



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 20 July 2017<sup>1</sup>

**Case C-187/16**

**European Commission**

**v**

**Republic of Austria**

(Failure of a Member State to fulfil obligations — Public service contracts — Directives 92/50/EEC, 2004/18/EC and 2009/81/EC — Article 346 TFEU — Need for special security measures — Protection of the State's essential security interests — Manufacture of identity documents and other official documents — Award of a contract to Österreichische Staatsdruckerei without first conducting a procurement procedure)

### **I. Introduction**

1. It goes without saying that official documents such as biometric passports, identity cards, driving licences and residence permits must be manufactured in compliance with particular secrecy and security requirements, as the issue of such documents is an expression of the exercise of fundamental State functions. The documents are used as part of everyday life and the importance of public confidence in their authenticity and veracity is not to be underestimated. Consequently, highest priority is given to security of supply, protection against counterfeiting and responsible handling of these documents, including of data processed in their manufacture, and abuse must be effectively prevented.<sup>2</sup>

2. In these infringement proceedings, however, the Court will be required to clarify whether such considerations justify entrusting the manufacture of such documents, without any procurement procedure, exclusively to a certain undertaking which is considered to be particularly trustworthy.

3. Specifically, the European Commission alleges that, by reserving the manufacture of security-related documents exclusively for Österreichische Staatsdruckerei GmbH, a formerly State-owned undertaking which has now been privatised, the Republic of Austria has infringed EU public procurement law.

4. Going beyond the case at issue, the present proceedings are also significant because in them the Court will once again shed light on the leeway available to Member States to derogate from EU law where they rely on their essential national security interests within the meaning of Article 346(1) TFEU. At a time when the threat from international terrorism and organised crime and the question of effective control of migration flows are a focus of public interest everywhere, this case could scarcely be more timely.

<sup>1</sup> Original language: German.

<sup>2</sup> See, for example, the Action plan to strengthen the European response to travel document fraud, which the European Commission outlined in its Communication of 8 December 2016 to the European Parliament and the Council (COM(2016) 790 final).

## II. Legislative framework

### A. EU law

5. The EU law framework for the present case is defined, first, by the provisions of primary law contained in Articles 49, 56 and 346(1)(a) TFEU (formerly Articles 43, 49 and 296(1)(a) EC) and, second, by a number of rules of secondary law in Directives 92/50/EEC<sup>3</sup> and 2004/18/EC,<sup>4</sup> the former directive being relevant for the period up to 31 January 2006 and the latter for all periods thereafter.

#### *The directives relating to the award of public service contracts*

6. For the award of public service contracts concerning ‘publishing and printing services on a fee or contract basis’, both Directive 92/50 and Directive 2004/18 require in principle that a procurement procedure be conducted in accordance with EU law. This is clear from Article 3(1), Article 11(1), Article 8 and Article 15(2) of, in conjunction with Annex IA(15) to, Directive 92/50 and from Article 20 of, in conjunction with Annex II(A)(15) to, Directive 2004/18.

#### *Derogations from the duty to conduct a procurement procedure*

7. However, both Directive 92/50 and Directive 2004/18 exclude from their scope secret contracts and contracts requiring special security measures.

In the case of Directive 92/50, such provision is made in Article 4(2), which reads as follows:

‘This Directive shall not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State’s security so requires.’

A substantively identical provision is contained in Article 14 of Directive 2004/18:

‘This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of the Member State so requires.’

8. The background to this exclusion from the scope of the procurement procedures laid down in EU law for public service contracts is explained for the first time in the 14th recital of Directive 92/50:

‘Whereas, in the field of services, the same derogations as in Directives 71/305/EEC and 77/62/EEC should apply as regards State security or secrecy and the priority of other procurement rules such as those pursuant to international agreements, those concerning the stationing of troops, or the rules of international organisations’.

<sup>3</sup> 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).

<sup>4</sup> 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).

9. In recital 22 of Directive 2004/18 this derogation for State security and State secrecy is updated as follows:

‘Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures on grounds relating to State security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.’

10. Reference should also be made to Article 10 of Directive 2004/18, which was given the following wording by Directive 2009/81/EC<sup>5</sup> for ‘contracts in the fields of defence and security’:

‘Subject to [Article 346 TFEU], this Directive shall apply to public contracts awarded in the fields of defence and security, with the exception of contracts to which Directive 2009/81/EC ... applies.

This Directive shall not apply to contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.’

11. Under Article 13(a) of Directive 2009/81, which is headed ‘Specific exclusions’, that directive does not apply to ‘contracts for which the application of the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security’.

12. The period for the transposition of Directive 2009/81 expired on 21 August 2011, as provided for in Article 72(1) of that directive.

#### *Special rules of EU law for passports and identity cards*

13. Furthermore, specifically with respect to passports and identity cards, reference should be made to Regulation (EC) No 2252/2004.<sup>6</sup> As regards the object of that regulation, it is worth noting recital 4 thereof, which contains these explanations:

‘This Regulation is limited to the harmonisation of the security features including biometric identifiers for the passports and travel documents of the Member States. The designation of the authorities and bodies authorised to have access to the data contained in the storage medium of documents is a matter of national legislation, subject to any relevant provisions of Community law, EU law or international agreements.’

