JUDGMENT OF THE COURT (Third Chamber)

29 April 2010 *

In Case C-160/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 April 2008,

European Commission, represented by M. Kellerbauer and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and J. Möller, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by:

Kingdom of the Netherlands, represented by C.M. Wissels and Y. de Vries, acting as Agents,

intervener,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász, G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 February 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests that the Court declare that, by failing to make a public call for tenders or to award contracts in the field of emergency ambulance and qualified patient transport services ('public ambulance services') transparently and by failing to publish notices of contracts awarded, the Federal Republic of Germany has failed to fulfil its obligations under 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) and 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) and to observe the principles of the freedom of establishment and the freedom to provide services laid down by Articles 43 EC and 49 EC.

Legal context

Directive 92/50

2 According to Article 1(a) of Directive 92/50, 'public service contracts' are to mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

3 Article 3(2) of Directive 92/50 states:

'Contracting authorities shall ensure that there is no discrimination between different service providers.'

4 Article 7(1) provides that the directive is to apply to public service contracts where the estimated value, net of value added tax, is not less than EUR 200 000.

5 Article 10 of Directive 92/50 states:

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

6 The Titles referred to in Article 10 of Directive 92/50, which apply in their entirety in the circumstances referred to in the first sentence of Article 10, concern, respectively, the choice of award procedures and the rules governing design contests (Title III; Articles 11 to 13), common rules in the technical field (Title IV; Article 14), common advertising rules (Title V; Articles 15 to 22) and common rules on participation, criteria for qualitative selection and criteria for the award of contracts (Title VI; Articles 23 to 37).

7 Article 14 of Directive 92/50 concerns the technical specifications which must be given in the documents relating to the contract.

8 Article 16 of Directive 92/50 provides:

‘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.

2. The notices shall be published:

— in the case of public contracts for services listed in Annex I A, in accordance with Articles 17 to 20,

— in the case of design contests, in accordance with Article 17.

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.

…’

9 The services listed in Annex I A to Directive 92/50 include, under category 2, '[l]and transport services …, including armoured car services, and courier services, except transport of mail' and, under category 3, '[a]ir transport services of passengers and freight, except transport of mail'. The services listed in Annex I B to Directive 92/50 include, under category 25, '[h]ealth and social services'.

Directive 2004/18

10 Article 1(2)(a) and (d) of Directive 2004/18 includes the following definitions:

'(a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…'

11 Article 2 of Directive 2004/18 provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

12 According to Article 7(b) of Directive 2004/18, the directive is to apply to public service contracts which have a value exclusive of value added tax estimated to be equal to or greater than EUR 249 000. That figure was successively reduced to EUR 236 000 by Commission Regulation (EC) No 1874/2004 of 28 October 2004 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2004 L 326, p. 17) and then to EUR 211 000 by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28).

13 Directive 2004/18 includes a provision, Article 22, under Title II headed 'Rules on public contracts', which states:

'Contracts which have as their object services listed both in Annex II A and in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).'

14 Articles 23 to 55 of Directive 2004/18, which apply in their entirety in the circumstances referred to in the first sentence of Article 22 of that directive, set out, in order, the specific rules governing specifications and contract documents (Articles 23

to 27), the rules of procedure (Articles 28 to 34), the rules on advertising and transparency (Articles 35 to 43) and the rules relating to the conduct of the procedure (Articles 44 to 55).

15 Article 23 of Directive 2004/18 concerns the technical specifications which must be set out in the contract documentation.

16 Article 35(4) of Directive 2004/18 provides:

'Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

…

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

…'

17 The services referred to under categories 2 and 3 of Annex II A and under category 25 of Annex II B to Directive 2004/18 respectively are identical to those referred to under the corresponding categories of Annexes I A and I B to Directive 92/50.

Facts

18 The Commission received a number of complaints from, inter alia, undertakings established in Member States other than the Federal Republic of Germany concerning the award of contracts for public ambulance services in the Federal Republic of Germany.

General background

19 In Germany, the organisation of the emergency services falls within the competence of the *Länder*.

20 In most *Länder*, emergency services are provided using a 'dual' system ('duales System'), also known as the 'separation model' ('Trennungsmodell'). This is based on a distinction between public emergency services, which account for approximately 70% of all emergency services, and the provision of emergency services on the basis of authorisations granted under the relevant laws of the *Länder*, which account for approximately 30% of all such services.

21 Public emergency services normally cover emergency ambulance and qualified patient transport services. Emergency ambulance services consist in the conveyance in an emergency vehicle or ambulance, with appropriate medical care, of persons

with life-threatening injuries or conditions. Qualified patient transport consists in the conveyance in a patient transport ambulance, with appropriate medical care, of persons who are ill, injured or otherwise in need of help but who are not emergency patients. These two types of service are generally available to the population 24 hours a day throughout the whole of the area concerned and, more often than not, involve the operation of an ambulance station with personnel and response vehicles permanently available.

22 Medical services are available in the case of emergency ambulance services as well as, to a lesser extent, in the case of qualified patient transport. However, the majority of incidents involving emergency ambulance services and all incidents involving qualified patient transport proceed without a doctor being in attendance. In the case of emergency ambulance services, medical services are provided mainly by ambulance personnel. The services of emergency doctors are normally governed by separate agreements with hospitals.

