

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 14 September 2006¹

I — Introductory remarks

1. This action for failure to fulfil obligations, like another such action brought in parallel,² relates to the question of what requirements can be inferred from primary law as regards the transparency of award procedures. In particular, the present case concerns the obligations that can be derived from the fundamental freedoms and general principles of law for awards which are not covered by the public procurement directives. Finally, the case concerns the interpretation and further development of the Court's case-law in *Telaustria*³ and *Coname*.⁴

procedures for the award of public service contracts,⁵ which has been replaced in the meantime by the 'legislative package', covers awards in respect of emergency services, which are the services at issue in the present case, it covers only contracts in writing.

II — Legal context

A — *Community law*

2. While Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of

3. This case involves primarily the freedom to provide services, that is to say Article 49 EC.

1 — Original language: German.

2 — See my Opinion, also delivered today, in Case C-507/03 *Commission v Ireland*.

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

4 — Case C-231/03 [2005] ECR I-7287.

5 — OJ 1992 L 209, p. 1.

4. Article 86 EC is also to be noted. Article 86(1) imposes obligations on Member States with regard to particular undertakings. Article 86(2), on the other hand, lays down obligations for particular undertakings, above all for undertakings entrusted with the operation of services of general economic interest.

B — *National law*

5. Section 65(1) of the Health Act 1953 provides:

‘A health board may, subject to any general directions given by the Minister and on such terms and conditions as it sees fit to impose, give assistance in any one or more of the following ways to any body which provides or proposes to provide a service similar or ancillary to a service that the health board may provide:

- (a) by contributing to the expenses incurred by the body,

...’

6. Section 25 of the Fire Services Act 1981 provides:

‘A fire authority [section 9 of the Act provides that local authorities are fire authorities] may carry out or assist in any operations of an emergency nature, whether or not a risk of fire is involved, and a fire authority may accordingly make such provision for the rescue or safeguarding of persons and protection of property as it considers necessary for the purposes of that function.’

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

7. The Commission learnt following a complaint of the manner in which emergency ambulance services were allocated in Ireland. Since the Commission was of the view that the award should have been advertised in accordance with Directive 92/50, it entered into an exchange of correspondence with Ireland. The correspondence concerned the question whether there was a contract to which certain advertising requirements should have applied.

8. On 28 November 2001 the Commission requested from the Irish authorities information on the relationship between Dublin City Council ('DCC') and the Eastern Regional Health Authority ('the Authority'). Since the Commission received no reply, it initiated the Treaty infringement procedure under Article 226 EC.

9. In their response of 18 June 2002, the Irish authorities stated that the services provided by DCC and paid for by the Authority under section 65(1)(a) of the Health Act 1953 were provided by DCC independently as 'principal' and not pursuant to any contract with, or under any control or supervision of, the Authority. Moreover, such services had been provided for decades.

10. In its letter of 9 August 2002, the Commission requested from the Irish authorities all relevant documents in order to determine the relationship between DCC and the Authority.

11. The Department of Health and Children replied on 19 September 2002, attaching a number of documents.

12. The Commission maintained its position that there was a breach of Community law and on 17 December 2002 sent Ireland a reasoned opinion under Article 226 EC. By letter of 14 February 2003, the Irish authorities sent a detailed reply to the Commission. The Commission was not satisfied by this reply.

13. In its application, the Commission claims that the Court should:

1. declare that, in permitting emergency ambulance services to be provided by Dublin City Council without the Eastern Regional Health Authority undertaking any prior advertising, Ireland has failed to fulfil its obligations under the Treaty;
2. order Ireland to pay the Commission's costs.

14. Ireland contends that the Court should:

1. dismiss the Commission's application;

2. order the Commission to pay Ireland's costs.
- advertising must therefore be undertaken. The advertising to be undertaken depends on the nature of the service and on the class of undertakings for which the service is of interest.

