Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

22 April 2021*

(Failure of a Member State to fulfil obligations – Directive 2004/18/EC – Public works contracts – Contract between a public body and a private undertaking for the lease of building not yet constructed – Article 1 – Realisation of a work corresponding to requirements specified by the tenant – Article 16 – Precluded)

In Case C-537/19,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 12 July 2019,

European Commission, represented by L. Haasbeek, M. Noll-Ehlers and P. Ondrůšek, acting as Agents,

applicant,

v

Republic of Austria, represented initially by M. Fruhmann, and subsequently by J. Schmoll, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2020,

gives the following

* Language of the case: German.

Judgment

1 By its application, the European Commission asks the Court to declare that, in so far as Stadt Wien-Wiener Wohnen ('Wiener Wohnen') directly awarded the contract of 25 May 2012 in respect of the office building on Guglgasse 2-4 in Vienna (Austria), without any competitive tendering procedure and corresponding contract notice, the Republic of Austria has failed to fulfil its obligations under Articles 2 and 28 and Article 35(2) 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 (OJ 2004 L 134, p. 114).

Legal context

EU law

2 Recitals 2 and 24 of Directive 2004/18 state:

'(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

…

(24) In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of public procurement rules inappropriate.'

3 Article 1 of that directive, entitled 'Definitions', provided in paragraph 2(b):

'"Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.'

4 Article 2 of that directive, entitled 'Principles of awarding contracts', provided:

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

5 Article 16 of Directive 2004/18, entitled 'Specific exclusions', provided:

'This Directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

…'

6 Article 28 of that directive, entitled 'Use of open, restricted and negotiated procedures and competitive dialogue', stated:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

7 Article 35(2) of that directive, entitled 'Notices', provided:

'Contracting authorities which wish to award a public contract or a framework agreement by open, restricted or, under the conditions laid down in Article 30, negotiated procedure with the publication of a contract notice or, under the conditions laid down in Article 29, a competitive dialogue, shall make known their intention by means of a contract notice.'

8 Directive 2004/18 has been replaced by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), with effect from 18 April 2016.

Austrian law

9 On the date on which the lease at issue was concluded, 25 May 2012, the applicable national provisions appeared in the Bundesgesetz über die Vergabe von Aufträgen 2006 (Federal Law on Public Procurement 2006), in the version applicable on that date.

Pre-litigation procedure

10 Following a complaint received in 2015 and informal contacts with the Austrian authorities, on 25 July 2016 the Commission sent the Republic of Austria a letter of formal notice (infringement procedure No 2016/4074), in which it claimed that there had been an infringement of Articles 2, 28 and 35 of Directive 2004/18 on account of the direct award, without a competitive tendering procedure or contract notice in accordance with that directive, by Wiener Wohnen, on 25 May 2012 of a lease for an indefinite duration concerning the office building known as 'Gate 2' ('the Gate 2 building'), including an underground car park, on the plot situated at Guglgasse 2-4, Vienna.

11 Under the terms of that contract, the landlord, Vectigal Immobilien GmbH & Co KG, the owner of that plot at the time the agreement was concluded, intended to construct the Gate 2 building on that land.

12 The leased property consisted of two wings (A and B), from the ground floor to the fifth floor. Bridges between those two wings, from the first to fifth floors, were provided for as an alternative. In addition, Wiener Wohnen had, as an option (‘*Call-Option*’), a unilateral right to lease, in addition to the first five floors constituting the leased property from the outset, the sixth to eighth floors in the B wing of that building. An addendum to the lease of 25 October 2012 confirmed that Wiener Wohnen made use of that option.

13 The lease in question was concluded for an indefinite period. It initially provided that Wiener Wohnen could terminate the contract ordinarily only 15 years after the start of the lease and, subsequently, every 10 years. In addition to that ordinary termination, extraordinary termination was possible if there was a serious or persistent infringement of the lease by the landlord, or if the Gate 2 building could not be used as agreed for more than six months.

14 The second addendum to that lease, dated 16 and 17 September 2013, deferred the time limit for the first opportunity for ordinary termination. According to clause 2.4 to that addendum, the relevant clause was now drafted as follows: ‘The tenant may terminate the present lease ordinarily, but only at after 25 years, 35 years and 45 years (etc.) from the start of the lease (taking into account the notice period referred to in Clause 2.2) (Notice period of 12 months at the end of a calendar quarter)’.

15 After having occupied the Gate 2 building, Wiener Wohnen sublet office space to Wiener Wohnen Haus & Außenbetreuung GmbH. In addition, the Gewerkschaft der Gemeindebediensteten (Union of Municipal Employees) also set up an information centre in that property.