14. Article 3 of Regulation No 2252/2004 then provides as follows:

‘1. In accordance with the procedure referred to in Article 5(2) [7] it may be decided that the specifications referred to in Article 2 [8] shall be secret and not be published. In that case they shall be made available only to the bodies designated by the Member States as responsible for the printing and to persons duly authorised by a Member State or the Commission.

5 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76).

6 Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ 2004 L 385, p. 1).

7 This is a ‘comitology procedure’ under Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

8 This refers to technical specifications relating to additional security features and requirements, the storage medium of the biometric features and their security, and requirements for quality and common standards for the facial image and the fingerprint.

2. Each Member State shall designate one body having responsibility for printing passports and travel documents. It shall communicate the name of that body to the Commission and the other Member States. The same body may be designated by two or more Member States. Each Member State shall be entitled to change its designated body. It shall inform the Commission and the other Member States thereof.’

### **B. National law**

15. Österreichische Staatsdruckerei<sup>9</sup> is incorporated in private law in the form of a Gesellschaft mit beschränkter Haftung (limited liability company, GmbH). The sole shareholder in the GmbH is Österreichische Staatsdruckerei Holding AG, whose shares are listed on the stock market and held by private individuals.

16. On the basis of the factual and legal situation as at 12 September 2014,<sup>10</sup> the manufacture of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, credit card-sized vehicle licences and fireworks display permits is entrusted to Staatsdruckerei.

17. Under the second sentence of Paragraph 1a and Paragraph 2(2)(1) of the Staatsdruckereigesetz 1996 (Law on the State Printing Office 1996),<sup>11</sup> Staatsdruckerei is responsible in particular for ‘the manufacture of print products for the federal offices in the manufacturing process for which secrecy or compliance with security rules (security printing) is necessary’. Furthermore, Paragraph 2(3) of the Staatsdruckereigesetz 1996 provides that the federal bodies are required to ‘entrust [Staatsdruckerei] exclusively’ with the manufacture of the abovementioned print products.<sup>12</sup>

18. Under the heading ‘Supervision of security printing’, Paragraph 6(1) of the Staatsdruckereigesetz 1996 further provides that business and work processes relating to the manufacture, processing and storage of security printing products are subject to supervision by the Federal Minister responsible for the security printing product in question. Under Paragraph 6(2) of that law, Staatsdruckerei is required to take all security measures necessary to prevent abuse in connection with the manufacture, processing and storage of security printing products. Lastly, under Paragraph 6(3) of that law, Staatsdruckerei must grant the Federal Minister responsible for the security printing product in question, to the extent necessary for supervision, access to its business premises and an opportunity to inspect the relevant business records.

9 Austrian State Printing Office; also ‘Staatsdruckerei’.

10 On 12 September 2014, the period laid down by the Commission in its reasoned opinion in accordance with the first paragraph of Article 258 TFEU expired.

11 BGBl. I No 1/1997.

12 For chip passports, emergency passports and identity cards such provision is also made in the Regulation of the Federal Minister for the Interior on the design of passports and passport substitutes, for residence permits in the Regulation of the Federal Minister for the Interior on the implementation of the Law on Settlement and Residence, for credit card-sized driving licences in the Regulation of the Federal Minister for Science and Transport on the implementation of the Law on driving licences, for credit card-sized vehicle licences in the Regulation of the Federal Minister for Science and Transport on the establishment of vehicle licencing offices, and for fireworks display permits in the Regulation of the Federal Minister for the Interior on the implementation of the Law on fireworks 2010. Where the obligation to assign the contract to Staatsdruckerei is not expressly laid down in those regulations, it follows from the requirement to protect those documents against counterfeiting in conjunction with Paragraph 2(3) of the Staatsdruckereigesetz 1996.

### III. Facts and pre-litigation procedure

19. By letter of formal notice of 6 April 2011, the Commission made Austria aware of concerns regarding the compatibility with the provisions of the TFEU and of Directives 92/50 and 2004/18 of the direct award of certain service contracts for the printing of official documents to Staatsdruckerei. The documents concerned at the time were chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, paper and card-sized vehicle licences, fireworks display permits, boatmasters' certificates, security document forms, labels for narcotic substances and moped licences.

20. In its reply of 7 June 2011, Austria relied on the protection of essential national security interests. Protection of secret information, safeguarding of the authenticity and veracity of the documents concerned, security of supply and guaranteed protection of sensitive data justified awarding the printing contracts exclusively to Staatsdruckerei, as Staatsdruckerei alone demonstrated the appropriate organisational, technical and structural security measures for performing those contracts. By letters of 17 July 2012 and 28 March 2013, Austria supplemented its arguments in this regard.

21. On 10 July 2014, the Commission issued a reasoned opinion. In that opinion, the Commission emphasised that it was perfectly possible to organise a public invitation to tender in such a way that only undertakings which specialised in the manufacture of documents subject to special security requirements and were supervised accordingly could be successful.