IV — Submissions of the principal parties and the intervener

A — The Commission

15. The Commission submits that although, in the absence of a contract in writing, the basis upon which the emergency ambulance services are performed does not fall within the scope of Directive 92/50, certain obligations do arise from the fundamental freedoms, in particular Articles 43 EC and 49 EC, and from general principles of law. Those general principles undoubtedly include the principle of transparency and the principle of equality or non-discrimination. The Commission refers in this connection to the decisions in *Telaustria* and *Vestergaard*.

16. While the Member States are free to opt for a particular procedure, they must in so doing comply with the requirements of Community law. An appropriate form of

17. The Commission considers that its interpretative communication on concessions under Community law⁶ constitutes a guide in this regard.

18. It is apparent from a number of letters, in particular one written by DCC's Finance Officer and Treasurer dated 15 January 1999, that certain arrangements regarding the services to be performed were entered into in June 1998. This also led to a contract being drafted, whose categorisation under national law is immaterial for the purposes of Community law.

19. The Commission therefore rejects Ireland's argument that the services have not been performed for the Authority. The tasks discharged by the Authority indeed involve, amongst others, monitoring the performance of the services. While DCC may be under no obligation to provide the services, the Authority must ensure their provision. This is clear, for example, from the draft contract mentioned above.

⁶ — OJ 2000 C 121, p. 2.

20. If Ireland argues that performance — without prior advertising — of the services is founded on section 65(1)(a) of the Health Act, this merely means that that provision infringes Articles 43 EC and 49 EC. In the Commission's submission, however, that provision merely empowers the Authority to enter into an arrangement. It does not prevent the Authority from calling for tenders. The nature of the service and its lack of attraction for undertakings do not mean that all advertisement can be dispensed with.

21. Nor is the approach adopted rendered lawful by the fact that the Authority would not outsource the services at issue if DCC did not provide them.

22. It is also not correct that the exception in Article 6 of Directive 92/50 is applicable.

23. Finally, the argument according to which the provision of services of general economic interest within the meaning of Article 86(2) EC is involved must be rejected. Compliance with the obligations arising under the EC Treaty does not obstruct performance of the particular tasks assigned. Besides, it is unclear whether DCC or the Authority is to be regarded as the undertaking entrusted with operation of the services.

24. In arguing that emergency ambulance services are provided free of charge, Ireland confuses the services drawn on by individuals with those provided vis-à-vis the Authority.

25. The Commission observes with regard to Ireland's submission that DCC is not reimbursed all its costs that that is immaterial, and moreover disputes the truth of the submission.

26. The Commission submits with regard to the Netherlands Government's view that application of the fundamental freedoms requires a cross-border element that that is the case here.

27. The restriction referred to by the Netherlands Government relating to the precedence accorded to harmonising provisions rests on a false understanding of the case-law cited. Moreover, Directive 92/50 itself requires application of the principle of non-discrimination, in Article 3(2).

28. The view that the requirement of transparency applies only where a voluntary tendering procedure is conducted must be rejected, as must the view that in the present

case grounds of justification exist or the requirements of Article 86(2) EC are met.

29. The Commission stresses with regard to the appropriate degree of publicity that advertisement nationally or internationally is not required in all cases, and that notification given to specific firms may suffice. The carrying out of an award procedure as under the directives is not required.

B — *Ireland*

30. Ireland disputes the need for advertising in respect of the services at issue.

31. Fundamentally the Commission is challenging the existence of an arrangement and not a new award. The provisions relied upon by the Commission are, however, inapplicable thereto. The alteration of existing arrangements cannot be required.

32. Nor is there a contract or contractual arrangement of any kind between DCC and the Authority. The 'arrangement' of June 1998 concerns an interinstitutional arrangement between two statutory bodies and negotiations on the contribution to DCC's costs.

33. DCC acts pursuant to statutory powers of its own, and in its own name. Nor is it subject to the Authority's control. The costs contribution made by the Authority does not constitute consideration and does not fully cover the costs.

34. Ireland points out that the services at issue fall under Annex I B to Directive 92/50. Even if a contract had been concluded in writing, under Article 9 of the directive only the less stringent regime would be applicable, that is to say Articles 14 and 16. In the contrary case the Commission would have had to propose an appropriate amendment to the directive.

