OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 18 January 2007 [1]

1. This action raises before the Court the question of the extent of the transparency obligation imposed on a contracting authority awarding a contract whose value falls below the threshold specified in the relevant Community public procurement directive. Although a contract whose value is below the relevant threshold may still be significant in economic terms, I shall for convenience refer to such a contract in this Opinion as a 'low value contract'.

2. The Commission seeks a declaration under Article 226 EC that 'Finland has failed to comply with its obligations under Article 28 EC, since [the authority responsible in Finland for the management of government buildings] in procuring catering equipment infringed fundamental rules of the EC Treaty and, in particular, the principle of non-discrimination which implies an obligation of transparency'.

Relevant Community law

3. Council Directive 93/36/EEC [2] coordinating procedures for the award of public supply contracts lays down requirements for the award of such contracts.

1 — Original language: English.

2 — Of 14 June 1993 (OJ 1993 L 199, p. 1), as amended in particular by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1). After the material time, further amendments were made by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1). With effect from 31 January 2006, Directive 93/36 was repealed and replaced by European Parliament and Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works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).

4. In so far as relevant the preamble provides:

'[10] ... supply contracts of less than [EUR 214 326 [3]] may be exempted from competition as provided under this Directive and it is appropriate to provide for their exemption from coordination measures;

[14] ... to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; ... the information contained in these notices must enable suppliers established in the Community to determine whether the proposed contracts are of interest to them; ... for this purpose, it is appropriate to give them adequate information about the goods to be supplied and the conditions attached to their supply; ... more particularly, in restricted procedures advertisement is intended to enable suppliers of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions'.

5. Under Article 1(a), public supply contracts include contracts for the purchase of products between a supplier and a contracting authority. Contracting authorities are defined in Article 1(b) as the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law.

6. In accordance with Article 5(1)(a)(i), the substantive harmonising provisions of the directive (Articles 6 to 27) — which include the common advertising rules set out in Articles 9 to 14 — are applicable only to public supply contracts awarded by contracting authorities referred to in Article 1(b) 'where the estimated value net of value added tax (VAT) is not less than [EUR 214 326 [4]]'. Thus, low value contracts are not caught by the common advertising rules; and Member States are under no obligation to apply the rules in the directive to those contracts, although they may of course choose to do so as a matter of national law.

3 — See the values of thresholds set pursuant to Directive 93/36 in OJ 1999 C 379, p. 20, which came into force on 1 January 2000. Neither party has informed the Court of the precise date on which the contested contract was concluded. For reasons which I set out below at point 24, I assume that that occurred in the first part of 2000. At the material time the threshold from which Directive 93/36 applied was subject to change on a biennial basis. With effect from 1 January 2002, that threshold was increased to EUR 249 681 (see the values of thresholds set pursuant to Directive 93/36 in OJ 2001 C 332, p. 21).

4 — See footnote 3.

7. Contracts falling within the scope of the public procurement directives must be awarded using an open, a restricted or a negotiated procedure. Under a restricted procedure a contract notice is advertised inviting undertakings to express an interest in tendering for the contract and the contracting authority subsequently invites tenders from a limited number of undertakings. Under a negotiated procedure the contracting authority may select undertakings with whom to negotiate the contract without advertising the contract and without holding a competition. [5]

8. According to Article 6(3)(a), contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice 'in the absence of tenders or appropriate tenders in response to an open or restricted procedure insofar as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission'.

5 — Under a second type of negotiated procedure, the contracting authority advertises the contract and invites tenders from a limited number of undertakings but may also negotiate the terms of the contract to some extent.

Background to the infringement proceedings

9. The Commission and Finland rely on partially differing accounts of the facts giving rise to the present action, which have been hotly contested throughout the proceedings. I will therefore set out the relevant background in some detail, noting and evaluating the points of disagreement.

The first stage: March 1998

10. In March 1998, under a restricted procedure, the contracting authority [6] published in the Official Journals of both the Community and of Finland [7] a notice inviting expressions of interest in a public works contract for renovation of, and alteration works to, the premises of the regional

6 — Valtion kiinteistölaitos is the former name of the authority responsible for management of governmental buildings in Finland. It was renamed Senaatti-kiinteistöt in 2001.

7 — Supplement to the Official Journal S 48 of 10 March 1998 and the Official Journal of Finland, public procurement series, No 11, of 12 March 1998.

administration of Turku. Finland refers to this as the 'first stage'. [8]

11. The contract was subdivided into lots. These included, inter alia, the installation of catering equipment. In accordance with Annex IV to Council Directive 93/37/EEC [9] it was specified that tenders could be made for one, several or all of the lots. Individual lots varied in value between FIM 1 million and 22 million (between EUR 168 000 and EUR 3.7 million approximately), and the aggregate value of the lots was above the threshold from which the Works Directive applied. [10] The works were to be carried out in two tranches.

12. The kitchen in which the equipment was to be installed is part of the restaurant located within the Turku regional administration's premises.

13. The parties are at odds over whether any tender to supply catering equipment was received in the first stage.

14. In reply to a question from the Court at the hearing, Finland stated that just one tender to supply the catering equipment was received in the first stage, from Kopal Markkinointi Oy ('Kopal'). Finland was unable to provide further details of that tender. It stated that, since no other tenders had been received, there was no means of comparing tenders. Therefore, Kopal's tender had been rejected.