23 In the field of public emergency services, the local authorities, in their capacity as the authorities responsible for organising those services, conclude contracts with providers for the provision of such services to the entire population of the area within their remit. Payment for the services in question is made either directly by the contracting authority in accordance with the 'tender' model, the only one to which the present action relates, or in the form of charges levied directly by the contractor on patients or sickness funds, in accordance with the 'concession' model.

24 The complainants to the Commission claimed that, in Germany, contracts for public ambulance services are not, as a rule, covered by contract notices published at European Union level, nor are they awarded in a transparent way. Some complainants stated that the circumstances leading to the lodging of their complaint reflect general practice in Germany.

25 The Commission's investigations revealed that, between 2001 and 2006, only 13 contract notices from 11 different local authorities were published in the *Official Journal of the European Communities* or in the *Official Journal of the European Union* in relation to the provision of emergency ambulance or qualified patient transport services. In that same period, the number of notices of the results of the award of a contract was also very limited, only two such notices having been published.

Circumstances of the present action

26 The cases complained of to the Commission and which the latter submits as examples of the practice to which the present action relates concern the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

Land of Saxony-Anhalt

27 According to the Commission, the city of Magdeburg has used an authorisation procedure ('Genehmigungsverfahren') for the award of contracts for pecuniary interest for public ambulance services since October 2005. The services cover the provision of personnel and vehicles for emergency ambulance or qualified patient transport services for the period 2007 to 2011. The contract has a total annual value of EUR 7,84 million. No contract notice was published at European Union level.

Land of North Rhine-Westphalia

28 According to the Commission, in 2004 the city of Bonn awarded a contract for public ambulance services for the period from 1 January 2005 to 31 December 2008. The object of the contract concerned was, inter alia, the operation of four ambulance stations. The total value of the contract was at least EUR 5,28 million. A contract notice was published, but at national, not European Union level. At least one tenderer was unsuccessful following the submission of his expression of interest, and the procurement procedure was eventually suspended for lack of an economic outcome. The contract in question was ultimately awarded to the incumbent service provider.

29 Again according to the Commission, in 1998 an undertaking submitted an expression of interest to the town of Witten in relation to taking over the operation of the Witten-Herbede ambulance station. However, the operation of that ambulance station, representing a contract with an annual value of EUR 945 753, was awarded to the Deutsche Rote Kreuz (German Red Cross; 'DRK'). No contract notice was published at European Union level.

Land of Lower Saxony

30 According to the Commission, in 2004 the Region of Hanover organised, for the first time, a procurement procedure for the provision of public ambulance services within its area. Only operators who were already responsible for such services at that time, namely the Arbeiter-Samariter-Bund ('ASB'), the DRK, the Johanniter-Unfall-Hilfe ('JUH') and RKT GmbH, were authorised to participate in that procedure. The value of the contract, covering the period between 1 January 2005 and 31 December 2009, was in the region of EUR 65 million.

31 Again according to the Commission, in 1993 the administrative district of Hamelin-Pyrmont made the district association of the DRK responsible for the provision of public ambulance services within its territory. The contract, which had an initial duration of 10 years, was not terminated. In 2003 it was renewed for 10 years without any contract notice being published. In addition, a new ambulance station was established in 1999 in the municipality of Emmerthal, the operation of which was also entrusted to the DRK without any prior publication of a contract notice. The total value of those contracts was EUR 7,2 million per year.

32 The Commission obtained information that the district association of the DRK had been providing public ambulance services in the administrative district of Uelzen since 1992. The contract awarded by that district to the district association of the DRK was extended in 2002 to encompass the operation of the ambulance station at Bad Bevensen without a contract notice being published. It has a total value of EUR 4,45 million per year.

Land of Saxony

33 According to information obtained by the Commission, the contracts between the Rettungszweckverband Westsachsen and the ASB, DRK, JUH and the Zwickau fire service had an initial duration of four years and cover the administrative districts of Chemnitzer Land, Aue-Schwarzenberg, Zwickauer Land and the town of Zwickau. In 2003 those contracts, representing a total value of EUR 7,9 million per year, were renewed for four years without a contract notice being published. On their expiry they were renewed until 31 December 2008.

34 The contracts between the Rettungszweckverband Chemnitz/Stollberg and the ASB, DRK, JUH and the Chemnitz fire service had an initial duration of four years and

cover the administrative district of Stollberg and the city of Chemnitz. On 1 September 2002 those contracts, representing a total value of EUR 3,3 million per year, were renewed for a further four years without a contract notice being published. On their expiry they were renewed until 31 December 2008.

35 The contracts between the Rettungszweckverband Vogtland and the ASB, DRK, JUH, the private Plauen ambulance service and the Plauen fire service had an initial duration of four years and cover the administrative district of Vogtland and the town of Plauen. Those contracts, with a total annual value of EUR 3,9 million, were concluded without a contract notice being published and came into effect on 1 January 2002 or 1 January 2004. On their expiry they were renewed until 31 December 2008.