35. It follows from the fact that emergency ambulance services are provided free of charge in Ireland that they are not services normally provided for remuneration. Articles 43 EC and 49 EC are therefore also not applicable. Nor is there any discrimination against foreign private undertakings.

36. Ireland further submits that the Court's case-law in *Telaustria* and *Bellini*⁷ which is cited by the Commission is not relevant.

37. Article 295 EC leaves the Member States free to choose the rules governing the system of property ownership.

38. Finally, reference should be made to the special provisions for services of general economic interest under Articles 16 EC and 86(2) EC.

C — The intervener

39. The Kingdom of the Netherlands, which has intervened in the proceedings in support of Ireland, notes that the principle of transparency does not mean that there is an obligation to apply the requirements of Directive 92/50. Furthermore, a series of exceptions to that principle exists. First, here there is no connecting factor with the internal market. Freedom to provide services is not affected. There are no grounds for examining compliance with the principle of non-discrimination. If the threshold under

the directives is not reached, the requirement of transparency is also inapplicable.

40. Second, the requirement of transparency also does not apply in so far as secondary Community legislation lays down corresponding provisions. Nor does it operate in cases in respect of which the public procurement directives lay down an exception, such as Articles 4 and 6 of Directive 92/50. Since the directives provide for minimum harmonisation with regard to transparency, the Member States are of course free to go further.

41. Third, a Member State is required to observe the principles of the EC Treaty only where a tendering procedure is initiated.

42. Fourth, it must be examined whether grounds of justification exist or the requirements of Article 86(2) EC are met.

43. With regard to the content of the requirement of transparency, the Netherlands Government submits that it must be determined what the appropriate degree of publicity is. That is to be left in every award

⁷ — Joined Cases 27/86, 28/86 and 29/86 *CEI and Bellini* [1987] ECR 3347.

procedure to the contracting authority. In October 2005 the Commission put forward a draft interpretative communication, which concerns the requirement of transparency. It is therefore high time that the Court determined more precisely the content of that requirement.

V — Appraisal

A — Preliminary remarks

44. It must be stated with regard to the form of order sought by the Commission that the latter has applied only for a declaration that the provision of certain services is contrary to Community law. That, by its nature, involves conduct of the defendant Member State in the past and, to be more precise, at a particular time, namely upon expiry of the period set in the reasoned opinion. In principle, therefore, the subsequent adherence to certain conduct, including toleration, can also be the subject-matter of a failure to fulfil obligations under Article 226 EC.

45. The form of order sought by the Commission does not concern the equally interesting issue of whether and how a particular contract or concession awardee has the obligation to terminate a contract

that has been concluded. For Ireland, however, this question arises in so far as it will be obliged under Article 228(1) EC, if the arrangement is declared unlawful, to take the measures necessary to comply with the judgment of the Court.⁸

46. The Commission's action is limited to an application for a declaration that the particular activity should have been advertised. By this, the Commission would appear to mean a form of contract notice.

47. This action for failure to fulfil obligations is therefore not intended to determine the form which the approach adopted in respect of the particular award would have taken, but only that it was in any event impermissible for there to be no contract notice at all.

48. According to the Court's case-law, 'Article 49 EC prohibits restrictions on freedom to provide services within the European Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. Furthermore, it is settled case-law

⁸ — Case C-126/03 *Commission v Germany* [2004] ECR I-11197, paragraph 26, and judgment of 3 March 2005 in Case C-414/03 *Commission v Germany*, not published in the ECR, paragraph 11.

that that provision requires the elimination of any restriction, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.⁹

dispute correctly submit, in the absence of a contract in writing it is not covered by Directive 92/50.

49. With regard to the legal bases whose infringement is to be examined in the present proceedings, the broad formulation of the form of order sought by the Commission, which complains of a failure to fulfil 'obligations under the Treaty', means that not only Articles 43 EC and 49 EC may require consideration, but also general principles of law and Article 10 EC. The latter provision may require consideration in the form of the requirement for equivalence and effectiveness.¹⁰

51. The process which forms the basis for this action for failure to fulfil obligations relates to a specific mechanism concerning the use of public funds for specific services. Ireland itself acknowledges that a certain form of arrangement exists.

