performance; Hintersteininger, M., 'Fehlerhafte Anwendung des EG-Vergaberechts am Beispiel St. Pölten — Zum Urteil des EuGH vom 28.10.1999', *Österreichische Juristen-Zeitung*, 2000, Vol. 55, Book 17, p. 634, describes the straightforward payment of monetary damages as a deficient form of redress. In their view, the principle whereby *restitutio in integrum* takes precedence over the award of pecuniary damages can be applied as a general principle of law.

54 — Leffler, H., 'Damages liability for breach of EC procurement law: governing principles and practical solutions', *Public Procurement Law Review*, No 4, 2003, p. 160, refers to the slim chance a tenderer has of winning in an action for damages for the loss of a public contract; Fernández Martín, J. M., *The EC Public Procurement Rules: A Critical Analysis*, Clarendon Press, Oxford, 1996, p. 214, refers to the fact that in most Member States evidence must be adduced to show that the applicant would have been awarded the contract or that it at least had a serious chance of being awarded it. Where that evidence is not furnished, the courts refuse to award damages. In the author's view, it is unlikely that an applicant will be able to overcome that obstacle.

55 — Arrowsmith, S., 'Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts', *Remedies for enforcing the public procurement rules*, 1993, p. 8, considers it possible for a Member State to be required by the Court in infringement proceedings to rescind a contract that is contrary to public procurement law.

exhausted in compliance with the principle of the effectiveness and equivalence of the remedies available to enforce Community law.[56] The fact that both the City of Brunswick and the municipality of Bockhorn managed during the proceedings before the Court of Justice to free themselves from their contractual obligations belies, moreover, the view adopted by the German Government that the contractual obligations cannot be terminated, or can be terminated but only at the risk of incurring a disproportionately high exposure to damages.

83. Since the Federal Republic of Germany did not terminate the criticised contract by the relevant date, it has not taken the necessary measures to comply with the judgment of the Court of Justice of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* concerning the award of a contract for waste disposal by the City of Brunswick.

C — *The lack of any need for penalties*

84. Following the view of the law expressed here, it must be assumed that the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, thus affording the Court of Justice the possibility of imposing coercive measures.

85. Even though the Commission withdrew in its entirety its original claim for a periodic penalty payment to be imposed and made no claim for the imposition of a lump sum, the Court still retains the right to adopt a final decision in that regard, since it is not bound by the Commission's proposals as regards the financial consequences of the finding that a Member State has failed to comply with an earlier judgment of the Court. Those proposals merely constitute a useful point of reference for the Court in exercising its discretion under Article 228(2) EC.[57] In other words, the application of that provision falls within the full jurisdiction of the Court.[58]

86. The procedure under Article 228(2) EC is intended to induce a defaulting Member

56 — In its judgment of 20 December 2005 (Ref. 33 O 16465/05) the Landgericht München I (Regional Court Munich I) regarded as permissible the extraordinary termination by the City of Munich of a transport contract not put out to tender, citing Paragraph 313(3) of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter:'BGB') and a contractual 'loyalty clause', since under a previous judgment of the Court of Justice of the European Communities in the infringement proceedings relating to that case (judgment in Case C-126/03 *Commission* v *Germany*, cited in footnote 8), the City could no longer reasonably be expected to maintain the contract. Prieß, G. concurred in 'Beendigung des Dogmas durch Kündigung: Keine Bestandsgarantie für vergaberechtswidrige Verträge', *Neue Zeitschrift für Baurecht und Vergaberecht*, 2006, Book 4, p. 221. For continuous contractual obligations, termination on just and proper grounds is possible under Paragraph 314 of the BGB.

57 — *Commission* v *Greece*, cited in footnote 24, paragraph 89, and Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraph 41.

58 — Opinion of Advocate General Geelhoed of 29 April 2004 in Case C-304/02 *Commission* v *France*, cited in footnote 33, point 84.

State to comply with a judgment establishing an infringement and thus to ensure that Community law is applied effectively. The measures provided for by that provision, namely the periodic penalty payment and the lump sum, both serve that purpose.

87. As the Court made clear in Case C-304/02 *Commission* v *France*, whether one or the other of those two measures should be applied depends on whether it is capable of meeting the objective pursued according to the circumstances of the specific case. Whilst the imposition of a periodic penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations that, in the absence of such a measure, would otherwise tend to persist, the imposition of a lump sum is based more on assessment of the effects on private and public interests of the relevant Member State's failure to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it. [59]

88. In view of the persuasive function, described above, of the periodic penalty payment, it is appropriate, in assessing whether the Member State against which the judgment has been given still has not complied with its obligations and whether, therefore, the criteria for imposing such a penalty continue to be met, to take the date of the hearing, as discussed earlier, as the relevant point of reference. In this case those criteria ceased to apply upon cancellation of the waste disposal contract while the written procedure was still ongoing, and thus the imposition of a periodic penalty payment no longer appears to be appropriate.