15. The Commission said that, so far as it was aware, Kopal did not submit a tender in 1998.

16. No further evidence relating to the first stage has been placed before the Court. In any event, the parties agree that no tender was *accepted* at this point for the supply of catering equipment.

8 — In following Finland's nomenclature for the three stages, I am using those terms for identification purposes. The question of whether the three stages form part of the same procedure, or should be considered to be separate procedures, is discussed below at points 60 to 63.

9 — Of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) ('the Works Directive'). The Works Directive (rather than Directive 93/36) governed the contract notice (and subsequent procedure) for the renovation and alteration works, which constituted the majority of the lots.

10 — See Article 6(3) of Directive 93/37. The value of thresholds set pursuant to the Works Directive in OJ 1998 C 22, p. 2 (which was applicable during the period 1 January 1998 to 31 December 1999) was SDR 5 000 000, equivalent to FIM 29 908 547. The contract notice indicated that the estimated total value of the contract was FIM 38 million.

The second stage: early 2000

17. In early 2000 [11] the contracting authority wrote directly to four undertakings, inviting them to tender for the supply and installation of catering equipment. On the basis of the follow-up letter of 9 April 2001 [12] it may be deduced that those four undertakings were Dieta Oy ('Dieta'), Electrolux Professional Oy ('Electrolux'), Kopal, and the eventual supplier Hackman-Metos Oy ('Hackman-Metos'). Thus it was the contracting authority who first approached Hackman-Metos. Finland claims that, those undertakings included a representative in Finland of a catering equipment supplier located in another Member State (presumably Electrolux). The Commission has not challenged that statement.

18. By this point, the restaurant in which the catering equipment was to be installed had been leased by the contracting authority to Amica Ravintolat Oy ('Amica' or 'the tenant'). The contracting authority agreed with Amica that that company would purchase the catering equipment on the contracting authority's behalf. The contracting authority agreed to pay FIM 1 050 000 (about EUR 177 000) towards the purchase of the catering equipment. That amount is less than the threshold above which Directive 93/36 applied. [13]

The third stage: later in 2000

19. In February 2000 the contracting authority issued a notice which informed its addressees that all tenders received had been rejected because of their high cost. Addressees were however invited to approach the tenant, whose contact details were provided, with new offers. Finland refers to this invitation and what followed as the 'third stage'.

20. The parties disagree as to whether that notice was addressed to all undertakings who

11 — The Commission says these invitations to tender were issued in 2000, but neither the Commission nor Finland has identified the exact date. Given that the ensuing tenders were rejected in February 2000, it appears that the invitations must have been issued in either January or February 2000.

12 — See point 25 below.

13 — See points 4 and 6 above.

had tendered in 2000 to supply catering equipment.

21. Finland claims that the notice was sent to all four undertakings. In its reply, the Commission alleges that not all undertakings which previously tendered were informed of the rejection of all tenders and subsequently invited to tender under the 'third stage'. According to the Commission, at least one undertaking, Rakentajamestarit Oy ('Rakentajamestarit'), which had previously tendered to supply the catering equipment was not informed of the rejection of tenders and was not invited to tender under the third stage. It refers to a tender (annexed to the reply) which was submitted by Rakentajamestarit.

22. Finland correctly objects that in submitting evidence of Rakentajamestarit's tender only in its reply without explanation the Commission has not complied with Article 42(1) of the Rules of Procedure, which requires that a party offering further evidence in reply or rejoinder must give reasons for the delay in offering it. [14] Finland also points out that Rakentajamestarit's tender related to the main works (which included installing *kitchen furniture*), not to the supply of *catering equipment*.

23. I therefore consider that the evidence of Rakentajamestarit's tender is inadmissible; and that, in any event, it also appears to be irrelevant. [15]

24. The tenant concluded the contract with Hackman-Metos. [16] The parties have not been able to inform the Court when that happened. At the hearing the Commission indicated that two years had elapsed between the notice in the Official Journal and the purchase of the catering equipment. I therefore assume that the contract was probably concluded during the first part of 2000. [17]

14 — See Case C-308/87 *Grifoni* v *EAEC* [1994] ECR I-341, paragraph 7.

15 — The text of the tender does in fact make clear that it was made in the context of the second tranche of renovation and alteration works referred to in the contract notice published in March 1998. It seems that Rakentajamestarit had also offered to supply certain kitchen furniture (storage cupboards and the like); but Finland stressed that Rakentajamestarit was not a manufacturer or supplier of catering equipment (in the sense of kitchen appliances) and that it had never offered to supply such equipment.

16 — This information emerged only at the hearing.

17 — Since the third stage began in February 2000, the contract was obviously concluded *after* that point. Whilst the date at which the contract was concluded is material to determining whether the threshold from which the Directive became applicable was EUR 214 326 or EUR 249 681 (see footnote 3 above), self-evidently the value of the contract (approximately EUR 177 000) is below either threshold.