22. Austria responded to the reasoned opinion on 10 September 2014. In essence, the Member State relied again on its national security interests and emphasised that the performance of the printing contracts was closely linked to public order and the institutional operation of the State. Their direct award to Staatsdruckerei was justified by the need for a guaranteed supply and for production conditions which ensured compliance with special secrecy and security rules. Observance of security requirements by undertakings other than Staatsdruckerei could be enforced only by means of civil law, whereas the Austrian State authorities enjoyed special supervisory powers vis-à-vis Staatsdruckerei by law.

23. In the course of the pre-litigation procedure, the Commission gradually withdrew its complaints in relation to moped licences, paper vehicle licences, boatmasters' certificates, security document forms and labels for narcotic substances, as in some cases those documents were abolished and in some cases their manufacture was put out to competitive tender.<sup>13</sup> In all other respects, however, it maintained its complaints and stated that it was for Austria to prove the need for a direct award of the printing contracts at issue to Staatsdruckerei.

### IV. Forms of order sought and procedure before the Court

24. By written pleading of 4 April 2016, the Commission brought the present action at the Court pursuant to the second paragraph of Article 258 TFEU. It claims that the Court should:

1. declare that

<sup>13</sup> According to the documents before the Court, on 17 July 2012 Austria had envisaged abolishing moped licences and conducting an open award procedure for fireworks display permits, paper vehicle licences, boatmasters' certificates, security document forms and labels for narcotic substances. On 28 March 2013, Austria eventually confirmed to the Commission that it had abolished moped licences and implemented its announcement regarding security document forms and labels for narcotic substances. It asserted that the Commission's complaints regarding boatmasters' certificates had also been remedied, as the Commission expressly stated in the application.

- by awarding public service contracts for the manufacture of certain documents, such as chip passports, emergency passports, residence permits, identity cards, fireworks display permits, credit card-sized driving licences and credit card-sized vehicle licences, under and above the thresholds applicable under Directive 92/50 and Directive 2004/18 in the time before and after the transposition of Directive 2004/18 directly to Österreichische Staatsdruckerei GmbH, and
- by maintaining national provisions, such as in particular Paragraph 2(3) of the Bundesgesetz zur Neuordnung der Rechtsverhältnisse der Österreichischen Staatsdruckerei (Federal Law on the reorganisation of the legal relationships of Österreichische Staatsdruckerei), which require contracting authorities to award such public service contracts exclusively to Österreichische Staatsdruckerei GmbH,

the Republic of Austria has failed to fulfil its obligations under Articles 49 and 56 TFEU or under Article 4 read in conjunction with Articles 11 to 37 of Directive 92/50/EEC and Articles 14, 20 and 23 to 55 of Directive 2004/18/EC;

2. order the Republic of Austria to pay the costs.

25. The Republic of Austria contends that the Court should:

- dismiss the action brought by the Commission in the present case; and
- order the applicant to pay the costs.

26. The action brought by the Commission was examined before the Court on the basis of the written documents and at the hearing on 7 June 2017.

## V. Assessment

27. At the present stage, the subject matter of these infringement proceedings is now confined only to the manufacture of chip passports, emergency passports, identity cards, residence permits, credit card-sized driving licences, credit card-sized vehicle licences and fireworks display permits. In the course of the extrajudicial pre-litigation procedure the Commission withdrew its complaints in relation to the manufacture of paper vehicle licences, boatmasters' certificates, labels for narcotic substances, security document forms and moped licences.

28. The action brought by the Commission is well founded if and in so far as certain requirements existed under EU law for the award of the printing contracts at issue (see immediately below, section A), with which Austria failed to comply and which it could not evade by relying on essential national security interests (see further below, section B).

29. It is noted for the sake of completeness that in this case it is not possible to apply the case-law concerning 'in-house' transactions,<sup>14</sup> as the Republic of Austria no longer controls Staatsdruckerei like it does its own departments. Rather, Staatsdruckerei is an undertaking incorporated purely under private law and is wholly privately owned.

<sup>14</sup> See in this regard, inter alia, judgments of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50); of 8 April 2008, *Commission v Italy* (C-337/05, EU:C:2008:203, paragraph 36); and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 31). The exception for 'in-house' transactions applies in cases covered by the public procurement directives as well as in cases which are to be assessed solely by reference to the fundamental freedoms of the European internal market: judgments of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605, paragraphs 60 to 62); of 29 November 2012, *Econord* (C-182/11 and C-183/11, EU:C:2012:758, paragraph 26); and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 24).

***A. Duties under EU law in respect of the award of public service contracts by national authorities***

30. The printing contracts at issue are undeniably public service contracts under the EU public procurement law applicable in the material period. Specifically, this follows for the period up to 31 January 2006 from Annex IA(15) to Directive 92/50 and for the period thereafter from Annex II(A)(15) to Directive 2004/18, each of which classify ‘publishing and printing services on a fee or contract basis’ as priority services. For such services both directives lay down detailed rules for contracting authorities regarding the procurement procedure to be applied.