16 The Republic of Austria replied to the Commission’s letter of formal notice by letter of 26 September 2016, in which it acknowledged that the direct award of the lease in question fell within the scope of Directive 2004/18 and that, consequently, a putting out to competitive tender in accordance with that directive should have been implemented. That Member State stated that it regretted the error committed and pointed out that Wiener Wohnen would do everything possible in order to ensure that EU public procurement law was applied correctly in the future.

17 It is also apparent from the documents before the Court that the Republic of Austria set out in supplementary observations of 27 February 2017, and in other supplementary observations of 5 May, 13 September and 25 October 2017, how compliance with EU law on public procurement would henceforth be guaranteed, inter alia, by means of a register of contracts.

18 Having regard to the persistence of the alleged infringement, the Commission, by letter of 18 May 2018, sent the Republic of Austria a reasoned opinion, calling on that Member State to take the appropriate measures to comply with that opinion within two months of its receipt.

19 The Republic of Austria replied to that reasoned opinion by letter of 18 July 2018. As regards the possibilities of remedying the alleged infringement, that Member State claimed that, in view of the fact that Wiener Wohnen occupied the Gate 2 building, it was impossible to eliminate that infringement immediately. Having regard to the fact that the lease in question could be the subject of ordinary termination at the earliest on 1 October 2040 in respect of the A wing of that

property and on 1 April 2041 in respect of its B wing, Wiener Wohnen was, nevertheless, prepared to enter into negotiations with the landlord for early termination of that lease. Furthermore, the Republic of Austria pointed out that, at the time the contract was concluded, according to the prevailing legal opinion in Austria, the exclusion provided for in Article 16(a) of Directive 2004/18 also covered the letting of office premises which had not yet been constructed but were already planned and ready to be built. As Wiener Wohnen wished to lease precisely such a building, that entity acted in good faith.

20 Not being satisfied with the Republic of Austria's reply, the Commission brought the present action.

The action

Arguments of the parties

21 The Commission submits that the conclusion by Wiener Wohnen, a public body linked to the City of Vienna, with a private undertaking of a long-term lease in respect of the Gate 2 building before it was built constitutes the direct award of a works contract for the construction and lease of office premises because Wiener Wohnen had an influence on the planning of the works relating to those premises which went well beyond the usual requirements of the tenant of a new building.

22 The Commission recalls, referring to the judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraphs 40 to 42), that the question whether a transaction constitutes a public works contract is one of EU law and that, if a complex is offered for rental before the works had begun, its main object is the creation of that complex. It points out in that regard that, on the date on which the lease in question was concluded, the Gate 2 building was not the subject of an enforceable building permit.

23 The Commission adds, referring to paragraph 43 of the same judgment of the Court, that that contract does not come within the exception provided for in Article 16(a) of Directive 2004/18. That exception does not apply where the execution of the planned work corresponds to the requirements specified by the contracting authority. It is apparent from paragraph 58 of the judgment of 29 October 2009, *Commission* v *Germany* (C-536/07, EU:C:2009:664), that that would be the case, in particular, where the specifications laid down in the contract relate to a precise description of the building to be constructed, its quality and its fixtures and fittings and thus far exceed the usual requirements of a tenant with regard to newly constructed premises of a certain size.

24 As regards the structure of the Gate 2 building, the Commission considers that two interventions by Wiener Wohnen had an influence on the design of that building. Those interventions related to the construction of bridges between the floors of the A and B wings and the construction of the sixth to eighth floors of the B wing.

25 As regards other actions taken by Wiener Wohnen, the Commission submits that in the documents entitled 'Description of the building and its amenities', of 16 May 2012, and 'Supplement to the description of the building and its amenities', of 22 May 2012, both annexes to the lease in question, there are numerous examples showing that the specifications agreed between the parties to that lease far exceed what is usually agreed with a tenant and that Wiener Wohnen chose most of the technical solutions adopted in the final design of the Gate 2 building.

Although some of those specifications referred to 'ÖNORM' rules, those rules are no more than recommendations, binding only if so provided for by the contract. Normally, a tenant is interested only in whether the piping works properly, not the type of system chosen, or whether 'in the case of sealed systems, the drainage pipes are made of PE or ABS'.