25. By letter of 9 April 2001, the contracting authority provided the addressees of the notice issued in February 2000 with a form for appealing against the decision to reject the tenders made under the second stage.

26. Pausing here to recapitulate: in the first stage, under a restricted procedure, a contract notice was published in the Official Journals of the EU and of Finland inviting applications to tender for a contract of which the installation of catering equipment was a separate lot. It seems that one undertaking, Kopal, may have offered to supply catering equipment in the first stage (that is, in the course of the restricted procedure) but that even if it did so its tender was rejected. In the second stage, the contracting authority approached Kopal and three other potential suppliers — Dieta, Electrolux and Hackman-Metos — and invited them to tender, but then rejected all four tenders on the ground that they were too expensive. In the third stage, the contracting authority gave the incoming tenant, Amica, power to negotiate as its agent with such of those four undertakings (Kopal, Dieta, Electrolux and Hackman-Metos) as chose to approach it, having been invited to do so by the contracting authority. Amica concluded the contract for catering equipment with Hackman-Metos.

27. A complaint regarding the contested award was lodged with the Commission, which sent Finland a letter of formal notice on 18 July 2002. The Commission took the view that the contracting authority had not ensured that the contract had been awarded with a sufficient degree of advertising and that Finland was therefore in breach of its obligations under Article 28 EC (*sic*). The Commission added that, according to the information it had received, Amica (acting as agent for the contracting authority) had concluded the contract with an undertaking with which it shared close links and employees, but the Commission does not appear to have pursued this allegation beyond the pre-litigation procedure.

28. Finland replied by letter dated 3 September 2002. It accepted that public procurement procedures were subject to advertising and transparency requirements, but denied that it had infringed Article 28 EC or any other rule of Community law.

29. Not satisfied by Finland's reply, the Commission sent Finland a reasoned opinion on 19 December 2002. It relied expressly on the Court's judgment in *Telaustria and*

Telefonadress ('*Telaustria*') [18] and repeated that, in its view, the contracting authority had failed to guarantee a sufficient degree of advertising [19] for the procurement contract.

30. Not satisfied by Finland's reply of 12 February 2003 (which merely reiterated its position), the Commission lodged the present infringement action. [20]

31. Following initiation of the present infringement proceedings by the Commission, Finland informed the Commission on 1 December 2003 that it intended to reinforce the obligation of transparency in Finland. [21]

32. Denmark, Germany and the Netherlands have made submissions as intervening parties. At the hearing on 8 June 2006 the Commission, Finland, Germany and the Netherlands made oral submissions.

18 — Case C-324/98 [2000] ECR I-10745.

19 — See paragraph 62 of the judgment.

20 — Finland notes that the award was contested at national level by Finland's Ministry of Finance and the Ministry of Commerce and Industry but was not challenged before its national consumer protection tribunal.

21 — In October 2004, a working group was due to make a legislative proposal for introducing an obligation to publicise on an electronic database contracts whose value exceeded prescribed national thresholds.

Admissibility

Finland's objection of inadmissibility

33. Finland argues that the action is inadmissible. According to the case-law of the Court, the subject-matter of the action is delimited by the pre-litigation procedure and the application cannot be founded on any objections other than those raised in the pre-litigation procedure. Finland considers that the Commission has expanded the subject-matter of the action beyond the scope outlined in the reasoned opinion in two respects.

34. First, the Commission states for the first time in the application that the contracting authority ought to have organised an 'invita-

tion to tender'. The reasoned opinion merely mentioned the obligation to ensure a sufficient degree of advertising. [22]

35. Second, the application states that the initial invitation to tender was unsuccessful and that the contract for catering equipment was not advertised subsequently in the form of an invitation to tender. In the reasoned opinion, however, the infringement was said to arise from the fact that the tenant, acting as the contracting authority's procurement agent, concluded the contract.

36. The Commission replies that the subject-matter of the action is set out in a precise manner on the cover page and at paragraph 23 of the application (the declaration sought). Both there and in the reasoned opinion, the essential allegation is that Finland infringed its obligations under Article 28 EC because the contracting authority breached fundamental rules of the Treaty in procuring catering equipment.

22 — Thus the English version of the reasoned opinion. The French translation has 'un degré de publicité adéquat'. See point 82 below for an analysis of the difference in meaning.

Assessment

37. Despite the loose way in which the declaration sought is framed, which I deal with below, I do not think that Finland's objection of inadmissibility is founded. The reasoned opinion concludes by alleging that in procuring catering equipment, the contracting authority was in breach of fundamental Treaty rules, and in particular the principle of non-discrimination, which implies an obligation of transparency; in consequence (it is said) Finland infringed its obligations under Article 28 EC. The application asks for a declaration that Finland has infringed its obligations under Article 28 EC because, in procuring catering equipment, the contracting authority infringed fundamental rules of the Treaty and, in particular, the principle of non-discrimination which implies an obligation of transparency. I cannot see how the way in which the Commission puts its case in those two statements can be distinguished in any meaningful way.