*1. Duty under secondary law to conduct a procurement procedure for the printing of all documents except for fireworks display permits*

31. The parties agree that the values of all the printing contracts at issue except for the contract for the manufacture of fireworks display permits were above the thresholds for public service contracts laid down in Directives 92/50 and 2004/18.

32. Consequently, there was in principle — subject to the question of protection of essential national security interests which will be discussed below<sup>15</sup> — a duty to conduct a procurement procedure in accordance with EU secondary law for all of those contracts. This is clear from Article 3(1), Article 11(1), Article 8 and Article 15(2) of, in conjunction with Annex IA(15) to, Directive 92/50 and from Article 20 of, in conjunction with Annex II(A)(15) to, Directive 2004/18.

*2. No duty under primary law to produce a minimum amount of publicity for the contract for the printing of fireworks display permits*

33. As regards the contract for the printing of fireworks display permits, on the other hand, whose estimated value was only EUR 56 000 and thus well below the thresholds for public service contracts laid down in Directives 92/50 and 2004/18, there was no obligation under secondary law to conduct a procurement procedure.

34. It is true that this does not mean that such public contracts would fall completely outside the scope of EU law. Rather, it is established case-law<sup>16</sup> that the fundamental freedoms of the European internal market — in this case the freedom of establishment and the freedom to provide services (Articles 43 and 49 EC for the period before 1 December 2009 and Articles 49 and 56 TFEU since 1 December 2009) — and in particular the duty of transparency implicit in those fundamental freedoms require that a sufficient degree of advertising is also ensured before the award of public service contracts below the threshold, provided that the contract in question is of certain cross-border interest.

35. In the present case, however, the Commission and Austria disagree on whether the contract at issue for the printing of fireworks display permits was actually of such certain cross-border interest.

<sup>15</sup> See below, points 40 to 72 of this Opinion.

<sup>16</sup> Judgments of 7 December 2000, *Telaustria and Telefonadress* (C-324/98, EU:C:2000:669, paragraphs 60 to 62); of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraphs 42, 45 and 46); of 13 November 2007, *Commission v Ireland* (C-507/03, EU:C:2007:676, paragraphs 29 to 31); of 17 December 2015, *UNIS and Beaudout Père et Fils* (C-25/14 and C-26/14, EU:C:2015:821, paragraphs 27, 38 and 39); and of 6 October 2016, *Tecnoedi Costruzioni* (C-318/15, EU:C:2016:747, paragraph 19).

36. As Austria rightly states, the low value of a contract is an indication that there is no certain cross-border interest. The Commission is correct to state that the existence or non-existence of such cross-border interest cannot be determined on the basis of the value of the contract alone, but that an overall assessment of all the relevant circumstances of the individual case is essential.<sup>17</sup> In my view, however, such an overall assessment also shows that there is no certain cross-border interest in the present case.

37. The market for the manufacture of counterfeit-proof documents is certainly characterised in general by a high degree of specialisation and international integration. Under these circumstances it cannot be ruled out that even smaller contracts from a Member State may attract considerable cross-border interest elsewhere in the European Union or in the European Economic Area (EEA). The Commission has nevertheless failed to explain adequately in the present case to what extent the printing of Austrian fireworks display permits which, according to the undisputed submissions of Austria, are manufactured in volumes of approximately 400 per year and at a unit price of EUR 35, might be of certain cross-border interest.

38. The fact cited by the Commission that Staatsdruckerei has also been commissioned by a number of foreign States to manufacture visas and passports casts little light on the matter, as visas and passports are printed in much larger volumes and according to uniform EU rules, unlike fireworks display permits. The cross-border interest in printing contracts for visas and passports is thus much greater and not comparable with the interest in printing contracts for fireworks display permits.

39. All in all, the circumstances invoked by the Commission do not therefore clearly indicate the existence of cross-border interest in the printing contract for fireworks display permits. Consequently, the Commission has not complied in this regard with the burden of proof on it.<sup>18</sup> Austria cannot therefore be considered to have been required by EU primary law to produce a minimum amount of publicity before the award of the printing contract for fireworks display permits. Austria was thus permitted, from the point of view of EU law, to award that contract directly to Staatsdruckerei without first considering other undertakings as contractors.

### ***B. Derogations from the duties under EU law***

40. With regard to the part of the Commission's action which is *not* concerned with fireworks display permits, it must now be considered whether and to what extent the undeniably sensitive nature of the printing contracts at issue could mean that Austria was permitted to award those contracts directly to Staatsdruckerei, in derogation from the abovementioned duties under EU law, without considering other undertakings as contractors in any manner.

41. Austria cites Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18 in this connection. Article 346(1)(a) TFEU (formerly Article 296(1)(a) EC), which has also been the subject of intensive discussion between the parties, is *not* relied on by Austria here, as was made clear at the hearing.<sup>19</sup> I nevertheless consider it appropriate to include consideration of Article 346(1)(a) TFEU hereinafter, as all the abovementioned directive provisions can ultimately be traced back to it and are closely connected with it.