52. As the judgment in *Commission v Spain* demonstrates, the public procurement directives also cover cooperation agreements between the public authorities and other public bodies.¹² The fact that that case concerned agreements that were in writing is of no consequence for the present action since it concerns not compliance with a condition laid down in the directives but the application of primary law. Even less strict requirements than under the directives apply in the case of primary law, so far as the nature of the relations is concerned. It is in any event not in dispute that the present proceedings also involve two mutually distinguishable bodies.

50. According to the Court's case-law,¹¹ provisions of primary law apply if the award is not governed by any of the directives. This precondition is met with regard to the award at issue here because, as the parties to the

53. Application of the freedom to provide services stands at the heart of the present proceedings. That presupposes that the

9 — Case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 66.

10 — My Opinion in *Coname* (cited in footnote 4), point 81, with further references to the case-law.

11 — *Coname* (cited in footnote 4), paragraph 16, and *Commission v France* (cited in footnote 9), paragraph 32.

12 — Case C-84/03 *Commission v Spain* [2005] ECR I-139, paragraph 38 et seq.

subject-matter of the contested award constitutes ‘services’ within the meaning of Article 50 EC.

54. The view could be taken that normally ambulance services or emergency ambulance services are not paid for directly by the person who avails himself of the service, but that the costs are met by insurance or borne directly by the State budget. Since it suffices under the Court’s case-law in the very area of health care¹³ if the payment for a service is made by a third party, detailed examination of the accounting system for the services at issue is superfluous. It is in any event not in dispute that the East Coast Area Health Board pays a ‘contribution’. There is accordingly no need for the purpose of the present proceedings to clarify how great its share of the actual costs is.

56. As already explained in my Opinion in *Coname*, transparency under just the directives encompasses a whole series of aspects.¹⁴ The present proceedings concern only particular advertising obligations relating to the allocation of particular services.

57. According to the Court’s case-law, it is necessary to ensure, ‘for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and ... procedures to be reviewed’.¹⁵ This requirement indeed applies not only to awards which fall outside Directive 92/50 because they take the form of a concession but also to awards which are not covered by this, or another, public procurement directive for other reasons. It may be added here purely for the sake of clarification that the same standard does not apply to all awards irrespective of their subject-matter and their value.

B — Principle: requirement of transparency

55. The present action for failure to fulfil obligations is concerned with the question whether the requirement of transparency was infringed in a specific process.

58. The criterion for assessing the legality of the defendant Member State’s action is whether an appropriate degree of transparency was ensured.

13 — Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473; and Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509.

14 — My Opinion in *Coname* (cited in footnote 4), point 88 et seq.
15 — Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 49.

59. It must therefore be examined whether in the specific case the lack of a call for tenders infringes that requirement. As the Court stated in *Coname*, it must be determined whether 'the award ... complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to ensure that an undertaking located in the territory of [another] Member State ... can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession'.¹⁶

60. It can thus be inferred from the case-law that what is appropriate is to be determined having regard to the persons interested in the particular award. In this connection, account is to be taken not only of persons who are actually interested: those interested also include all potentially interested persons in other Member States.

61. Thus, the degree of transparency which satisfies this requirement must be chosen. The question is, however, whether that must necessarily be in the form of a call for tenders (tender notice).

1. Need for a call for tenders?

62. It must be determined first of all whether primary law requires a call for tenders in all cases.

63. That view might be supported by the judgments of the First Chamber in *Parking Brixen* and *ANAV*,¹⁷ in which the Court held that 'the Member States must not maintain in force national legislation which permits the award of public service concessions without their being put out to competition ['ohne eine Ausschreibung', that is to say 'without a call for tenders', in the German version] since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency'.