26 In particular, it is apparent from the cover page of the second of those documents that it was drafted by Wiener Wohnen and in the legal notice on the next page the following is stated: 'Supplement [to the description of the building and its amenities], based on the schedule of conditions applicable to administrative buildings drawn up by Department MA34; it sets out the specific use requirements of the tenant, supplements, details and, by way of specific exceptions, replaces [the description of the building and its amenities] of the landlord'. The Commission states that it is apparent from the website of the City of Vienna that this concerns a 'set of rules relating to the infrastructure of that city's administrative buildings [and that] those specifications serve as a basis for planning and calls for tenders'. According to the Commission, it is not surprising, in those circumstances, that an article which appeared in the Austrian press in 2016 concerning possible circumvention by Wiener Wohnen of the rules on public procurement in connection with the construction of the Gate 2 building was entitled '*Eine Zentrale nach Maß*' ('A made-to-measure head office').

27 The Commission submits that Wiener Wohnen supervised the execution of the construction of the Gate 2 building in the same way as a developer would. That undertaking had commissioned SET Bauprojektierung GmbH, a company specialising in the planning of construction projects, in order to carry out supervision of the process for the specific execution of the construction project. The Commission states, in that context, that it was agreed between the parties that that supervision would also extend to the compliance of the characteristics of the property, as defined in the lease in question. It refers in that regard to the first part of Annex A.1 of Annex 1.3 to that contract, which stipulates: 'Monitoring: in order to execute the construction project, Wiener Wohnen has put in place supervision with regard to the execution of the construction project and supervision by an external company.'

28 The Commission also observes that, without the conclusion of that lease, the Gate 2 building would not have been built. After the tenant purchased the land from the City of Vienna, articles in the press, which appeared in 2002, and a press release from the City of Vienna, published in 2005, announced the construction of that building on that land. In 2008, the media reported that the project '[was] dormant for years', since the supply of larger office space was higher than demand. The Republic of Austria accepted, moreover, that the construction of the Gate 2 building would have remained uncertain if Wiener Wohnen had not concluded the lease in question.

29 The Commission stresses that the Gate 2 building must in no way be classified as a standard building, which Wiener Wohnen proposed to rent in the state proposed by the landlord. It points out that Wiener Wohnen commissioned a service provider in 2012 to analyse the market for office space in Vienna. According to that analysis, out of 10 properties that could be let, 6 of which satisfied the minimum requirements defined by Wiener Wohnen, the Gate 2 building appeared to be the most suitable property. The Commission draws particular attention to the fact that, in the 'Management Summary' of that analysis, it is stated, in order to justify placing that building in first place, that 'the tenant is still able to influence the planning of the project on the basis of specific requirements, and [that] the desire to separate the entrances to the office area and the customer service centre can be satisfied in an optimum manner'.

30 The Commission adds that the Gate 2 building is used almost exclusively by Wiener Wohnen. The presence of two other tenants, namely, Wiener Wohnen Haus- & Außenbetreuung and Gewerkschaft der Gemeindebediensteten – Kunst, Medien, Sport, freie Berufe (Union of Municipal Employees – Art, Media, Sport and Liberal Professions) cannot justify the application of Article 16(a) of Directive 2004/18, having regard to the extensive right of Wiener Wohnen to let the property to departments of the City of Vienna or to legal persons in which the City of Vienna has a majority shareholding. Furthermore, it would appear that the area sub-let to the Union of Municipal Employees for the purposes of serving as an information centre is very small.

31 The Republic of Austria observes that Wiener Wohnen is the largest municipal housing manager in Europe and, as such, assumes significant responsibilities with regard to more than 500 000 people housed in approximately 200 000 municipal dwellings. As part of a strategic reorientation of that undertaking, the decision was taken to bring all of its facilities, which had previously been spread across the city of Vienna, onto a single site. According to that Member State, the new head office was due to be ready by the time the new organisation came into being, at the end of 2014 or the beginning of 2015, and had to provide accommodation for at least 750 employees, or 1 000 employees after the planned extension was built.

32 Since it was unable to buy or build a property tailored to its needs, the only solution available to Wiener Wohnen was to rent an existing office building or one whose planning was already completed. Moreover, as a body responsible for building social housing, Wiener Wohnen was in principle required to invest its financial resources in maintaining and improving the residential buildings it manages. Furthermore, in view of that undertaking's objective, the space to be leased should have been standard office space.

33 In order to have a general view of all the appropriate office buildings available on the property market and which met its requirements, Wiener Wohnen commissioned, at the beginning of 2012, an independent expert in real estate to conduct an overall analysis of the market and of office sites in Vienna. According to the Republic of Austria, when that analysis was being drawn up, the planning of the Gate 2 building had already been completed in its entirety, all the plans being available, but the project had not yet been implemented. Accordingly, Wiener Wohnen had exercised no influence on the architectural design or the actual planning of the A and B wings of that building. Apart from requirements concerning the office space and parking spaces, the negotiations relating to the lease in question related primarily to the amount of the rent and the operating costs. One of the essential elements of the negotiations was the handing over of those two wings on the scheduled dates, in order for the relocation of some 1 000 employees to be organised. The only aspects of the construction in respect of which Wiener Wohnen was able to intervene concerned the subdivision of the premises, the occupation of the offices and the basic amenities of the leased space.