38. It is true that the Commission argued expressly for the first time in its application that an 'invitation to tender' should have been issued; and that the initial invitation to tender was unsuccessful and subsequently the contract for catering equipment was not

advertised in the form of an invitation to tender. [23] However, an action is not inadmissible where the application merely expands on a charge made in the reasoned opinion and does not formulate a new charge. [24] It seems to me that the two detailed arguments set out in the application merely expand on the charge advanced in the reasoned opinion that the contract concerned was not sufficiently advertised [25] and that the obligation of transparency was therefore breached. They do not alter the subject-matter of the Commission's complaint.

39. Finland seeks to rely on *Commission* v *Netherlands* [26] and *Commission* v *Italy*. [27] In the former, the Court declared inadmissible part of the Commission's action, which concerned water pollution, that varied in geographical scope from that identified by the Commission in the pre-litigation procedure. [28] In the latter, the Commission's action was inadmissible in so far as it was based on (a) national provisions which had been referred to in the pre-litigation procedure erroneously and (b) national provisions which differed from those referred to in the pre-litigation procedure. [29] The geographical scope and the basis in national law of an infringement action clearly go to the core of the subject-matter of that action. The precise detail of the arguments advanced in the application in support of the Commission's main objection does not. Those cases may therefore be distinguished.

40. It follows that Finland's objection cannot be upheld.

The declaration sought

41. However I have serious doubts about the admissibility and merits of the Commission's action on other grounds.

42. The Court has stated that the Commission must, in the heads of claim in an

23 — Presumably, the Commission's real point is that, after the failure of the restricted procedure, a new procurement procedure — which could have been a negotiated procedure — should have been organised.

24 — Case C-340/02 *Commission* v *France* [2004] ECR I-9845, paragraph 29.

25 — See point 34 above.

26 — Case C-152/98 [2001] ECR I-3463, paragraph 23.

27 — Case C-439/99 [2002] ECR I-305, paragraph 11.

28 — Paragraphs 24 and 25.

29 — See paragraphs 13 and 14.

application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule and that those heads of claim must be set out unambiguously so that the Court does not rule ultra petita or indeed fail to rule on a complaint. [30]

43. The Commission asks the Court to declare that 'Finland has failed to comply with its obligations under Article 28 EC, since [the authority responsible in Finland for the management of government buildings] in procuring catering equipment infringed fundamental rules of the EC Treaty and, in particular, the principle of non-discrimination which implies an obligation of transparency'.

44. Those terms are far from precise.

45. First, it is not clear from the text as formulated whether the Commission is asking for a declaration that (i) Article 28 EC, (ii) the non-discrimination principle which it contains, (iii) other fundamental rules of the Treaty, or (probably) (iv) a combination of the above have been infringed.

46. Second, the Commission does not explicitly state why Article 28 EC is relevant to its action.

47. Article 28 EC states that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States. That prohibition covers all national measures. [31]

48. However, the Commission's application fails to identify with precision which act constitutes the measure, act or procedure which is alleged to have breached Article 28 EC. The Commission merely complains, in a general way, of the contracting authority's conduct 'in procuring' catering equipment.

49. I therefore consider that the heads of claim fail to indicate the specific complaints

30 — Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 24.

31 — See, for example, Case C-366/04 *Schwarz* [2005] ECR I-10139, paragraph 28.

on which the Court is asked to rule and that the action should be declared inadmissible.

50. In the event that the Court does not share that view, I turn to the substance of the case.

Substance

Preliminary points

51. The Commission has failed to explain how, by not advertising the contested contract or initiating a new contract award procedure, both of which imply positive obligations, the contracting authority has infringed the negative obligation contained in Article 28 EC.

52. I should make it clear that I am not denying that Article 28 EC may create an obligation of transparency. My point is that, if so, the Commission has failed to explain that that is its case. In my view the action is therefore unfounded in so far as it fails to set out clearly how the alleged breach of the transparency obligation infringes Article 28 EC.

53. Again, in the event that the Court does not share my view, I turn to examine the Commission's complaint in detail.

54. It is common ground that the contested contract was a low value contract, and that it therefore falls outside the scope of the Directive 93/36.

55. It is moreover settled case-law that, although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities concluding such contracts are nevertheless bound to comply with the fundamental rules of the Treaty. [32] In par-

32 — See Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 20, and Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 32.

ticular, contracting authorities are bound by the principle of non-discrimination on grounds of nationality, which in turn implies an obligation of transparency in order to enable the contracting authorities to satisfy themselves that the principle of non-discrimination has been complied with. [33]

56. The outcome of the Commission's application thus depends on whether the measures adopted by the contracting authority in the course of procuring the catering equipment were sufficient to comply with the transparency obligation as established by the case-law. The answer to that depends on answering two further questions.

57. Did the contract notice which the contracting authority published in March 1998 under the restricted procedure in accordance with the Works Directive publicise substantially the same supply contract as was finally awarded in early 2000 and therefore ensure the necessary degree of transparency?

58. Alternatively, if it did not, did the contracting authority comply with the transparency obligation in 2000 (at stages two and three) when it twice issued invitations to tender directly to four potential tenderers?

59. In approaching these questions, I emphasise that the steps taken in 1998 (the first stage) and 2000 (the second and third stages) represent very different degrees of publicity. There can be no doubt that the transparency obligation is satisfied by publishing a contract notice in the Official Journal of the EU for a contract to be awarded under a restricted procedure (irrespective of the fact that that initial publication took place in accordance with the requirements of the Works Directive rather than Directive 93/36). It is more open to debate whether the transparency obligation is likewise fulfilled by contacting four undertakings directly.