<sup>17</sup> See, to that effect, judgment of 6 October 2016, *Tecnoedi Costruzioni* (C-318/15, EU:C:2016:747, paragraph 20).

<sup>18</sup> With regard to the burden of proof on the Commission, see for example judgment of 13 November 2007, *Commission v Ireland* (C-507/03, EU:C:2007:676, paragraph 32).

<sup>19</sup> Austria relies on Article 346(1)(a) TFEU only with regard to the previously discussed fireworks display permits.



## 1. General remarks

42. Article 346(1)(a) TFEU makes clear at the level of primary law that no Member State is to be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. Unlike the subsequent point (b) of that article, point (a) is not restricted, according to its wording, only to arms, munitions and war material, but offers general protection to the essential security interests of the Member States and may therefore also be applied to non-military procurement processes such as the printing contracts at issue here.<sup>20</sup> If a Member State refuses to invite tenders for or otherwise publicise a public contract, it ultimately withholds relevant information regarding a forthcoming procurement project from the interested public. It thus departs from its duty to supply information which is laid down by EU law for this area in Article 346(1)(a) TFEU.

43. In secondary law, the possibility set out in Article 346(1)(a) TFEU to derogate from duties under EU law is fleshed out for public procurement law, on the one hand, in Article 13(a) of Directive 2009/81 and, on the other, in Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18. The latter two provisions each stipulate, using substantively identical wordings, that the rules in those directives do not apply to public contracts

- when they are declared to be secret,
- when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned,
- or when the protection of the essential interests of that Member State so requires.

44. Austria relies only on the latter two variants of Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, that is to say, it considers that the printing contracts at issue must be accompanied by special security measures (second variant) and the protection of essential security interests of the State is concerned (third variant). On the other hand, Austria does *not* assert any need for secrecy in respect of the printing contracts (first variant).

45. In essence, Article 4(2) of Directive 92/50, Article 14 of Directive 2004/18 and Article 346(1)(a) TFEU all express the same legal principle, namely that Member States are permitted to depart from the obligations actually incumbent on them under EU law in order to protect essential national security interests. It is therefore appropriate to assess all these exceptions together, the extensive case-law on Article 346(1) TFEU — on point (b) in particular — also providing guidance for the interpretation of Article 4(2) of Directive 92/50 and of Article 14 of Directive 2004/18.

## 2. Discretion of Member States as to their essential security interests

46. Essential national security interests constitute a concept of EU law which must be given an autonomous interpretation. That concept covers both the Member State's internal security and its external security.<sup>21</sup>

<sup>20</sup> As the Commission makes clear in its Interpretative communication of 7 December 2006 on the application of Article 296 of the Treaty in the field of defence procurement (COM(2006) 779 final, also '2006 Communication'); it states that Article 296(1)(a) EC (now Article 346(1)(a) TFEU) 'goes beyond defence, aiming in general at protecting information which Member States cannot disclose to anyone without undermining their essential security interests' (section 1 of the Communication). Advocate General Ruiz-Jarabo Colomer also seems to take a similar approach in his Opinion in *Commission v Finland and Others* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:67, point 106).

<sup>21</sup> Judgments of 26 October 1999, *Sirdar* (C-273/97, EU:C:1999:523, paragraph 17), and of 11 January 2000, *Kreil* (C-285/98, EU:C:2000:2, paragraph 17); in the same vein, judgments of 10 July 1984, *Campus Oil and Others* (72/83, EU:C:1984:256, paragraphs 34 to 36); of 4 October 1991, *Richardt and 'Les Accessoires Scientifiques'* (C-367/89, EU:C:1991:376, paragraph 22); and of 15 December 2009, *Commission v Denmark* (C-461/05, EU:C:2009:783, paragraph 51, first sentence).

47. It has been acknowledged that each Member State must be granted a wide discretion in the definition of its essential security interests;<sup>22</sup> this is shown by the use of the words ‘as it considers necessary’ in Article 346(1) TFEU.

48. The provisions of EU law on the protection of essential national security interests cannot, however, be read in such a way as to confer on Member States a power to depart from their duties under EU law based on no more than reliance on those interests.<sup>23</sup> Rather, it is for the Member States in each case to offer substantiated evidence to show precisely which national security interests are affected and to what extent compliance with certain obligations under EU law would in practice be contrary to those security interests.

49. Austria argues convincingly in this case that the issue of the official documents in question affects fundamental functions of the State.<sup>24</sup> For example, passports and identity cards are used to prove a person’s identity, nationality and age. In practice, the presentation of such documents ensures the holders’ right to participate in elections and their freedom to travel, to reside in other Member States of the European Union or in other EEA Member States and possibly to study or work there. A driving licence provides information about its holder’s entitlement to drive motor vehicles and thus to make active use of the roads; in some cases it may even be recognised as proof of identity.

50. As Austria rightly states, in printing these and similar documents it must be ensured, first, that their authenticity and protection against counterfeiting are guaranteed, second, that unauthorised parties do not become aware of the security arrangements for their manufacture, third, that the reliable supply of public bodies with the documents concerned is guaranteed and, fourth, that a high level of protection is provided for personal data processed in the manufacture of the documents.