34 As regards the structural changes alleged by the Commission, the Republic of Austria submits that the bridges formed part of the Gate 2 building project from the outset. Moreover, the bridges were not part of the leased space. As regards the option relating to the leasing of the sixth to eighth floor areas of the B wing, that Member State states that those floors were, in any event, to be constructed.

35 The document entitled 'Description of the building and its amenities', like the 'Supplement' to that document, merely laid down the requirements with which all modern office buildings must comply. The Commission has not identified any information contained in those documents which departs from the conditions laid down by the statutory provisions or by the applicable directives and technical standards or which is not used in the sector in question.

36 According to the Republic of Austria, the supervision by the external company SET Bauprojektierung concerned only the areas covered by the lease, to the exclusion of the other areas of the Gate 2 building, such as, inter alia, the technical heating plants, automated systems, lift installations and communal or external areas. The Commission overlooks the fact that it is usual, in a large-scale removal plan, for there to be not only supervision carried out by the developer but also checks carried out by the tenant.

37 The Republic of Austria points out that Wiener Wohnen was not the only tenant in the Gate 2 building. In that context, it is irrelevant whether the spaces rented to other tenants were smaller than those occupied by Wiener Wohnen. The mere fact that tenants other than Wiener Wohnen rented premises in that building shows that the office space in question is that of a standard office building, which may also be rented by third parties under normal market conditions.

38 Nor does the 'Management Summary' support the Commission's point of view, since it was not stated anywhere in that document that the requirements set out by Wiener Wohnen went beyond the usual wishes of a tenant. It is entirely normal for a tenant who intends to commit to using office premises for more than 1 000 employees on a contractual basis over a long period to wish to know, before taking that decision, to exactly what extent the landlord will permit any adjustments that the tenant considers necessary.

39 In particular, according to the Republic of Austria, the document entitled 'Supplement to the description of the building and its amenities' is only 'based' on the 'schedule of conditions applicable to administrative buildings, drawn up by Department MA34'. That schedule of conditions was in itself a summary of the latest statutory and regulatory requirements, applicable to all office buildings and not just to the City of Vienna. The measures described in that 'supplement' would therefore also have applied if the lease had been concluded not with Wiener Wohnen but with a private undertaking. Where the Commission submits that environmental standards are merely 'recommendations', it fails to have regard to the applicable legislation. According to the settled case-law of the Oberster Gerichtshof (Supreme Court, Austria), those are the latest standards for determining whether there has been proper technical implementation. Consequently, the application of those standards is not optional.

40 The Commission's criticism of the duration of the lease provided for in the contract at issue, namely 25 years, fails to have regard to the reality of the property market. This is the only basis on which landlords are prepared to lease large spaces at affordable prices. In Wiener Wohnen's view, surrendering the right to terminate that contract did not present any difficulties, since another relocation of 1 000 employees was unlikely, given the cost and lack of suitable alternative sites.

Findings of the Court

41 The Commission's action concerns the classification as a direct award, without a competitive tendering procedure or contract notice, of a contract relating to the Gate 2 building in Vienna. The Commission submits that on 25 May 2012 Wiener Wohnen, in its capacity as contracting

authority, concluded a long-term lease of that building with a private undertaking even before it was constructed. Wiener Wohnen had an influence on the design of the building that greatly exceeded the usual requirements of the tenant of such a building. That contract, which cannot fall within the exclusion laid down in Article 16(a) of Directive 2004/18, should be classified as a 'works contract', within the meaning of that directive. The resulting infringement of Directive 2004/18 persists for as long as the lease in question continues, which cannot be terminated ordinarily before 2040.

42 As a preliminary point, it should be noted that Directive 2004/18, like the other directives on public procurement, as is apparent, in essence, from recital 2 thereof, seeks to ensure compliance, in the award of public contracts with, inter alia, the free movement of goods, freedom of establishment and the freedom to provide services, as well as with the principles deriving therefrom, in particular equal treatment, non-discrimination, proportionality and transparency, and to ensure that public procurement is opened up to competition (judgments of 12 July 2001, *Ordine degli Architetti and Others*, C-399/98, EU:C:2001:401, paragraphs 52 and 75, and of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023, paragraph 33).