The pre-litigation procedure

36 In a letter of formal notice dated 10 April 2006, the Commission notified the Federal Republic of Germany that:

— with regard to the award of contracts for pecuniary interest relating to the emergency services in which transport services within the meaning of categories 2 or 3 of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18 are predominant, the Federal Republic of Germany may have infringed, until 31 January 2006, Article 10 of Directive 92/50 in conjunction with Titles III to VI thereof and, from 1 February 2006, Article 22 of Directive 2004/18 in conjunction with Articles 23 to 55 thereof; and

— with regard to the award of contracts for pecuniary interest relating to the emergency services in which health services within the meaning of category 25 of Annex I B to Directive 92/50 or Annex II B to Directive 2004/18 are predominant, the Federal Republic of Germany may have infringed, until 31 January 2006, Article 10 of Directive 92/50 in conjunction with Article 16 thereof and, from 1 February 2006, Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof, and may, in any event, have infringed the principles of the freedom of establishment and of the freedom to provide services contained in Articles 43 EC and 49 EC, in particular the prohibition of discrimination that is inherent in those principles.

37 The Federal Republic of Germany replied to that letter of formal notice by a letter of 10 July 2006 in which it contended, inter alia, that the tasks which are delegated to the public emergency services are organised in accordance with public-law rules and that their implementation is a matter of State sovereignty. According to the defendant, agreements relating to ambulance services cannot, therefore, be categorised as 'public service contracts'.

38 The Commission was not satisfied with that response and, on 15 December 2006, sent a reasoned opinion to the Federal Republic of Germany in which it maintained as they stood the complaints set out in the letter of formal notice and called on the Federal Republic of Germany to adopt the measures necessary to end that infringement within a period of two months from receipt of the opinion.

39 The Federal Republic of Germany having maintained its position in its letter of reply to the reasoned opinion dated 22 February 2007, the Commission decided to bring the present action.

The action

Admissibility

40 Since the conditions for admissibility of an action and of the complaints set out therein are a matter of public policy, the Court may consider them of its own motion in accordance with Article 92(2) of its Rules of Procedure. Furthermore, it is entitled to ascertain of its own motion whether the procedural safeguards conferred by the European Union's legal order have been complied with (see, to that effect, Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraphs 14 and 15).

41 It should be pointed out that, in an action for failure to fulfil obligations, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with obligations under European Union law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraph 18).

42 The proper conduct of that procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see, to that effect, *Commission* v *Netherlands*, paragraph 19).

43 It follows that the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision and cannot, therefore, be extended during the judicial procedure. The Commission's reasoned opinion and the application must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion, which for its part must contain a cogent and detailed exposition

of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (see *Commission* v *Netherlands*, paragraph 20, and Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraphs 59 and 60).

44 On that basis, it is incumbent on the Commission, during the pre-litigation procedure, to indicate the specific provision or provisions which define the obligation with which the Member State is alleged to have failed to comply (see Case C-437/04 *Commission* v *Belgium* [2007] ECR I-2513, paragraph 39).

45 In the present case it should be noted, on the one hand, that, both in the letter of formal notice and in the reasoned opinion, the Commission limited the complaint alleging an infringement of Articles 43 EC and 49 EC to the award of contracts for public ambulance services characterised by the predominance of the value of health services within the meaning of Annex I B to Directive 92/50 or Annex II B to Directive 2004/18 over the value of transport services within the meaning of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18.

46 With regard to the award of contracts of such services characterised, conversely, by the predominance of the value of transport services over the value of health services, the Commission's complaints during the pre-litigation procedure related to an infringement of Directives 92/50 and 2004/18. By contrast, no mention was made in the letter of formal notice or in the reasoned opinion of a complaint alleging an infringement of Articles 43 EC and 49 EC in connection with the award of those contracts.

47 However, in its application, the Commission now puts forward a complaint also alleging an infringement of Articles 43 EC and 49 EC with regard to the award of the contracts referred to in the previous paragraph, which constitutes an unlawful extension of the scope of the alleged infringement, as defined at the stage of the pre-litigation

procedure. Therefore, the complaint alleging an infringement of those articles must be held inadmissible in so far as it relates to the award of those contracts.

48 On the other hand, in so far as the present action must be understood, on the basis of certain passages in the application, to include a complaint alleging an infringement in the relevant procurement procedures of Article 3(2) of Directive 92/50 or of Article 2 of Directive 2004/18, it must be noted that there was no mention at all of those two provisions as being the object of an infringement alleged by the Commission at the stage of the pre-litigation procedure. The complaint alleging an infringement of those provisions is, therefore, also inadmissible.

49 Finally, it must be pointed out that, under Article 38(1) in conjunction with Article 42(2) of the Rules of Procedure, the subject-matter of the claim must be defined in the application, and that a claim put forward for the first time in the reply modifies the original subject-matter of the application and must therefore be regarded as a new claim and, accordingly, be rejected as inadmissible.

50 In the present case, it must be observed that the Commission expressly stated in its application that, although the procurement practice at issue also exists in other *Länder*, the present action is confined to procurement in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

51 In those circumstances, the Commission's request, contained in its reply, that the Court should hold that the practice at issue exists throughout the whole of the Federal Republic of Germany constitutes an unlawful extension of the original scope of the application. Therefore, the complaints put forward by the Commission must be held inadmissible in so far as they refer to *Länder* other than those identified in the previous paragraph.