51. Even if the Commission is correct and there is doubt whether and to what extent this latter aspect of data protection can specifically be regarded as a matter of national security,<sup>25</sup> it is nevertheless undeniable that in any case all the other factors mentioned — authenticity and protection against counterfeiting for official documents, protection of the security arrangements for their manufacture and guaranteed security of supply — can affect essential national security interests.

52. In principle, Austria may therefore rely on its essential national security interests and the measures necessary for their protection, as mentioned in Article 346(1)(a) TFEU, Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18. However, the resolution of the present case hinges on the question whether those security interests and measures can justify completely dispensing with the practice prescribed by EU law for the award of public contracts. I will now turn to this question.

22 Judgment of 30 September 2003, *Fiocchi munizioni v Commission* (T-26/01, EU:T:2003:248, paragraph 58); see also the 2006 Communication (cited in footnote 20), according to which Article 296 EC (now Article 346 TFEU) ‘has been acknowledged to grant to Member States a broad degree of discretion’ in deciding how to protect their essential security interests (section 4 of the Communication) and ‘[i]t is the Member States’ prerogative to define their essential security interests’ (section 5 of the Communication).

23 Judgments of 16 September 1999, *Commission v Spain* (C-414/97, EU:C:1999:417, paragraphs 22 and 24); of 15 December 2009, *Commission v Finland* (C-284/05, EU:C:2009:778, paragraph 47); of 7 June 2012, *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 35); and of 4 September 2014, *Schiebel Aircraft* (C-474/12, EU:C:2014:2139, paragraph 34).

24 Similarly, see the statements made by the Court in the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4, paragraph 24), regarding the tasks transferred to Staatsdruckerei.

25 The Commission points out that data protection is an important public interest, but not a matter of national security.

### 3. Exceptional character of measures for the protection of essential national security interests and the principle of proportionality

53. As Article 346(1)(a) TFEU permits derogations from fundamental freedoms, which are of basic importance in the system established by the treaties, it is an exception which is to be interpreted strictly.<sup>26</sup> The same applies to Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, which provide for exclusions from the scope of EU public procurement law and thus ultimately also exceptions to the fundamental freedoms under the treaties.<sup>27</sup>

54. Where recourse is had to such exceptions, even though the Member State concerned is accorded a wide discretion in security matters, it is not entirely free, but is subject to review by the Court. In particular, it is for that Member State to prove that it is *necessary* to have recourse to the measures taken by it in order to protect its essential national security interests.<sup>28</sup> The Member State concerned must therefore ultimately undergo a proportionality test.

55. Austria essentially invokes three arguments in this regard to justify a direct award of the printing contracts at issue to Staatsdruckerei. First, the protection of essential national security interests necessitates the centralised performance of the printing contracts by a single undertaking; second, effective official controls are necessary in connection with the implementation of security-related printing contracts; and, third, the contractor as such must be trustworthy. As I will explain below, I do not think that any of these arguments stands up to closer scrutiny in the case at issue.

#### (a) The need for the centralised performance of the printing contracts

56. First of all, Austria relies on the need for the centralised performance of the printing contracts at issue by a single undertaking. This makes it easier for the Austrian authorities to monitor the proper performance of the contracts in compliance with the necessary secrecy and security arrangements. In addition, it reduces the risk of unauthorised parties becoming aware of those security arrangements or of sensitive materials (such as forms for passports or residence permits) falling into the hands of unauthorised parties.

57. The centralised performance of the contract may, in a case like the present one and for the reasons cited by Austria, be regarded as contributing to the protection of essential national security interests, and possibly also as contributing to data protection. However, the centralisation argument can ultimately only explain why the printing contracts at issue are *only ever awarded to a single undertaking* (and not to several at the same time). On the other hand, there is no plausible justification, based on the need for centralisation, why it should be necessary, in order to protect essential national security interests, to commission *only ever the same undertaking*, namely Staatsdruckerei.

58. Nothing else follows from Article 3(2) of Regulation No 2252/2004, which is cited by Austria. It is true that that provision requires Member States to designate one *body having responsibility* for printing passports and travel documents. The provision does not, however, indicate how that body having responsibility should be selected by Member States. In particular, it certainly does not preclude a

<sup>26</sup> Judgments of 15 December 2009, *Commission v Finland* (C-284/05, EU:C:2009:778, paragraph 48), of 15 December 2009, *Commission v Denmark* (C-461/05, EU:C:2009:783, paragraph 52); and of 7 June 2012, *Insinööri-toimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 35).

<sup>27</sup> See, to that effect, judgment of 7 June 2012, *Insinööri-toimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 35), in relation to Article 10 of Directive 2004/18.