43 In that regard, it is clear from the case-law, first, that the question whether a transaction constitutes a public works contract for the purposes of EU legislation is one of EU law. The classification of the proposed contract as a 'lease' by the parties is not decisive in that regard (judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 40 and the case-law cited).

44 In a public works contract, the contracting authority receives a service consisting of the realisation of works which it seeks to obtain and which has a direct economic benefit for it. Such an economic benefit may also be held to exist not only where it is provided that the contracting authority is to become the owner of the works which are the subject of the contract, but also if it is provided that it is to hold the legal right over the use of those works, in order that they can be made available to the public (see, to that effect, judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, paragraphs 48 to 51).

45 Likewise, the fact that the main contract may not provide for an option or obligation on the part of the City of Vienna or Wiener Wohnen to repurchase the buildings constructed is irrelevant to the classification of the contract in question (see, to that effect, judgment of 29 October 2009, *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraph 62).

46 Secondly, where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is necessary to refer to the main object of that contract in order to determine its legal classification and the EU rules applicable (judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 41 and the case-law cited).

47 As regards the object of the project at issue, it must be noted that the contract at issue is referred to as a 'lease' and does, in fact, contain certain elements of a lease. However, on the date on which that contract was concluded, the works covered by that contract had not yet started. Consequently, that contract could not have had as its immediate object the lease of buildings. The object of that contract was the construction of those buildings which were subsequently required to be handed over to Wiener Wohnen under a 'lease' (see, to that effect, judgment of 29 October 2009, *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraph 56).

48 In that regard, it should be observed that, as stated in recital 24 of Directive 2004/18, Article 16(a) of that directive provides for an exclusion from the material scope of that directive and that the interpretation that that exclusion, as the Advocate General observed in point 30 of his Opinion, may extend to the leasing of non-existent buildings, that is to say, buildings which have not yet been built, has been upheld in the Court's case-law.

49 However, as is apparent from the Court's case-law, the contracting authority cannot rely on the exclusion laid down in that provision where the execution of the planned work constitutes a 'public works contract', within the meaning of Article 1(2)(b) of Directive 2004/18, since that execution corresponds to the requirements specified by the contracting authority (see, by analogy, judgments of 29 October 2009 *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraph 55, and of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 43 and the case-law cited).

50 Such is the case where that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design (judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 44 and the case-law cited).

51 That is the case, in particular, where the specifications requested by the contracting authority exceed the usual requirements of a tenant in relation to a building such as the complex concerned (see, to that effect, judgment of 29 October 2009, *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraph 58).

52 Lastly, although the amount paid to the developer or the arrangements for payment are not the decisive elements for the purposes of the classification of the contract concerned, they are not irrelevant (see, to that effect, judgments of 29 October 2009, *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraphs 60 and 61, and of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraphs 49 to 51).

53 As regards the proposed building, a decisive influence on its design can be identified if it can be shown that that influence is exercised over the architectural structure of that building, such as its size, external walls and load-bearing walls. Stipulations concerning interior fittings may be regarded as demonstrating a decisive influence only if they are distinguished because of their specificity or scale.

54 The Commission's action must be assessed on the basis of the case-law referred to above.

55 In that regard, it should be noted that, according to settled case-law relating to the burden of proof in proceedings for failure to fulfil an obligation under Article 258 TFEU, it is for the Commission to determine whether the obligation has not been fulfilled. It is the Commission that must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 14 January 2021, *Commission* v *Italy (Contribution towards the purchase of motor fuel)*, C-63/19, EU:C:2021:18, paragraph 74 and the case-law cited).

56 However, the Member States are required, in accordance with Article 4(3) TEU, to facilitate the achievement of the Commission's tasks, which consist inter alia, pursuant to Article 17(1) TEU, in ensuring that the provisions of the FEU Treaty and the measures taken by the institutions of the European Union pursuant thereto are applied. In that regard, account must be taken of the fact that, where it is a question of checking that the national provisions intended to ensure

effective implementation of a directive are applied correctly in practice, the Commission, which does not have investigative powers of its own in this area, is largely reliant on the information provided by any complainants and by the Member State concerned (judgment of 18 November 2020, *Commission* v *Germany (Refund of VAT – Invoices)*, C-371/19, not published, EU:C:2020:936, paragraphs 66 and 67 and the case-law cited). It follows, inter alia, that, where the Commission has adduced sufficient evidence to establish that the national provisions transposing a directive are not applied correctly in practice in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the inferences drawn (judgment of 28 March 2019, *Commission* v *Ireland (System for collecting and treating waste water)*, C-427/17, not published, EU:C:2019:269, paragraph 39 and the case-law cited).