52 It follows from this that the action must be declared inadmissible in so far as the applicant claims that the Court should find:

— an infringement of Articles 43 EC and 49 EC as regards the award of contracts for public ambulance services characterised by the predominance of the value of transport services within the meaning of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18 over the value of health services within the meaning of Annex I B to Directive 92/50 or Annex II B to Directive 2004/18;

— an infringement of Article 3(2) of Directive 92/50 or of Article 2 of Directive 2004/18; and

— the existence of a practice of awarding contracts for public emergency services that is contrary to European Union law in *Länder* other than the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

Substance

Arguments of the parties

53 The Commission alleges, first, that there has been an infringement of Articles 10 and 16 of Directive 92/50 and of Articles 22 and 35(4) of Directive 2004/18. It submits that, irrespective of the relative importance in the various contracts referred to in its action of the value of transport services and of health services, the results of the award of those contracts were not published in any way.

54 The Commission also alleges a breach of the principle of non-discrimination contained in Articles 43 EC and 49 EC, which imposes obligations on contracting authorities over and above those arising under Directives 92/50 and 2004/18. In that respect, the condition relating to the existence of a certain cross-border interest, established in Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraphs 29 and 30, is satisfied in the present case, in view of the origin of the complaints sent to the Commission and the significant economic value of the services in question.

55 The Commission submits that the cases complained of reveal a general practice of granting contracts for public ambulance services without adhering to provisions of European Union law which are designed to ensure that such contracts are transparent and subject to competition. The very limited number of procurement procedures launched at European level by local authorities – 13 contract notices published by 11 of over 400 administrative and urban districts in Germany in a period of 6 years – confirms the existence of such a practice.

56 Second, the Commission states that the failure by the German regional authorities to observe European Union rules on public service contracts cannot be justified by considerations relating to the exercise of State sovereignty.

57 It maintains that the services at issue in the present case do not fall within the scope of Articles 45 EC and 55 EC, given that they are not, as such, directly and specifically connected with the exercise of official authority. It states, in particular, that those services do involve a specific power of coercion or special powers of intervention on the part of their providers.

58 Neither the use of flashing blue lights and sirens, nor the recognition that providers of such services have right of way under the German Highway Code, nor the fact that emergency rescue measures can be taken without the injured person's consent or by

ambulance staff who are not fully medically trained, constitutes a manifestation of such powers of coercion or of intervention.

59 Even if, as the Federal Republic of Germany maintains, public emergency services constitute for the public bodies responsible for them a task that involves the direct and specific exercise of official authority, the functional integration into the planning, organisation and administration of those services of auxiliary staff responsible for providing ambulance services does not mean that such staff have official rights or powers of coercion.

60 Third, the Commission denies that Article 86(2) EC can reasonably be relied on in the present case. It claims that Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089 is irrelevant for the purpose of assessing whether the practice at issue is in conformity with European Union law on public contracts and that, in order for that provision to be applicable, it would have to be demonstrated that the application of the rules of the internal market precludes the provision of a high-quality, efficient and profitable emergency service, which the Federal Republic of Germany has never actually claimed.

61 In the first place, the Federal Republic of Germany challenges some of the facts alleged by the Commission.

62 As regards, first of all, the procurement procedure organised by the city of Bonn, it claims that the unsuccessful tenderer was rejected on the ground that, owing to a lack of professional reliability, the tenderer in question had been refused renewal of the authorisation required under the law of the *Land* of North Rhine-Westphalia for the operation of private emergency services, which the authorities of that city had to take into account when awarding a public contract.

63 With regard, second, to the Bad Bevensen ambulance station, the defendant states that the sole object of the process documented by a contract concluded in April 2004 was the transfer or assignment to the district association of the DRK of the activities, staff and equipment of the joint municipality of Bevensen and of the July 1984 contract connecting that body with the administrative district of Uelzen. That April 2004 contract was a continuation of the original contract which, having been concluded in July 1984, did not fall within the scope of Directive 92/50. The April 2004 contract did not substantively modify the original contract, either in terms of its object, the geographic scope of the contract, the services provided or the method of financing.

64 Third, as regards the *Land* of Saxony, the Federal Republic of Germany states that the alleged infringement ended when the contracts renewed between 2002 and 2004 expired and when new rules of the *Land* entered into force in January 2005 requiring, from then on, the adoption of a transparent procedure for the procurement of public ambulance services.

65 In the second place, the Federal Republic of Germany, supported in that respect by the Kingdom of the Netherlands, contends that, as elements of public policy in respect of risk prevention and health protection, public ambulance services are covered by the exception under Articles 45 EC and 55 EC, which takes them outside the scope of European Union law on public contracts.

66 It states that the categorisation of the activity concerned under national law determines the assessment of its association with the exercise of official authority. In the present case, the organisation of public ambulance services, including contracts awarded to providers of those services, is governed by public-law rules. In addition, and above all, the activity entrusted to those providers is connected with the exercise of official authority, as evidenced by emergency vehicle drivers' right of way and associated features, namely the use of flashing blue lights and sirens.