<sup>28</sup> Judgments of 16 September 1999, *Commission v Spain* (C-414/97, EU:C:1999:417, paragraphs 22 and 24); of 15 December 2009, *Commission v Finland* (C-284/05, EU:C:2009:778, paragraphs 48 and 49); of 8 April 2008, *Commission v Italy* (C-337/05, EU:C:2008:203, in particular paragraph 53); of 2 October 2008, *Commission v Italy* (C-157/06, EU:C:2008:530, paragraph 31); and of 7 June 2012, *Insinööri-toimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 45); similarly, see the 2006 Communication (cited in footnote 20, section 5), according to which it must be demonstrated why the non-application of public procurement rules in the specific case is *necessary* for the protection of an essential security interest.

procurement procedure first being conducted in accordance with the requirements of EU law. This is also confirmed by a glance at the overall context of that provision. According to recital 4 thereof, Regulation No 2252/2004 is limited to the harmonisation of the security features for passports and travel documents, while the designation of the responsible authorities and bodies by the Member States is expressly subject to any relevant provisions of EU law. These provisions of EU law, compliance with which is not affected by Regulation No 2252/2004, include in particular public procurement law, as expressed in the fundamental freedoms and Directives 92/50 and 2004/18.

*(b) The need for effective official controls*

59. Second, Austria stresses the importance of effective official controls in connection with the manufacture of the documents in question. For this reason too, it is justified to award the printing contracts at issue to Staatsdruckerei.

60. It should be noted in this regard that the sensitive nature of these printing contracts may undoubtedly necessitate the implementation of strict official controls on the undertaking commissioned, including unannounced controls. However, in this context Austria is permitted to take only measures which are actually necessary to ensure the effectiveness of those controls. A practice whereby all potential tenderers other than Staatsdruckerei are excluded a priori from the award of contract goes beyond what is necessary in order to attain the legitimate objective of effective controls.

61. Austria objects that, on the basis of the applicable law — and more precisely Paragraph 6(3) of the Staatsdruckereigesetz 1996 — its authorities have *public* supervisory powers only vis-à-vis Staatsdruckerei and not vis-à-vis other undertakings. In particular, if problems arose, action could not be taken against foreign undertakings on the basis of public powers, but at best under civil law.

62. I do not find this objection convincing, however. It cannot be disputed that public supervisory powers may specifically be necessary for the protection of essential national security interests because they are more effective than rights of supervision simply agreed in a civil-law contract. Nevertheless, this does not, in itself, justify disregarding the existing EU public procurement rules entirely and only ever considering a *certain undertaking* — Staatsdruckerei — a priori as a contractor.

63. Rather, the Member State in question — in this case Austria — must ensure as careful a balance as possible between its security-related supervision requirements and its obligations under EU law. In this connection, much less restrictive measures would be possible, in the light of public procurement law, which would have permitted undertakings other than Staatsdruckerei to apply for the printing contracts at issue:

- Rather than excluding undertakings established in other EEA Member States entirely from the award of the contract, Austria could, if necessary, stipulate for all interested parties that the printing contracts at issue, if awarded, must be carried out from a permanent establishment in Austria,<sup>29</sup> that data obtained in connection with the contracts must be processed solely in Austria and that neither such data nor security-related information may be transmitted via foreign data cables or servers or passed on to parts of the undertaking located abroad or to foreign authorities.
- And rather than providing for public supervisory powers such as those in Paragraph 6(3) of the Staatsdruckereigesetz 1996 solely vis-à-vis Staatsdruckerei, the Austrian legislature could authorise the competent State bodies in general to exercise such supervision of all undertakings with permanent establishments in Austria if they perform security-related printing contracts there.

<sup>29</sup> While such a requirement of a permanent establishment in national territory is de facto the very negation of the freedom to provide services, Member States may nevertheless impose such a requirement, very exceptionally, if they show that it is indispensable to the necessary controls (see judgment of 4 December 1986, *Commission v Germany*, 205/84, EU:C:1986:463, paragraph 52 in conjunction with paragraph 54, last sentence).

(c) *The need for the trustworthiness of the contractor*

64. Third and last, Austria submits that Staatsdruckerei was entrusted with the printing contracts at issue specifically because there was a special relationship of trust between that undertaking and the competent State bodies.

65. It is correct that it may be necessary, for the protection of a Member State's essential security interests, to restrict the list of possible candidates for the award of a public contract to undertakings which are regarded as particularly reliable and trustworthy.

66. However, it would run flagrantly counter to the basic principle underpinning the European internal market in general and public procurement law in particular<sup>30</sup> if a Member State almost arbitrarily classified a single undertaking — especially its formerly State-owned and now privatised 'historic' provider in a certain area — as particularly reliable and trustworthy according to the motto 'tried and tested', whilst a priori denying or at least questioning the reliability and trustworthiness of all other undertakings.

67. This is demonstrated not least by a comparison with public contracts in the military and security fields, which also relate to highly sensitive matters and are nevertheless, as a rule, subject to a procurement procedure under the rules of EU law.<sup>31</sup> In particular, the Court has ruled that the requirement to impose an obligation of confidentiality in no way prevents the use of a competitive tendering procedure for the award of a contract.<sup>32</sup> The EU public procurement rules allow contracting authorities sufficient leeway for the necessary security and secrecy arrangements in sensitive areas, whether in the procedure to select the most suitable contractor or at the later stage of contract performance.