57 In the present case, it should be noted that the Commission has not claimed that Wiener Wohnen sought to exercise an influence on the plans of the owner of the land, namely Vectigal Immobilien, before receipt, on 28 February 2012, of the site analysis (*Standortanalyse*) which had been carried out by the surveyor that it had instructed.

58 That expert identified 10 buildings that were free to let and, after finding that 6 building projects satisfied Wiener Wohnen's minimum requirements, reached the conclusion that the project for the construction of the Gate 2 building was the most suitable.

59 As is apparent from the site analysis of 28 February 2012 and the document entitled 'Feasibility study' ('*Bebauungsstudie*') of 23 January 2012, the characteristics of the Gate 2 building were already determined on those dates.

60 It should be noted that the structure of the Gate 2 building, described in that feasibility study of 23 January 2012, and the structure appearing in that of 4 May 2012, which is part of the lease in question, are essentially identical, the most recent document also containing additional details, in particular as regards the use of certain areas, those two documents having been prepared by the same firm of architects.

61 Therefore, that information supports the argument that, as the Republic of Austria submits, 'at the time of the negotiations for the conclusion of the lease, the planning of the [Gate 2] building had already been fully completed [and that] Wiener Wohnen … had no influence from the outset on the architectural design or the specific planning of the A and B wings of the [Gate 2] building'.

62 However, the Commission identifies two circumstances from which it is possible, in its view, to infer that Wiener Wohnen had an influence on the design itself of that building's structure.

63 The Commission refers to the construction of the sixth to eighth floors of the B Wing and the bridges connecting the A and B wings of that building.

64 As regards the construction of those floors of the B wing, it should be noted that the lease in question provided for an option not for the construction, but for the lease of additional space.

65 Clause 1.9 of the lease states that Wiener Wohnen had, as an option ('*call-option*'), a unilateral right to lease, in addition to the first five floors that initially constituted the leased property, the sixth to eighth floors of the B wing of the Gate 2 building. That clause also provides that if Wiener Wohnen does not exercise that option or exercises it only partially, the landlord is free either not to build the unwanted floors or to build them and rent them to third parties. In that

regard, it is also stated in that clause that, in that situation, third parties have the right to use certain general parts of the building, such as the entrance or lifts, and that, in return, Wiener Wohnen should benefit from a rent reduction.

66 It should be noted that that construction was already envisaged in the feasibility study of 23 January 2012, which contains a drawing of the B wing of the Gate 2 building comprising eight floors. The site analysis of 28 February 2012 relating to the B wing refers to nine levels (a ground floor and eight floors) and, lastly, the lease in question also contains, in the feasibility study of 4 May 2012 annexed thereto, a drawing of the B wing, comprising eight floors.

67 Consequently, it is apparent from the information before the Court that the design of the sixth to eighth floors of the B wing was not planned in order to meet a need specified by Wiener Wohnen.

68 The same circumstances may be noted as regards the bridges linking the A and B wings of the Gate 2 building.

69 The feasibility study of 23 January 2012 already contains the words '*Option Brücke*' ('bridge option') between the A and B wings. The site analysis contains a clause that provides that the A and B wings 'can be connected by the construction of a bridge'. The lease in question contains the same reference '*Option Brücke*' ('bridge option') between the A and B wings of the Gate 2 building.

70 Consequently, the design of the bridge connecting the A and B wings was also not conceived in order to meet a need specified by Wiener Wohnen.

71 Therefore, in the present case, the mere fact that Wiener Wohnen made use of the options offered, that is to say that it availed itself of the possibilities already provided, cannot suffice to show that that entity exercised a decisive influence on the design of the work in question.

72 In addition, the Commission refers to several other factual elements from which it is possible, in its view, to infer that the lease in question must be reclassified as a works contract. It submits that there was no building permit, that there was a long-term lease, supervision ordered by Wiener Wohnen of the execution of the works and that the work was overly specific.

73 Those various elements must be examined.

74 As regards the absence of a building permit at the time when the lease was concluded, it should be noted that, according to standard commercial practice, large-scale architectural projects are let well before the detailed construction plans are finalised, so that the owner of the site or the developer initiates the formal procedure for obtaining a building permit only when it has commitments from future tenants for a significant part of the space in the planned building. In those circumstances, the fact that, as in the present case, the building permit was not applied for and issued until after the date on which the lease in question was concluded does not prevent the view from being taken that the Gate 2 building was, on that date, already planned and ready to be built. In accordance with market practices and habits, a comprehensive architectural project is not a prerequisite for the engagement of potential tenants. Moreover, the exercise of a decisive influence on the design of the work in question cannot result from the absence of a comprehensive architectural project.