67 The Federal Republic of Germany adds that activities associated with public ambulance services generally presuppose the existence of special powers, namely the planning, organisation and administration of services, the imposition of information and notification obligations on third parties, as well as decisions on the deployment of other specialist services and involvement in the appointment of members of staff of those services as civil service administrators. Those activities are based on close coordination between the various human and technical links in the 'emergency chain', which only an official authority is in a position to undertake on a permanent basis throughout the whole of the territory concerned.

68 The Federal Republic of Germany and the Kingdom of the Netherlands maintain that the fact that public emergency services are, as such, an official function of the public body responsible for them also militates in favour of a functional connection between the providers of those services and the exercise of official authority. The same applies to the collaboration between those providers and other operators also involved in the planning, organisation and administration of those services, such as the police, civil protection and fire services, which are responsible for prevention or protection and which can implement evacuation or security measures and roadblocks and provide assistance with admissions, for example of persons suffering mental illness, since such tasks and measures are typical of such an official function.

69 In the third place, the Federal Republic of Germany, again supported in this respect by the Kingdom of the Netherlands, puts forward in the alternative the argument that ambulance services fall within the definition of 'service of general economic interest' within the meaning of Article 86(2) EC, which entails authority to derogate not only from the competition rules (see *Ambulanz Glöckner*) but also from the fundamental freedoms and from the rules relating to public contracts.

70 It contends that a derogation from those freedoms and rules is necessary to enable cross-subsidisation between densely-populated geographic areas, where the

provision of ambulance services is profitable, and areas of low population density, which are far less profitable in that regard.

71 The link that exists between the emergency and civil protection services also militates in favour of a derogation from the rules of European Union law relating to public contracts. The State's obligation to provide civil protection in major emergencies requires the protection of national health organisations which are obliged to provide assistance in such cases and effectively guarantee the availability of a large number of volunteers living in the vicinity of the emergency.

Findings of the Court

72 In view of the consequences arising from the application of the first paragraph of Article 45 EC and Article 55 EC, it is necessary to determine at the outset whether those provisions apply in the present case (see, to that effect, Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 31).

– The exception under the first paragraph of Article 45 EC, in conjunction with Article 55 EC

73 According to the first paragraph of Article 45 EC, in conjunction with Article 55 EC, the provisions relating to the freedom of establishment and the freedom to provide services do not extend to activities which in a Member State are connected, even occasionally, with the exercise of official authority.

74 As the Advocate General stated at point 51 of her Opinion, such activities are also excluded from the scope of directives which, like Directives 92/50 and 2004/18, are designed to implement the provisions of the Treaty relating to the freedom of establishment and the freedom to provide services.

75 It is necessary, therefore, to determine whether the ambulance service activities at issue in the present case are among the activities referred to in the first paragraph of Article 45 EC.

76 In that regard, it must be borne in mind that, as derogations from the fundamental rules of freedom of establishment and freedom to provide services, Articles 45 EC and 55 EC must be interpreted in a manner which limits their scope to what is strictly necessary in order to safeguard the interests which they allow the Member States to protect (see, in particular, Case 147/86 *Commission* v *Greece* [1988] ECR 1637, paragraph 7; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45; and Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219, paragraph 34).

77 Moreover, it has consistently been held that the review of the possible application of the exceptions laid down in Articles 45 EC and 55 EC must take into account the fact that the limits imposed by those articles on the exceptions referred to fall within European Union law (see, in particular, Case 2/74 *Reyners*, [1974] ECR 631, paragraph 50, and *Commission* v *Portugal*, paragraph 35).

78 According to settled case-law, the derogation provided for under those articles must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority (see *Reyners*, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; and *Commission* v *Portugal*, paragraph 36).

79 As the Advocate General noted at point 58 of her Opinion, such a connection requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion.

80 In the present case, it must first be observed that a contribution to the protection of public health, which any individual may be called upon to make, in particular by assisting a person whose life or health are in danger, is not sufficient for there to be a connection with the exercise of official authority (see, to that effect, Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 37, and *Commission* v *Italy*, paragraph 38).

81 As regards the right of ambulance service providers to use equipment such as flashing blue lights or sirens, and their acknowledged right of way with priority under the German Highway Code, they certainly reflect the overriding importance which the national legislature attaches to public health as against general road traffic rules.

82 However, such rights cannot, as such, be regarded as having a direct and specific connection with the exercise of official authority in the absence, on the part of the providers concerned, of official powers or of powers of coercion falling outside the scope of the general law for the purposes of ensuring that those rights are observed, which, as the parties agree, is within the competence of the police and judicial authorities (see, to that effect, *Commission* v *Italy*, paragraph 39, and *Commission* v *Portugal*, paragraph 44).

83 Nor can matters such as those raised by the Federal Republic of Germany – concerning special organisational powers in the field of the services delivered, the power to

request information from third parties and the deployment of other specialist services, or even involvement in the appointment of civil service administrators in connection with the services at issue – be regarded as reflecting a sufficiently qualified exercise of official powers or of powers falling outside the scope of the general law.

84 As the Federal Republic of Germany also asserted, the fact that the provision of public ambulance services entails collaboration with the public authorities and with professional staff on whom official powers have been conferred, such as members of the police force, does not constitute evidence that the activities of those services have a connection with the exercise of official authority either (see, to that effect, *Reyners*, paragraph 51).