64. However, there would appear to be an inaccuracy in the German version of those judgments. The French version in both cases, and similarly the Italian version in *ANAV*, speak of 'mise en concurrence' and a 'procedura concorrenziale' respectively. Reference is therefore deliberately not being made to an 'appel d'offres' or a 'bando di gara', that is to say to a tender notice for the purposes of the public procurement directives.

16 — *Coname* (cited in footnote 4), paragraph 21.

17 — *ANAV* (cited in footnote 15), paragraph 23, and *Parking Brixen* (cited in footnote 15), paragraph 52.

65. Besides, the Court expressly points out in the judgment delivered by the Grand Chamber in *Coname* that primary law does not in all cases require advertising in the form of a call for tenders (tender notice).¹⁸

66. That judgment of the Court is therefore to be regarded as the leading decision and thus forms the starting point for the assessment below. Apart from the fact that the judgment in *Coname* was delivered by the Grand Chamber and that the other judgments contain linguistic inaccuracies, this also follows from a consideration of principle.

67. The view that an award without a tender notice (call for tenders) and the direct contacting of specific undertakings are universally impermissible cannot be followed if only because even the public procurement directives provide for exceptions to such an obligation to advertise. The Commission itself expressly points out that, for it, it is not a question of transposing the obligations to advertise under Directive 92/50 into primary law. If a tender notice were always required under primary law, contracting

authorities would be subject to stricter rules outside the public procurement directives than within their field of application.

68. In addition, certain exceptions to the requirement to comply with the obligations of primary law were recognised by the Court in *Coname*. Those exceptions are still to be addressed separately.

69. It therefore remains to be stated that there can be procurement for which no call for tenders (tender notice) is required to be issued.

70. In this context, it appears to me necessary to recall the view that I have already expressed in my Opinion in *Coname*¹⁹ that there is no uniform set of procurement rules under primary law and that instead it is appropriate to draw distinctions according to the circumstances of the particular award. The present proceedings offer the Court an opportunity to provide the necessary clarification.

18 — *Coname* (cited in footnote 4), paragraph 21. That is also shown by the French version of the judgment ('un appel d'offres').

19 — Opinion in *Coname* (cited in footnote 4), point 69 et seq.

2. Differentiation according to the particular award

71. The starting point must therefore be the principle that the details of the requirement of transparency depend on the circumstances of each particular case.

72. The following observations concern, in accordance with the subject-matter of this action for failure to fulfil obligations, the conditions under which advertising may be dispensed with and whether they were met in this specific case.

73. Guidance is provided by the principle that review must be possible and the principles of proportionality and equal treatment. Also, regard is to be had to the objectives of all Community procurement law, such as safeguarding competition and the internal market, and to the 'effet utile' of the provisions of primary law.

74. The content of the obligation of transparency in each case depends on various factors, such as the subject-matter — that is to say whether services, the supply of goods, or works are involved — and the estimated value of the contract.

75. Since the present proceedings concern services falling within Annex I B to Directive 92/50, that is to say non-priority services, it must be examined whether the distinction drawn in the directive between priority and non-priority services is also relevant to primary law.

76. This categorisation found in the directives would appear to be based on the idea, applicable to procurement generally, that some awards are of greater relevance to the internal market than others, that is to say they are of interest to a wider group of economic operators — to be more precise, also to undertakings from other Member States. This could be a matter relevant particularly to application of the fundamental freedoms, given that they require a cross-border element.²⁰

77. While it is true that the Community legislature made only certain categories of services, namely priority services, subject to the full regime under Directive 92/50, that cannot automatically be taken to mean that other services, namely non-priority services, are not relevant to the internal market, that is to say that they essentially could not be provided from another State. Even though the Community legislature retained this split when the rules were amended, that is to say in Directive 2004/18, and used the same

20 — See my Opinion in *Coname* (cited in footnote 4), point 78.

reasoning,²¹ that does not in itself preclude as a matter of principle the application of primary law.

78. If a presumption were to be applied that non-priority services are of no interest to tenderers from other Member States, the Commission would have to furnish proof in an action for failure to fulfil obligations that the award at issue nevertheless does potentially have transnational interest.