75 In that regard, it must be observed that, even though the 'management summary' of the site analysis of the market for office space in Vienna stated that the Gate 2 building offered the tenant the possibility to influence the planning of the project according to specific requirements, the finding of the existence of a 'public works contract', within the meaning of Article 1(2)(b) of Directive 2004/18, requires, at the very least, that it be established that advantage was actually taken of that possibility.

76 As regards the duration of the lease, it is sufficient to note that, in any event, that aspect cannot alter the fact that, in order to find that the execution of the planned work constitutes a 'public works contract', it is the conditions identified in the case-law set out in paragraphs 49 to 51 of this judgment which must be satisfied. It should be added that the fact that a lease is concluded for a long period, irrespective of the circumstances of the case, is not in itself unusual.

77 Moreover, in the present case, the Republic of Austria's argument, first, that the obligation not to terminate the lease for a long period has an influence on the amount of rent and, secondly, that Wiener Wohnen itself wished to avoid a new move which would be costly and seriously disrupt its operation may be accepted.

78 As regards the Commission's argument that Wiener Wohnen commissioned the company SET Bauprojektierung, which specialises in the planning of construction projects, to supervise the specific implementation of the construction project, and that Wiener Wohnen thus monitored the follow-up of the execution of the work, as a developer would have done, it should be noted that it is in no way unusual for a tenant to take measures in order to ensure that the move into the premises could take place on the planned date, in particular, as in the present case, where a large-scale move is involved. The fact of having recourse to the services of a third party specialising in this area enables effective monitoring of the deadlines for handing over the building, ensures monitoring with a view to detecting any delays or defects well in advance and making the necessary arrangements, such as, for example, extending certain leases in certain buildings that were still occupied.

79 By such supervision, Wiener Wohnen also did not exercise a decisive influence over the design of the Gate 2 building.

80 As regards the specifications set out by Wiener Wohnen, it is apparent from the documents before the Court that that building was designed as a traditional office building, without reference to specific groups of tenants or specific needs. The A and B wings of that building follow a grid system, which is normal for office buildings of its size, ensuring that the interior configuration remains as flexible as possible and adapted to the needs of future tenants.

81 In that regard, it is normal for an undertaking, whether private or public, which seeks to rent an office building, to make its wishes clear as to the specifications which that site should, as far as possible, meet, whether in respect of a building which is yet to be constructed or a change of tenant where upgrade work is carried out. Such steps do not allow a lease to be reclassified as a works contract.

82 In those circumstances, it is necessary to determine whether the specifications set out by Wiener Wohnen were intended to satisfy stipulations that went beyond what a tenant of a building such as the Gate 2 building might normally require and lead to Wiener Wohnen being regarded as having exercised a decisive influence on its design.

83 As the Republic of Austria observed, in so far as Wiener Wohnen sought to ensure that the specifications in the technical standards applicable under statutory provisions were complied with or that the specifications of the building comply with the normal ‘state of the art’ on the market concerned, in the light of which the proper technical execution of the construction is evaluated, those requirements cannot be regarded as measures taken by Wiener Wohnen in order to influence the design of the Gate 2 building or as exceeding what a tenant may normally require.

84 In particular, in so far as the stipulations made by Wiener Wohnen concerned the application of standards, even though not binding, which sought to attain objectives relating to improving the energy performance of that entity’s future headquarters and, more generally, to reduce the environmental impact of that building, nor did those stipulations exceed what a tenant of such a building may usually request.

85 Since the legislative or regulatory standards in the abovementioned areas have evolved considerably over the last decades, becoming ever more exacting, and continue to evolve in that direction, the wish to have a building whose characteristics are not limited to compliance with the standards in force at the time of the conclusion of the lease but which have a degree of longevity as to compliance with the applicable standards over time, cannot be regarded as constituting an excessive requirement on the part of a public entity, such as Wiener Wohnen, which seeks to rent a building intended to house its central administration over a long period.

86 Although the number of those stipulations and their degree of detail is high, the fact remains that the decisive criterion in that context is whether those stipulations go beyond the usual requirements of a tenant concerning a building such as the Gate 2 building.

87 Although the Commission established, on the basis of the documents entitled ‘Description of the building and its amenities’, of 16 May 2012, and ‘Supplement to the description of the building and its amenities’, of 22 May 2012, both annexed to the lease in question, that the stipulations submitted by Wiener Wohnen were numerous and detailed, with specific examples in support, it is not, however, apparent from its written pleadings that Wiener Wohnen submitted a not insignificant number of stipulations which had the effect, in that they were intended to satisfy its own requirements, that that entity exercised a decisive influence on the design of the Gate 2 building.