85 The same applies to the fact, also maintained by the Federal Republic of Germany, that agreements relating to the service contracts at issue come within the scope of public law and that the activities concerned are carried out on behalf of those public-law bodies which take on responsibility for public emergency services (see, to that effect, Case C-281/06 *Jundt* [2007] ECR I-12231, paragraphs 36 to 39).

86 It follows from this that the Court cannot accept that Articles 45 EC and 55 EC are applicable to the activities at issue in the present case.

87 It is, therefore, necessary to consider whether the infringement alleged by the Commission has been established.

– The infringement alleged by the Commission

88 As a preliminary point it must be noted, first of all, that it is clear from the particulars provided by the Commission in the written pleadings which it lodged with the Court that the present action is limited to the 'tender' model, just one of the various methods of providing public ambulance services that exist in the Federal Republic of Germany, under which the provider to whom a contract is awarded is paid directly by the contracting authority with which it concluded the contract or by a funding body connected with that contracting authority.

89 Second, the Federal Republic of Germany did not challenge the Commission's assertion that the local authorities which awarded the various contracts identified in the action are contracting authorities within the meaning of Article 1(b) of Directive 92/50 or Article 1(9) of Directive 2004/18 (see, to that effect, Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 18).

90 Third, the fact, as maintained by the Federal Republic of Germany, that the agreements by which those contracts were awarded are governed by public law cannot eclipse the existence of the contract required by Article 1(a) of Directive 92/50 or Article 1(2)(a) of Directive 2004/18. As the Commission argued, on the contrary, it militates in favour of the existence of such a contract (see, to that effect, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 73).

91 The fact that those contracts are in writing and for pecuniary interest is not in any way denied by the Federal Republic of Germany, which, moreover, does not dispute the Commission's statistics showing that the respective value of the various contracts at issue is considerably higher than the thresholds set under Article 7 of Directive 92/50 or of Directive 2004/18.

92 Fourth, it is also common ground between the parties that the emergency ambulance or qualified patient transport services at issue in the present case are within category 2 or 3 of Annex I A to Directive 92/50 or of Annex II A to Directive 2004/18 as well as category 25 of Annex I B to Directive 92/50 or of Annex II B to Directive 2004/18, and that, therefore, the contracts for such services fall within the scope of Article 10 of Directive 92/50 or of Article 22 of Directive 2004/18 (see, to that effect, Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 40).

93 On the other hand, the Federal Republic of Germany denies certain facts alleged by the Commission. It also challenges the Commission's assertion that those facts reveal a general practice in the award of contracts for public ambulance services.

(i) The facts alleged

94 It is settled case-law that, where the Commission relies on detailed complaints revealing repeated failures to comply with European Union law, it is incumbent on the Member State concerned to contest specifically the facts alleged in those complaints (see Case C-489/06 *Commission* v *Greece* [2009] ECR I-1797, paragraph 40 and the case-law cited).

95 In the present case, the Federal Republic of Germany does not deny the veracity of the facts claimed by the Commission in respect of the contract awarded by the city of Magdeburg in the *Land* of Saxony-Anhalt, the contract associated with the operation of the Witten-Herbede ambulance station in the *Land* of North Rhine-Westphalia and the contracts awarded by the Hanover Region and by the administrative district of Hamelin-Pyrmont in the *Land* of Lower Saxony, these being the contracts at issue which are referred to in paragraphs 27 and 29 to 31 of the present judgment.

96 By contrast, the Federal Republic of Germany objects to the Commission's factual claims in respect of the contracts awarded by the city of Bonn, by the administrative district of Uelzen and by the various public authorities of the *Land* of Saxony.

97 As regards, first of all, the contract awarded by the city of Bonn, referred to in paragraph 28 of the present judgment, the information given by the Federal Republic of Germany concerning the reasons for the rejection of a German tenderer cannot eclipse the Commission's allegations – unchallenged by the Federal Republic of Germany – concerning the failure, in connection with that contract, to observe European Union rules on transparency in relation to public contracts.

98 Next, as regards the contract awarded by the administrative district of Uelzen, referred to in paragraph 32 of the present judgment, it is apparent from the parties' exchanges before the Court that the Commission's complaint relates to the fact that the object of the contract concluded between that district and the district association of the DRK in 1984 was extended in 2004 to encompass the operation of the ambulance station at Bad Bevensen, contrary to European Union law on public contracts.

99 In that regard, it must be observed that an amendment to the initial contract may be regarded as being material and, therefore, as constituting the new award of a contract for the purposes of Directive 92/50 or of Directive 2004/18, inter alia, when it extends the scope of the contract considerably to encompass services not initially covered (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 36).

100 In this instance, it is apparent from the information in the documents before the Court that the value of the contract relating to the operation of the ambulance station at Bad Bevensen amounts to EUR 673 719,92, which is considerably higher than the thresholds set under Article 7 of Directive 92/50 and of Directive 2004/18.

101 In those circumstances, the extension of the contract referred to in paragraph 98 of the present judgment must, as maintained by the Commission, be regarded as a material amendment of the original contract, which would have required compliance with the relevant provisions of European Union law on public contracts.