79. It is true that the Commission is in principle obliged in an action for failure to fulfil obligations to prove its submissions with regard to both the facts and the law. This might be taken to mean that the Commission must show, by way of a market analysis, which economic operators have an interest in the proposed award as potential competitors; in this connection the value and subject-matter of the contract play a decisive role.

80. Neither the written nor the oral submissions of the Commission satisfy those requirements. On the basis of this strict standard for allocation of the burden of proof, the Commission's claims would have to be rejected as unfounded.

81. However, it is not to be overlooked in this context that hitherto the Court has not applied such a strict standard in relation to procurement.²² Rather, in the absence of evidence to the contrary, it would probably proceed on the basis that awards of a certain order of magnitude are, in the event of doubt, potentially of interest to undertakings from other Member States.

82. Thus, the principle remains in the present proceedings that as much information is to be given as potentially interested undertakings need to enable them to decide whether to participate in the award procedure or to submit a tender. Under no circumstances does primary law require the details which the models laid down in the public procurement directives prescribe for notices.²³

83. It is not to be inferred from the documents in the case or the hearing that the specific features of the particular award are such as to warrant no advertising at all. Neither the annual value nor the subject-matter of the services supports the conclusion that such an omission is in conformity with Community law.

21 — Nineteenth recital in the preamble.

22 — See the judgment of 27 October 2005 in Case C-158/03 *Commission v Spain*, not published in the ECR.

23 — See my Opinion in *Coname* (cited in footnote 4), point 97.

84. It must therefore now be examined whether it was possible for that omission to be founded on exceptions expressly provided for in primary law, or on the grounds of justification recognised by the case-law on the fundamental freedoms generally or relating to procurement.

85. Since in the case in point no advertising at all of the planned services took place, there is, however, no need to examine in detail what publication medium should have been chosen and what the minimum content of the advertising should have been.

C — *Exceptions and grounds of justification*

86. It is now to be investigated whether, because the effects of the restrictions are slight, the fundamental freedoms are not affected, whether the defendant Member State can rely on one of the Treaty rules providing for a general exemption of measures of the Member States from the application of primary law, whether one of the grounds of justification expressly provided for in the Treaty or a ground of justification recognised by case-law applies, and whether Article 86(2) EC is applicable. Finally it must be examined whether the exceptions in the directives, in particular Article 6 of Directive 92/50, are to be applied as such or by analogy.

1. Slight effects of the award

87. In *Coname*, the Court took up again a line of case-law, developed in the context of the free movement of goods, in accordance with which, 'because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in [another] Member State ... would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed'.²⁴

88. Apart from the fact that it is open to question where the limit lies as to what is 'modest', the award at issue, having a value of several million Irish punts per year, in any event does not satisfy those requirements. In 2001 the annual value of the services is supposed already to have amounted to more than IEP 7 000 000. This indeed exceeded by far the threshold value under Directive 92/50.

²⁴ — *Coname* (cited in footnote 4), paragraph 20.

2. Grounds of justification expressly laid down in the Treaty

89. First, the Treaty rules are to be noted that provide, even if subject to certain conditions, for a general exemption of measures of the Member States from the application of primary law. In relation to procurement, it is above all the exemptions relating to security that are relevant, to be more precise Articles 296 EC and 297 EC. These exemptions cannot, however, apply in the case in point, in the absence of any basis therefor.

90. In addition, the Member States can rely on the grounds of justification expressly provided for in the Treaty under Article 46 EC in conjunction with Article 55 EC, such as public policy or public health. In the case in point it is, however, to be observed that the defendant Member State has not defended itself in such a way as to have proved the presence of a ground of justification of this kind.²⁵

91. A justification relating to official authority, that is to say one based on Article 45 EC, required that certain conditions be met. It is settled case-law that, 'as derogations from the fundamental rule of freedom of establishment, Articles 45 EC and 55 EC must be

interpreted in a manner which limits their scope to what is strictly necessary for safeguarding the interests which those provisions allow the Member States to protect'.²⁶

92. According to settled case-law, derogation under those articles must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority.²⁷

93. Here, however, the conditions specified in the case-law in order for these expressly prescribed grounds to apply are not met.