Did the 1998 contract notice cover the supply contract awarded in early 2000 and thereby satisfy the transparency obligation?

60. Finland maintains that there was 'only one award procedure' for the purposes of

33 — *Telaustria*, cited in footnote 18, paragraphs 60 and 61. The tenor of that case-law has since been affirmed in the second recital of the preamble to Directive 2004/18, cited in footnote 2, which states that '[t]he 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'.

assessing compliance with Article 28 EC. The contract for supplying catering equipment was first publicised as an independent lot within the overall public works contract for the Turku premises. That contract was advertised to all potential suppliers in the contract notice published in the Official Journal of the EU in 1998. The three stages represent three parts of the same procedure.

61. Finland considers that, in respect of a low value contract, the transparency obligation does not necessarily require a particular form of publication or the issue of a formal invitation to tender. The application of the transparency obligation depends on the circumstances and is primarily governed by national law. Finland is supported in this view by Denmark, Germany and the Netherlands.

62. The Commission seeks to draw a procedural distinction between each of the three stages identified above. The contracting authority failed to publish a fresh invitation to tender [34] before purchasing the catering equipment. That complaint relates to the second and third stages. Therefore, according to the Commission, there was an insufficient degree of advertising in procuring the catering equipment and the contracting authority thereby failed to comply with the transparency obligation.

63. I disagree with Finland that, formally speaking, the three stages formed a single award procedure. The first stage consisted of a restricted procedure which was unsuccessful as regards the lot concerning the supply of catering equipment. Under the second stage, the contracting authority contacted four undertakings directly, at least three of which had submitted no tender under the restricted procedure. Thus the second stage launched a separate, negotiated procedure. After the tenders received under that procedure were rejected, a further negotiated procedure was launched in the third stage.

64. That being said, it is necessary to examine whether, on the facts, the second

34 — I deduce that the real complaint is that the contracting authority failed to initiate a new procurement procedure: see footnote 23 above.

and third stages can be regarded as a direct consequence of the unsuccessful first stage so that transparency requirements with respect to the second and third stages were already satisfied by the contract notice published in the Official Journal of the EU in 1998.

65. In order to answer that question, one has to establish, first, whether the 1998 notice published under the restricted procedure should properly be read as inviting applications to tender for the supply of the catering equipment as a separate lot and, second, whether the terms of the supply contract advertised under the restricted procedure were substantially the same as those of the contract at issue in the second and third stages.

66. First, the public works contract advertised in the Official Journal in 1998 bears the heading 'Building works (rebuilding, extensions, alteration and repair works)' (my translation). The detailed description of the work [35] reads: 'Municipal building, extensive renovation and modification work, building, plumbing and ventilation work, work on monitoring, cooling, safety and electrical equipment and installation of catering equipment' (my translation). The contract notice also made it clear [36] that candidates could apply to tender for one, several or all of the lots and invited potential tenderers to contact the contracting authority [37] (in Finnish) for supplementary information on technical and administrative aspects of the contract. [38]

67. The Commission does not seek to argue that the contract notice was insufficiently clear. It seems to acknowledge that the contract notice did in fact call for applications to tender for catering equipment. [39] Its case appears to be limited to saying that what took place in 2000 cannot be said to be merely the continuation of what happened in 1998.

68. In my view the 1998 contract notice, whilst not perhaps a model of clarity, could

35 — Point 3.b) in the original Finnish version of the contract notice. Although it does not alter the fact that the contracting authority itself took the measures necessary to seek interest throughout the Community in installing catering equipment, it may be noted that other language versions of the contract notice (which in fact summarise the original version) failed to mention that particular lot.

36 — Point 3.c).

37 — Point 6.b).

38 — Point 13.

39 — Paragraph 21 of the application.

prima facie have been read as inviting expressions of interest in tendering for the installation of catering equipment; and the Commission has not contested that. Therefore I agree with Finland that would-be tenderers reading the contract notice published in March 1998 in the Official Journal would have understood that they could enquire about, and apply to tender for, the supply of catering equipment as an independent lot. [40]

69. Second, the Commission argues that the contractual terms altered between the various stages. It points out that the contract notice published in 1998 makes no mention of the tenancy agreement with Amica and its involvement in the awarding of the contract. [41] At the hearing the Commission, relying on a letter (annexed to its reply) from the contracting authority to Finland's Ministry of Commerce and Industry, also alluded to a modification of the plan for the restaurant, a change in the amount attributed to the contract and a change to the financing of the purchase (now to be shared between the contracting authority and Amica).

70. Finland replies that the essential clauses of the contract were not changed in the course of the procedure. The contracting authority was responsible for the award throughout. The only changes were that under the third stage Amica concluded the contract in its capacity as agent and that the contracting authority fixed in advance the sum that it would pay towards the purchase.