88 In its application, the Commission cites, in that context, certain clauses of the document entitled ‘Description of the building and its amenities’. According to those clauses, ‘all elevators go from the basement (garage) to the floor which is in each case the highest’, ‘the work is carried out in accordance with the guidelines of the ÖGNI certification system – gold level’, ‘[the] ground [is] raised with an average gross height of approximately 10 cm, with a load-bearing force of 5 kN/m^2’ and ‘cooling is carried out mainly by heat-activated ceiling elements covered or coated with spray paint’.

89 The Commission does not explain how the stipulation that all elevators should link all the levels, including the highest floor, constitutes an unusual request. Since, as the Republic of Austria submits, without being challenged in that regard by the Commission, such a specification arises from a legal obligation, it cannot be regarded as reflecting the exercise of a decisive influence on the design of the building attributable to Wiener Wohnen.

90 Similarly, it is standard practice to provide for a raised floor in office buildings in order to ensure, inter alia, the modularity of the internal configuration. As regards the average gross height and the load-bearing capacity of that floor, the Commission also fails to explain how the specifications referred to are unusual. The same is true of the stipulation that the Gate 2 building should be cooled primarily by heat-activated ceiling elements.

91 Concerning the 'ÖGNI certification system – gold level', the Commission notes, in its analysis of the document entitled 'Supplement to the description of the building and its amenities', that it is stated in the introduction to that document that 'the objective stated by the landlord and tenant to obtain the "ÖGNI – GOLD Green Building" certificate is regarded as agreed and is an unconditional requirement for execution in planning and construction'. The Commission goes on to claim that the Republic of Austria's argument that that certification was sought from the outset by the landlord and does not constitute a requirement of Wiener Wohnen is incorrect. In that regard, it should be noted that the site analysis of 28 February 2012, prepared by a surveyor, already states that 'ÖGNI – gold level' certification is envisaged for the Gate 2 building.

92 Therefore, it must be presumed that the design of the Gate 2 building in accordance with the requirements arising from that certification is the result not of a decisive influence exercised by Wiener Wohnen but of an initiative on the part of the landlord, which was adopted, as noted in paragraph 57 of the present judgment, before the negotiations with Wiener Wohnen began. Moreover, the Commission does not state in its written pleadings why that certificate was not also issued for the benefit of the landlord. It is clear that obtaining such a certificate enhances the value of the property concerned.

93 Some of the aspects referred to in the documents entitled 'Description of the building and its amenities' and 'Supplement to the description of the building and its amenities' must be understood in the light of Wiener Wohnen's intention to have available to it, for a long period, a site bringing together all of its services. Thus, the requirement relating to the size of the electricity supply, for there to be a 25% reserve capacity for any future extension, does not appear to be a requirement going beyond the usual requirements of a tenant concerning a building such as the Gate 2 building.

94 By contrast, it is apparent from the documents before the Court that, for financial reasons which had a particularly important aspect for it, Vectigal Immobilien, as the owner and developer of the Gate 2 building, took care to ensure that the construction was carried out in such a way that it could, in the event of total or partial release of the premises by Wiener Wohnen, immediately re-let the office space concerned to third parties. Thus, according to the Republic of Austria, Vectigal Immobilien provided, inter alia, for the entirety of the space to be let available on any given floor, several partitions with emergency exits and access to stand-alone lifts for each floor, so as to have the possibility to rent individual space or rent the various floors separately in the future.

95 In short, the Commission has not established that the stipulations made by Wiener Wohnen, in its capacity as future tenant, called into question the use of the Gate 2 building as office premises by any tenants who might succeed that entity. Consequently, it must be held that the adjustments resulting from those stipulations do not exceed what a tenant may normally require.

96 Lastly, contrary to the case-law cited in paragraph 52 of the present judgment, the Commission's action contains no information either on the costs of the works at the time of their completion in 2014 or on the relationship between those costs and the value, at that date, of the total amount of the rent over a period of 20 years.

97 It follows, therefore, from all the foregoing considerations that the Commission has not established to the requisite legal standard that, in so far as Wiener Wohnen directly awarded the contract of 25 May 2012 relating to the office building situated at Guglgasse 2-4 in Vienna, without carrying out a competitive tendering procedure and without providing the relevant notice, the Republic of Austria has failed to fulfil its obligations under Articles 2 and 28 and Article 35(2) of Directive 2004/18.

98 The Commission's action must therefore be dismissed.

Costs

99 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Republic of Austria has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Dismisses the action.**

2. **Orders the European Commission to pay the costs.**

[Signatures]