102 Finally, as regards the contracts awarded in the *Land* of Saxony, referred to in paragraphs 33 to 35 of the present judgment, the Federal Republic of Germany's claim that the infringement complained of ended on the expiry of the contracts renewed between 2002 and 2004 and the entry into force in January 2005 of new rules of the *Land* introducing a transparent procedure for the procurement of public ambulance services does not mean that the Court can dismiss the Commission's allegations – unchallenged by the defendant – that there was no transparency at European Union level in the renewal under the previous rules of those contracts until 31 December 2008.

103 The situation complained of by the Commission in respect of the various contracts of the *Land* of Saxony was therefore ongoing as at the date on which the period prescribed in the reasoned opinion expired, namely 16 February 2007, which is the relevant date for assessing the existence of the alleged infringement (see, to that effect, Case C-562/07 *Commission* v *Spain* [2009] ECR I-9553, paragraph 23).

104 It follows that all the facts alleged by the Commission must be deemed to have been established.

(ii) The practice alleged

105 The Federal Republic of Germany complains that the Commission relied on individual cases in order to plead the existence of a general practice of awarding contracts for public ambulance services contrary to European Union law.

106 In that regard, it must be noted that the Commission may seek a finding that European Union law has not been complied with because a general practice contrary thereto has been adopted by the authorities of a Member State, using particular situations to shed light on that practice (see, to that effect, Case C-248/05 *Commission* v *Ireland* [2007] ECR I-9261, paragraph 64 and the case-law cited).

107 A finding that there has been a failure to fulfil obligations on the basis of the administrative practice followed in a Member State none the less involves production by the Commission of sufficiently documented and detailed proof of the alleged practice. It must be apparent from such proof that that administrative practice is, to some degree, of a consistent and general nature. The Commission may not rely on any presumption for that purpose (see Case C-156/04 *Commission* v *Greece* [2007] ECR I-4129, paragraph 50 and the case-law cited, and Case C-489/06 *Commission* v *Greece*, paragraph 48).

108 When the Commission has adduced sufficient evidence to show that the authorities of the defendant Member State have developed a repeated and persistent practice which is contrary to European Union law, it is incumbent on that Member State to challenge in substance and in detail the information produced and the consequences flowing therefrom (see Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 47, and Case C-248/05 *Commission* v *Ireland*, paragraph 69).

109 In the present case, faced with the Commission's factual assertions concerning repeated instances of a failure to comply with European Union law in relation to the award of contracts for public ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, it is apparent from paragraphs 95 to 104 of the present judgment that the Federal Republic of Germany has been unable to disprove the facts complained of. Moreover, it has produced no evidence that other

contracts awarded on the basis of the tender model in those *Länder* were so awarded in accordance with European Union law on public contracts.

110 On the contrary, as the Advocate General noted at point 150 of her Opinion, the Commission's statements – which were not challenged by the Federal Republic of Germany – attesting to the very limited number of cases in which contracts for public ambulance services were awarded in accordance with European Union law, corroborate the existence in the four *Länder* concerned of a practice that goes beyond the individual cases highlighted by the Commission in the present action.

111 It follows from the foregoing that the practice alleged by the Commission must be deemed to have been established as regards the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

112 It is therefore necessary to determine whether there have been infringements of Directives 92/50 and 2004/18 and of Articles 43 EC and 49 EC as alleged by the Commission.

(iii) Infringements relating to failure to comply with Directive 92/50 or with Directive 2004/18, and with Articles 43 EC and 49 EC

113 In its application the Commission submits that, where contracts awarded for public ambulance services are characterised by the predominance of the value of transport services as compared with the value of health services, the practice in question

constitutes an infringement of Article 10 of Directive 92/50 in conjunction with Titles III to VI thereof or, since 1 February 2006, of Article 22 of Directive 2004/18 in conjunction with Articles 23 to 55 thereof. In accordance with those various titles or provisions, it is, inter alia, incumbent on the contracting authority to publish a contract notice at European Union level for the purposes of awarding the contract in question and to ensure that the results of the award of that contract are published.

114 Where contracts awarded for public ambulance services are characterised by the predominance of the value of health services as compared with the value of transport services, the Commission claims that the practice in question constitutes an infringement of Article 10 of Directive 92/50 in conjunction with Article 16 thereof or, since 1 February 2006, of Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof. Those provisions, in essence, require the contracting authority to ensure that the results of the award of the contract concerned are published.

115 The Commission also raises a complaint concerning an infringement of Articles 43 EC and 49 EC, which, however, as is apparent from paragraphs 45 to 47 and 52 of the present judgment, is admissible only in so far as it relates to the award of contracts in the circumstances referred to in the preceding paragraph.

116 In that regard, it must be borne in mind that, according to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations, it is for the Commission to prove the alleged failure by placing before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see Case C-246/08 *Commission* v *Finland* [2009] ECR I-10605, paragraph 52 and the case-law cited).

117 As the Advocate General stated at point 113 of her Opinion, the Commission's obligation to establish precisely the specific object of the alleged failure is critical if the defendant Member State is to have an accurate understanding of the measures it is required to adopt, in the event of such a failure being determined, in order to ensure that the situation complained of is restored to full conformity with European Union law.