71. I do not think that the Commission has succeeded in demonstrating that the terms of the contract changed sufficiently over the course of the three stages described to break the link of continuity between those stages. Although in the third stage the contracting authority used Amica as agent to make the purchase and shared the cost with it, the invitations to tender in the third stage were issued in its, not Amica's, name. Moreover the sum which the contracting authority fixed as its contribution towards the purchase lies within the range of values specified for the separate lots published under the works contract in 1998. Nor do I read the invitations to tender issued in the third stage as supporting the Commission's contention that the tenancy agreement between the contracting authority and Amica altered the terms of the contract. They merely make clear Amica's role as procurement agent.

40 — In support of that view, Finland points out that one potential supplier (Kopal) does appear to have read the announcement in that way and to have applied to tender specifically for catering equipment.

41 — As a matter of chronology, it could scarcely have done so.

72. Contrary to Article 42(1) of the Court's Rules of Procedure, the Commission has not explained why the letter from the contracting authority to Finland's Ministry of Commerce and Industry was submitted as evidence only as an annex to its reply. Consequently that letter constitutes fresh evidence submitted out of time within the meaning of Article 42(1) of the Rules of Procedure and may not be taken into consideration. [42] The Commission has not submitted any further evidence establishing that there was substantial change in the nature or quantity of the catering equipment to be supplied as publicised in the three different stages.

73. For those reasons, I take the view that substantially the same contract for supply of catering equipment was publicised in 1998 under a restricted procedure as was awarded in 2000 under a negotiated procedure.

74. If that is so, and the restricted procedure failed because no acceptable tender was received, the next question is whether the contracting authority infringed the transparency obligation by subsequently resorting to the negotiated procedure to buy the catering equipment, without further advertising.

75. Under Article 6(3)(a) of Directive 93/36, a contracting authority is entitled to award a supply contract falling within the scope of the directive by negotiated procedure without prior publication of a tender notice where no appropriate tender was received under a restricted procedure, provided that the terms of the contract are not substantially altered and provided that a report is communicated to the Commission.

76. It has recently been emphasised [43] that where a derogation from the public procurement directives is expressly allowed, a negotiated procedure without prior publication of an invitation to tender is justified and there can be no requirement for advertising. The principles which flow from the Treaty cannot impose a requirement of publicity which has to be satisfied even when the directives expressly provide for a derogation.

42 — See *Grifoni* v *EAEC*, cited in footnote 14 above, paragraph 7.

43 — By Advocate General Jacobs in his Opinion in Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, at point 47. The Court did not deal with this point, having found the action inadmissible. See also the Opinion of Advocate General Stix-Hackl in Case C-532/03 *Commission* v *Ireland*, delivered on 14 September 2006, point 111.

If they did, the derogation would be nugatory.

77. In my view the same reasoning applies to a contract not falling within the scope of Directive 93/36 by virtue of its low value. [44] Article 6(3)(a) expressly allows for recourse to a negotiated procedure without prior publication of a contract notice in respect of contracts falling within the directive. It follows that that procedure may similarly be used in respect of a low value contract.

78. I therefore conclude that where, after carrying out a restricted procedure with publication of a notice which fails due to the absence of any appropriate tenders, the contracting authority resorts to a negotiated procedure without advertising the supply contract, and where the terms of the contract under both procedures are substantially the same, the contracting authority does not infringe the transparency obligation under Community law.

Were the invitations to tender issued in 2000 in themselves sufficient to comply with the transparency obligation?

79. In case the Court reaches the conclusion that, contrary to my view, the second and third stages were unrelated to the first stage and cannot be considered to be covered by the 1998 contract notice, I must consider whether the invitations to tender issued directly to the four undertakings in 2000 complied with the transparency obligation.

80. The thrust of the Commission's allegation is that the contested contract should have been awarded in accordance with the condition laid down in *Telaustria* [45] for ensuring compliance with the transparency obligation. There, the Court stated that the transparency obligation imposed on the contracting authority 'consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the [market concerned] to be opened up to competition and the impartiality of procurement procedures to be reviewed'.

44 — Advocate General Jacobs went on to express the same view at point 48 of his Opinion in *Commission* v *Italy*.

45 — Cited in footnote 18, paragraph 62.

81. Finland, Germany and the Netherlands all submit that, whilst a contracting authority awarding a contract which falls outside the scope of the directives must respect the obligation of transparency, the issue remains as to what constitutes 'sufficient' advertising in the context of a particular award procedure to satisfy that obligation. [46] In principle, it is for the contracting authority to evaluate whether the detailed arrangements of the call for tenders are appropriate for the contract in question, subject to review by the competent courts. [47]

82. As Denmark and the Netherlands have pointed out, the use of the word 'advertising' in the English version of the judgment is problematic. On the one hand, advertising implies an obligation to publish. On the other hand, the words used in other language versions ('Öffentlichkeit' in the official language of the case, German; 'publicité' in the French; 'pubblicità' in the Italian; 'publicidad' in the Spanish) are more akin to 'publicity' in English. In my view, 'publicity' does not necessarily imply an obligation to publish. It does, however, imply an obligation to do more than simply contacting a single potential tenderer and awarding the contract to that undertaking. In his Opinion in *Telaustria*, [48] Advocate General Fennelly noted that the Commission had argued in that case that the transparency obligation did not require publication, and he shared the Commission's view. [49]

83. It seems to me that, where a contract falls outside the scope of the directives, the appropriate degree of publicity is to be determined by reference to the potential market for that contract. The contracting authority must ensure a degree of publicity sufficient to open up *that* market to competition and to permit the impartiality of the procurement procedure to be reviewed. [50] Therefore, there must in principle be *some* degree of publicity for the procurement contract. Absent such publicity, it is difficult to see how there can be said to be either equal treatment or transparency.