26 — Case 147/86 *Commission v Greece* [1988] ECR 1637, paragraph 7; Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 34; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45.

27 — Case 2/74 *Reyners* [1974] ECR 631, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; Case C-114/97 *Commission v Spain* (cited in footnote 26), paragraph 35; Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 20; and *Servizi Ausiliari Dottori Commercialisti* (cited in footnote 26), paragraph 46.

25 — *Commission v France* (cited in footnote 9), paragraph 69.

3. Grounds of justification not expressly laid down in the Treaty or requirements in the general interest

94. Under the Court's case-law,²⁸ which in principle can also be applied in relation to procurement,²⁹ restrictions on freedom of establishment and freedom to provide services can be justified if they satisfy certain conditions.

95. According to that case-law, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

96. However, the defendant Member State has been unable to demonstrate that grounds of justification, or requirements in the general interest, recognised by the Court, for example consumer protection, justify the approach chosen.

97. Finally, reference should be made to the ground of justification, developed by the Court, of 'objective circumstances'.³⁰ It is unnecessary to conduct a detailed analysis of this possibility, not explained more precisely by the Court, of justifying certain Member State rules, and in particular of the conditions for the ground's application, because Ireland has made no relevant submissions in this regard.

4. Article 86 EC

98. In the present proceedings Article 86 EC has also been discussed.

99. It must be pointed out with regard to the award in question that strictly speaking it involves the grant of exclusive rights, in the field of emergency services, to be more precise emergency ambulance services.

100. The question arises in this regard whether the very entrustment with such rights, and not just further State measures in relation to undertakings to which the Member States grant special or exclusive

28 — See Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 64 and 65.

29 — See Case C-158/03 *Commission v Spain* (cited in footnote 22), paragraph 35.

30 — *Coname* (cited in footnote 4), paragraph 23: 'with regard to the objective circumstances that could justify such a difference in treatment, it must be pointed out that the fact that the Comune di Cingia de' Botti has a 0.97% holding in the share capital of Padania does not, by itself, constitute one of those objective circumstances'.

rights, is covered by Article 86(1) EC. The Court's case-law yields indications that the very grant of exclusive rights — to be more precise by way of creation of a dominant position — also falls within Article 86(1) EC in conjunction with Article 82 EC. That does not mean, however, that the grant of such rights is automatically prohibited.³¹ The question whether their grant, for example grant of the right enabling emergency services to be provided by DCC, is consistent with Community law is to be determined by means of provisions other than Article 86(1) EC. The provisions of substantive law pertinent in this regard include Article 86(2) EC. This provision thus acquires a relevance that extends beyond measures of the undertakings covered by it to State measures.

101. However, the present proceedings are concerned not with the vesting of rights in the Authority but with the Authority's actions in the context of the provision of essential services, to be more precise the awards made by it, namely the assignment of emergency services to DCC. It is in relation to the conduct of the bodies in which specific rights have been vested that Article 86(2) EC is of legal significance.

102. So far as concerns the assignment of emergency services to DCC, it must be examined whether the Authority satisfies the conditions of Article 86(2) EC, that is to say whether it is an undertaking that is entrusted with the operation of services of general economic interest and whether the application of the provisions of primary law would have obstructed the performance, in law or in fact, of the tasks assigned to it.

103. It must in principle be acknowledged that, because of the lead time involved and the period to be specified for the submission of tenders, the carrying out of an award procedure entailing a call for tenders can in certain cases obstruct the performance of tasks. That would be true, for example, in the case of a utility company if interruptions or delayed commencement of the energy or water supply were to result.

104. In light of the Court's case-law, it must therefore be examined to what extent a restriction on competition or even the exclusion of all competition from other economic operators was necessary to enable the holder of the exclusive right to perform its task of general interest, and in particular to have the benefit of economically acceptable conditions.³²

31 — See, for example, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 29; Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 16; and Joined Cases C-271/90, C-281/90 and C-289/90 *Spain and Others v Commission* [1992] ECR I-5833, paragraphs 35 and 36.