89. By contrast, as a one-off financial penalty of a punitive nature, the lump sum is suited to penalising unlawful conduct which, although belonging to the past, meaning that elimination of the established infringement retains only minor interest for the Community, none the less makes the imposition of a penalty imperative as a deterrent. [60] Recourse should be had to the threat of a lump sum in particular if the Member State concerned has complied with the judgment only because it fears that a second set of proceedings may be brought against it [61] the breach is particularly

59 — Case C-304/02 *Commission* v *France*, cited in footnote 33, at paragraphs 80 and 81.

60 — Karpenstein, P./Karpenstein, U., in Grabitz/Hilf, *Das Recht der Europäischen Union*, Vol. III, Art. 228 EC, paragraph 28; Bonnie, A.,'Commission Discretion under Article 171(2) EC', *European law review*, Book 6 (1998), p. 547. Burgi, M., in *Handbuch des Rechtsschutzes der Europäischen Union (Ed. Rengeling/Middeke/Gellermann)*, Second edition, C. H. Beck, Munich, 2003, Section 6, paragraph 49.

61 — Karpenstein, P./Karpenstein, U., in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Band III, Art. 228 EC, paragraph 28; Gaitanides, C., *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Union*, von der Groeben/Schwarz (Hrsg.), Art. 228 EC, considers that such circumstances arise where the Member State concerned has only belatedly complied with the judgment but the new action is not yet pending at the Court or the judicial proceedings are not yet finished.

serious[62] or there is a tangible risk of its reoccurrence.[63]

90. In the present case, there are no indications to suggest a risk of reoccurrence, nor can the breach be defined as particularly serious. In view of the purely local relevance of the waste disposal contract concluded by the City of Brunswick in breach of public procurement law, the resulting damage to the efficient operation of the internal market can still be regarded as minor.

91. It is true that, any disregard of a judgment of the Court of Justice must be regarded as serious, and thus the infringement at issue could be penalised in principle by way of a lump sum as a symbolic penalty[64] in respect of the period from the date of the judgment, that is to say, 10 April 2003, in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* until the conclusion of the contract cancelling the previous contract; however, it should be borne in mind, allowing for extenuating circumstances, that the Federal Republic of Germany fulfilled its obligation under that first judgment while the written procedure was still ongoing.

92. In the circumstances of the present case, I consider it appropriate to refrain from imposing a financial penalty.

VII — Costs

93. Pursuant to 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 made an application to that effect and the Federal Republic of Germany has been unsuccessful in its submissions, it should be ordered to pay the costs.

94. Under Article 69(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. Accordingly, the French Republic, the Kingdom of the Netherlands and the Republic of Finland must bear their own costs.

62 — Candela Castillo, J., 'La loi européenne, désormais mieux protégée — Quelques réflexions sur la première décision de la Commission demandant à la Cour de Justice de prononcer une sanction pécuniaire au sens de l'article 171 du Traité à l'encontre de certains États membres pour violation du droit communautaire', *Revue du Marché Unique Européen*, Book 1 (1997), pp. 20 and 21.

63 — Karpenstein, P., Karpenstein, U., in Grabitz/Hilf, *Das Recht der Europäischen Union*, Vol. III, Art. 228 EC, paragraph 28; Díez Hochleitner, J., 'Le traité de Maastricht et l'inexécution des arrêts de la Cour de Justice par les États membres', *Revue du Marché Unique Européen*, Book 2, 1994, p. 140; Bonnie, A., 'Commission Discretion under Article 171(2) EC', *European Law Review*, Book 6, 1998, p. 547; Burgi, M., in *Handbuch des Rechtsschutzes der Europäischen Union* (Ed. Rengeling/Middeke/Gellermann), Second edition, C.H. Beck, Munich, 2003, Section 6, paragraph 51.

64 — Karpenstein, P., Karpenstein, U., in Grabitz/Hilf, *Das Recht der Europäischen Union*, Vol. III, Art. 228 EC, paragraph 28, take the view that a lump sum must take precedence over the periodic penalty payment, where the principle of proportionality demands that a 'symbolic' penalty be imposed on the defaulting Member State, for instance because it is foreseeable that the Member State will rectify its infringement before the judgment is given.

VIII — Conclusion

95. In the light of the foregoing considerations and the fact that the Commission has not maintained the action in respect of the municipality of Bockhorn, I suggest that the Court should:

— declare that, by failing to take the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* regarding the award of a contract for waste disposal by the City of Brunswick the Federal Republic of Germany has failed to comply with the obligations under Article 228(1)EC;

— order the Federal Republic of Germany to pay the costs;

— declare that the French Republic, the Kingdom of the Netherlands and the Republic of Finland must bear their own costs.