84. Are the publicity requirements for such contracts to be set by Community law, or left to national law?

46 — See further point 75 of the Opinion of Advocate General Stix-Hackl in Case C-507/03 *Commission* v *Ireland*, delivered on 14 September 2006, and points 75 to 77 of the Opinion of Advocate General Jacobs in Case C-174/03 *Impresa Portuale di Cagliari*, delivered on 21 April 2005.

47 — Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 50.

48 — Cited in footnote 18 above.

49 — See points 42 and 43 of the Opinion.

50 — This is the approach suggested by Advocate General Stix-Hackl in Case C-507/03 *Commission* v *Ireland*, cited in footnote 46, at point 80.

85. It seems to me that there is a fundamental difference between the potential market for a contract whose value is above the threshold but which, for whatever reason, is excluded from the scope of the relevant directive; and the potential market for a low value contract. The former may nevertheless be of very significant economic importance. One can readily see why the non-discrimination obligation, with its concomitant transparency obligation, should lead to a requirement under Community law to ensure adequate trans-national publicity for such a contract. The latter by definition falls below the threshold from which the relevant directive applies. That threshold marks the point at which the legislator deliberately chose *not* to apply detailed publicity requirements. It seems to me that, in so doing, he also implicitly defined which public contracts merit, because of their economic importance, being subject to detailed publicity requirements imposed by Community law. [51] I consider that Community law requires that, in principle, there must still be *some* degree of publicity for such a contract; but leaves it to national law to determine in detail what that publicity should be.

86. That logic is confirmed by the Court's statement in *Coname* [52] that special circumstances, such as the fact that the economic interest at stake was very modest, might mean that an undertaking located in a different Member State would have no appreciable interest in the contract in question. In such cases, the effects on the fundamental freedoms should be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed by differences in treatment arising from the absence of any transparency. [53] The 'special circumstances' there described represent the exception to the general rule that there should be some publicity. However, I do not read that statement as transposing the full panoply of the public procurement directives' publicity requirements to a context (low value contracts) from which the Community legislator deliberately excluded them.

87. In consequence, I do not accept the Commission's argument that, as a matter of

51 — Similarly, Advocate General Stix-Hackl observed in her Opinion in Case C-507/03 *Commission* v *Ireland*, at point 62, that the Community legislature consciously chose to fix limited transparency obligations for the award of contracts for non-priority services — obligations which are not as extensive as those imposed more generally by Council Directive 92/50/EEC of 18 June 1992 coordinating procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

52 — Case C-231/03 [2005] ECR I-7287.

53 — Paragraphs 18 to 20.

Community law, contracting authorities are required to apply detailed Community law requirements for publicising low value contracts. Two principal arguments support that conclusion.

88. First, the principle of subsidiarity enshrined in Article 5 EC dictates that Community law should only impinge on national law to the extent justified by an assessment of costs and benefits. [54] Imposing a detailed duty under Community law to publicise low value contracts throughout the Community means disregarding part of the legislative intention behind Directive 93/36. The thresholds in the various public procurement directives mark the boundary between what the Member States have agreed should be harmonised at Community level and what remains within the competence of Member States. It follows, in my view, that setting detailed publicity requirements at Community level for low value contracts is incompatible with the principle of subsidiarity.

89. Second, imposing under Community law a detailed obligation to publicise in relation to the potential market — an obligation whose actual details are nevertheless *not* to be found in any legislative text promulgated at Community level — would create significant legal uncertainty for contracting authorities and potential tenderers wanting to conclude low value contracts. When, where and in what form such contracts should be publicised cannot readily be deduced from the case-law; and, as I have indicated, those matters are not covered by secondary legislation.

90. The legal uncertainty that would be created by imposing such an obligation is illustrated by the Commission's own doubts. In response to direct questioning from the Court it could only suggest in vague terms what form of publicity would have been required to satisfy the transparency obligation in the present case. The Commission has recently argued, in the context of awarding contracts for emergency ambulance services which were not covered by the public procurement directives, that a national or international call to tender was *not* required to achieve 'sufficient' publicity — correspondence addressed to particular undertakings could suffice. [55] That submission directly contradicts the position that the Commission has adopted in the present case.

54 — See Braun, P., 'A Matter of Principle(s) — the Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives' (2000) 9 *Public Procurement Law Review* (1), p. 47.

55 — See point 29 of the Opinion of Advocate General Stix-Hackl in Case C-532/03 *Commission* v *Ireland*, cited in footnote 43.