32 — Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 16, and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 57.

105. Even though it is not necessary that the survival of the undertaking itself would have been threatened had a call for tenders been issued, it should at least be proved that the performance, in law or in fact, of the special obligations incumbent upon that undertaking would have been obstructed.³³

106. The defendant Member State has not been able to demonstrate that the approach adopted was necessary to enable DCC to perform its task in economically acceptable conditions.

107. There is accordingly no need to examine whether DCC is in fact an undertaking to which tasks of general *economic* interest were assigned.

108. It should, moreover, be pointed out in this context that, being a provision permitting derogation from the Treaty rules, Article 86(2) EC must be interpreted strictly.³⁴ Nor, in the present proceedings, does Article 16 EC change anything.

5. Application of exceptions under the directives

109. Finally, consideration is to be given to the application of exceptions to the duty first to publish a (contract) notice which are laid down in the directives.

110. It is necessary to proceed on the basis of the principle that, within the field of application of primary law, precisely the same rules cannot apply in respect of the award procedure as under the directives. This admittedly does not prevent many requirements, for example the prohibition of discrimination, from also applying outside the directives — though pursuant to another legal basis, for example a general principle of law.

111. As has already been pointed out a number of times,³⁵ exceptions corresponding to those which the directives³⁶ lay down ought in any event to be recognised in the context of primary law. It thus cannot be ruled out that there may also be cases in

33 — Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 43.

34 — *Commission v Netherlands* (cited in footnote 33), paragraph 37.

35 — See my Opinion in *Coname* (cited in footnote 4), point 93, and, following that, the Opinion of Advocate General Jacobs in Case C-525/03 *Commission v Italy* [2005] ECR I-9405, point 47.

36 — Article 11(3) of Directive 92/50 and Article 31 of Directive 2004/18.

which an award procedure may be conducted without a prior contract notice, that is to say without advertising.

112. It must, however, be stated here with regard to this kind of exception that the defendant Member State has not relied on any of the exceptions laid down in Directive 92/50 for conducting a negotiated procedure without a contract notice.

6. Article 6 of Directive 92/50

113. In the proceedings the applicability of Article 6 of Directive 92/50 was discussed a number of times. This provision removes public service contracts from the directive's field of application subject to certain conditions — inter alia the service provider must have an exclusive right.

114. It must be pointed out, as a matter of principle, with regard to the applicability of this exception that it can have effect only where the award actually falls within Directive 92/50. Since it is, however, not in dispute that other conditions required in order for Directive 92/50 to apply are already not met, there is no need to examine whether an exclusive right exists in the present case.

115. In an action for failure to fulfil obligations, it is for the defendant State to put forward possible reasons why the provisions of Community law do not apply. In the present proceedings, the discussion has, however, been limited to Article 6 of Directive 92/50 in the strict sense.

116. The parties have not discussed in any detail whether a comparable exception exists in primary law, possibly as a ground of justification or 'objective circumstance' within the meaning of *Coname*, with the effect that such processes are exempt even from the application of primary law.

D — Conclusion

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

118. It is true that there can be procurement procedures for which advertising can be entirely dispensed with, but in the case in point such circumstances were simply not present or at least have not been proved.

VI — Costs

119. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been

applied for in the successful party's pleadings. Since Ireland is unsuccessful and the Commission has applied for Ireland to pay its costs, Ireland should accordingly be ordered to pay those costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of the Netherlands which has intervened in the proceedings should bear its own costs.

VII — Conclusion

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

- (1) declare that, in permitting emergency ambulance services to be provided by Dublin City Council without the Eastern Regional Health Authority undertaking any prior advertising, although there were no circumstances which would have permitted Ireland to proceed in such a way, Ireland has failed to fulfil its obligations under the Treaty;
- (2) order Ireland to pay the Commission's costs;
- (3) order the Kingdom of the Netherlands to bear its own costs.