68. There is thus nothing to prevent the contracting authority, in connection with the award of sensitive public contracts like those at issue for the manufacture of official documents, imposing particularly high requirements for the suitability and reliability of contractors, formulating tender specifications and service contracts accordingly and requiring the necessary proof from candidates. In addition, conditions may be imposed on contractors relating to the performance of the printing contracts, covering in particular data protection, secrecy and security arrangements and the applicable official controls, including a security review of all employees involved in the performance of the contract. However, all this does not make the manufacture of official documents a contract *intuitu personae* which can be performed only by one very specific person.

69. At the hearing, Austria stated that foreign undertakings were not entirely outside the control of the authorities of their respective country of origin and in some cases were even required to cooperate with the intelligence services there, even if they carried out public contracts from a permanent establishment in Austria. Such undertakings could not therefore be considered as contractors for sensitive printing contracts like those at issue.

30 It is settled case-law that the primary aim of the rules of EU law in the field of public contracts is the attainment of freedom of establishment and free movement of goods and services and the opening-up of undistorted competition in all the Member States; see, inter alia, judgments of 16 December 2008, *Michaniki* (C-213/07, EU:C:2008:731, paragraphs 39 and 53), and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 28).

31 See Article 10 of Directive 2004/18 and, in general, Directive 2009/81.

32 Judgments of 8 April 2008, *Commission v Italy* (C-337/05, EU:C:2008:203, paragraph 52), and of 2 October 2008, *Commission v Italy* (C-157/06, EU:C:2008:530, paragraph 30); in the same vein, judgment of 7 June 2012, *Insinööri-toimisto InsTiimi* (C-615/10, EU:C:2012:324, end of paragraph 45).

70. As I have already stated elsewhere,<sup>33</sup> certain derogations from the procurement procedures prescribed by EU law may actually be justified by the fact that a Member State does not wish simply to disclose security-related information to foreign undertakings or undertakings controlled by foreign nationals, in particular undertakings or persons from non-member countries. A Member State can also legitimately ensure that it does not become dependent on non-member countries or on undertakings from non-member countries for its supplies of sensitive goods.

71. According to settled case-law, however, a measure is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.<sup>34</sup> In the present case, Austria has not, as far as can be seen, taken precautions which could effectively prevent Staatsdruckerei falling under the control of foreign shareholders or becoming a subsidiary of a foreign legal person. The Austrian State has neither stipulated, for reasons of security, voting rights in Staatsdruckerei in the form of a special share ('golden share')<sup>35</sup> nor made the sale of shares in Staatsdruckerei subject to any restrictions on security grounds.

72. Under these circumstances, there is no security-related justification for Austria's categorical refusal to consider other undertakings, whether other Austrian undertakings or undertakings from other EEA Member States, as contractors in addition to its 'historic' provider.

### **C. Conclusion**

73. All in all, the action brought by the Commission must therefore be dismissed in so far as the award of printing contracts for fireworks display permits is concerned. In respect of all other parts of the subject matter of the proceedings, on the other hand, its action must be granted in its entirety and it should be declared that Austria has failed to fulfil its obligations as alleged by the Commission.

### **VI. Costs**

74. In principle, pursuant to the first sentence of Article 138(3) of the Rules of Procedure, where, as in this case, each party succeeds on some and fails on other heads, the parties must bear their own costs. However, on the basis of the second sentence of that provision, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

75. According to my proposed solution, the Commission is largely successful, whereas Austria's arguments can be upheld in respect of only a small part of the subject matter of the proceedings, namely the fireworks display permits. Accordingly, it would seem appropriate in the present case to order Austria, in addition to bearing its own costs, to pay three quarters of the costs of the Commission, while the Commission should bear one quarter of its own costs.

### **VII. Conclusion**

76. In the light of the foregoing, I propose that the Court should:

(1) declare that

<sup>33</sup> See my Opinion in *Insinöörtoimisto InsTiimi* (C-615/10, EU:C:2012:26, point 66).

<sup>34</sup> Judgments of 10 March 2009, *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55), of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 42); and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 33). This case-law on the fundamental freedoms must also apply to secondary legislation on public procurement, particularly since the latter is intended to give effect to the fundamental freedoms (see also my Opinion in *Persidera*, C-112/16, EU:C:2017:250, point 66 with footnote 46).

<sup>35</sup> See, for example, judgment of 4 June 2002, *Commission v Belgium* (C-503/99, EU:C:2002:328).

- first, by maintaining national legislation such as Paragraph 2(3) of the Staatsdruckereigesetz 1996, under which contracting authorities have a duty to award printing contracts for the manufacture of certain official documents to Österreichische Staatsdruckerei GmbH, and
- second, by awarding specific service contracts for the manufacture of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle licences directly to Österreichische Staatsdruckerei without a procurement procedure,

the Republic of Austria has failed to fulfil its duties under Directives 92/50/EEC and 2004/18/EC;

- (2) dismiss the action as to the remainder;
- (3) order the Republic of Austria to bear its own costs and to pay three quarters of the costs of the European Commission. The European Commission must bear one quarter of its own costs.