118 In the present case, it follows from the documents before the Court that, having stated in the reasoned opinion that it did not have sufficient information available to be able to assess whether it is the value of transport or of health services which is predominant in the contracts identified, the Commission, as the Advocate General noted at point 96 of her Opinion, deliberately refrained from addressing that aspect in the context of the present action, although the documents before the Court do not indicate that that decision was dictated by any alleged lack of cooperation on the part of the German authorities during the pre-litigation procedure.

119 In its application, the Commission stated in general terms that the value of health services may be considerable, both in contracts relating to qualified patient transport services and in those relating to emergency ambulance transport services, and that, since the contracts at issue generally cover both types of service, the respective values of those services will vary from one contract to the next, although contracts in which the value of transport services is predominant as against the value of health services and contracts in which the converse is the case are equally conceivable.

120 Having opted for an approach based on those suppositions, the Commission deliberately refrained from establishing that the contracts at issue, or at least some of them, were characterised by the predominance of the value of transport services over the value of health services.

121 On the contrary, with regard to Directives 92/50 and 2004/18, the Commission's complaints were focused on the fact that, irrespective of the legal distinction made in Article 10 of Directive 92/50 or in Article 22 of Directive 2004/18, there had been a failure when awarding each of those contracts to comply with Article 16 of Directive 92/50 or Article 35(4) of Directive 2004/18 given that the results of the award of those contracts were not published, which was not denied by the Federal Republic of Germany in respect of any of the contracts referred to.

122 In such circumstances, where, in the absence of the production by the Commission of sufficiently specific evidence, it is conceivable that none of the contracts identified in the action is characterised by the predominance of the value of transport services over the value of health services, the finding of a failure to comply with Directives 92/50 and 2004/18 must be limited to an infringement of Article 10 of Directive 92/50 in conjunction with Article 16 thereof or, since 1 February 2006, of Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof, since those provisions are applicable in any event to contracts which, like those at issue in the present case, cover both transport and health services, regardless of the respective value of those services in the contract concerned.

123 As the Advocate General stated at point 93 of her Opinion, the Commission, moreover, has not sought to establish that the contracts identified in its action, or at least some of them, were characterised by the predominance of the value of health services over the value of transport services. In those circumstances, where, in the absence of sufficient specific information, it is conceivable that none of the contracts identified in the action is characterised by such predominance, the Court is not in a position to find that there has been a failure to comply with Articles 43 EC and 49 EC as alleged. The same conclusion applies as regards the question whether the contracts identified by the Commission have a certain cross-border interest.

124 The Court will also examine the merits of the arguments of the Federal Republic of Germany and of the Kingdom of the Netherlands in relation to the reasoning based on Article 86(2) EC.

– The reasoning based on Article 86(2) EC

125 In paragraphs 55 and 60 of the judgment in *Ambulanz Glöckner*, the Court categorised emergency transport services as services of general economic interest within the meaning of Article 86(2) EC.

126 However, it is apparent from settled case-law that it is incumbent upon a Member State which invokes Article 86(2) EC to show that all the conditions for application of that provision are fulfilled (see, in particular, Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 101).

127 In the present case, the Federal Republic of Germany pointed to the need to ensure cross-subsidisation of ambulance services between profitable and less profitable geographic areas on the basis of population density. It also emphasised the importance of a service that is in close proximity to and collaborates with other services involved in emergency work, which entails having staff living in the vicinity of incidents available who can be readily mobilised in the event of an emergency or a major disaster.

128 However, such considerations could, as the Commission pointed out, justify the adoption by the contracting authority responsible of specific measures designed to ensure the provision by the other party to the contract, on economically acceptable terms, of a high-quality ambulance service that is efficient and available throughout the whole of the area concerned – inter alia by means of payment arrangements adapted to the specific nature of the area covered or by means of an obligation to have sufficient human and technical resources available on the ground.

129 By contrast, such considerations do not clarify how the obligation to ensure that the results of the award of the contract concerned are published is liable to prevent the accomplishment of that task of general economic interest.

130 It follows from this that the arguments based on Article 86(2) EC must be rejected.

131 Having regard to all of the foregoing considerations, it must be held that, by failing to publish notices of the results of the procedure for the award of contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 10 of Directive 92/50 in conjunction with Article 16 thereof or, since 1 February 2006, under Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof in relation to the award in accordance with the tender model of contracts for public emergency ambulance and qualified patient transport services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

132 The application must be dismissed as to the remainder.

Costs

133 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. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own

costs. In the present case, since the Commission and the Federal Republic of Germany have each been unsuccessful in certain claims, they shall each bear their own costs.

134 Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member State which has intervened in the proceedings is to be ordered to bear its own costs. The Kingdom of the Netherlands shall therefore bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. Declares that, by failing to publish notices of the results of the procedure for the award of contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 10 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, in conjunction with Article 16 thereof or, since 1 February 2006, under Article 22 of 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, in conjunction with Article 35(4) thereof in relation to the award in accordance with the tender model of contracts for public emergency ambulance and qualified patient transport services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony;

2. Dismisses the action as to the remainder;

3. Orders the European Commission, the Federal Republic of Germany and the Kingdom of the Netherlands to bear their own costs.

[Signatures]