91. Shortly after the hearing in the present case, the Commission published a communication setting out in considerable detail its views as to when, where and in what form contracts which are not subject to the public procurement directives should be 'advertised'. [56] In the course of arguing the present case the Commission has not explained how the breach of Treaty obligations that it alleges against Finland relates to the requirements which it proposes in that communication. Furthermore, the introduction to the communication itself states that the communication does not create any new rules and that, in any event, interpretation of Community law is ultimately a matter for the Court. [57]

92. I do not consider that the conclusion I have reached contradicts the *Telaustria* case-law, in which the Court has required contracting authorities to ensure a degree of 'advertising' sufficient to enable a contract falling outside the scope of the public procurement directives to be opened up to competition throughout the Community and the impartiality of the procurement procedure to be reviewed. [58] On closer inspection, it becomes clear that those cases concerned public service concessions which are excluded, irrespective of their economic value, from the scope of public procurement directives. The values of the concessions at issue in those cases were on a par with contracts covered by the publicity require-

56 — Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2): see in particular section 2.1. The linguistic variations identified at point 82 above persist. Thus, for exemple, the English version of the Communication uses 'advertising'. The German version oscillates between 'Bekanntmachung' and 'Öffentlichkeit'. The French, Italian and Spanish versions all use variants on publicity ('publicité', 'pubblicità' and 'publicidad' respectively). All the illustrations given are, however, types of *publication*. The communication suggests that contracting authorities are responsible for deciding the most appropriate medium for advertising but that their choice should be guided by an assessment of the relevance of the contract to the internal market. The greater the potential interest in other Member States, the wider the coverage should be. The communication then lists a number of means of publication that may, in particular circumstances, be deemed 'adequate', such as the internet, including the contracting authority's website and portal websites, the Official Journals of the EU and of Member States, national journals specialising in public procurement announcements, national or regional newspapers, specialist publications, local means of publication such as newspapers, municipal journals and notice boards. I cannot see how that communication deals with the problem of legal certainty which I identify above.

57 — In Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, the Court emphasised the non-binding nature of an interpretation given by the Commission of a Community law measure.

58 — The Court has also imposed that requirement in relation to the need to advertise criteria for selecting candidates who will be invited to tender under a restricted procedure for a contract falling within the scope of Council Directive 93/37 (cited in footnote 9) where that directive contains no specific provision on requirements for such advertising (see Case C-470/99 *Universale-Bau* [2002] ECR I-11617, paragraphs 87, 92 and 93 and the analysis which follows).

ments laid down in the public procurement directives. [59]

93. There is therefore no contradiction between the fact that the Court has decided that the award of such contracts ought to be subject to a degree of 'advertising' sufficient to ensure they are opened up to competition throughout the Community and the approach that I suggest should be taken in respect of low value contracts. The interest from tenderers throughout the Community which such high-value concessions generate may reasonably be regarded as equivalent to the interest which the public procurement directives aim to protect in respect of contracts falling within their scope. [60] It is therefore reasonable to apply a Treaty-based obligation of transparency in respect of such concession contracts and to state that publicity for such contracts falls to be assessed by reference to Community law.

94. It may be objected that, economically, a contract whose value falls marginally below the threshold in the relevant public procurement directive might be valuable enough to be of interest to undertakings located in neighbouring Member States. In the present case, the value of the contract awarded (approximately EUR 177 000) was some EUR 47 000 below the threshold from which Directive 93/36 applied. [61] It was thus significantly lower than the value of contracts which the legislator considered to be of interest to suppliers located throughout the Community. [62] The potential profit to a supplier located in, for example, Spain from winning a contract worth EUR 177 000 would, it seems to me, be reduced significantly by transportation costs and other possible costs, such as modifying equipment and providing operating instructions in a

59 — In *Telaustria*, the value of the advertising space related to the directories which were the subject of the concession was ECU 35 million, according to Telaustria's submissions. In *Parking Brixen*, cited in footnote 47, the value of the concession is not apparent from the report in the ECR. However, the fact that the provider who was awarded the concession paid to the contracting authority an annual fee of EUR 151 700 which was indexed to the parking charges (see paragraph 26 of the judgment) suggests that the revenue from those charges must have been substantial. The Court found that it was possible that undertakings established in other Member States might have been interested in the contract (paragraph 55). Accordingly, the transparency of the award was assessed in the light of the *Telaustria* requirement to ensure a sufficient degree of 'advertising' (see paragraph 49 and the following analysis). In *ANAV* (Case C-410/04 [2006] ECR I-3303) the service concession was for the provision of transport services in the municipality of Bari for which the provider was remunerated, at least in part, by ticket sales to transport users. Again, the exact value of the concession is not stated in the report in the ECR. However, given that the sole and exclusive activity of the undertaking which had won the concession was providing the service of local urban public transport in the town of Bari (submissions of Comune di Bari, paragraph 5) it seems very probable that the value of the concession exceeded the threshold specified for non-concession contracts in the directive concerned.

60 — See, for example, recital 14 of Directive 93/36, cited in point 4 above.

61 — See point 6 above.

62 — As is clear from reading Article 5(1)(a) in conjunction with recital 14. In any event, setting a numerical threshold for the application of a rule necessarily implies that there will (sooner or later) be individual cases that fall just below the threshold and which, accordingly, are not covered by the rule in question.

form comprehensible to Finnish speakers. [63] Perhaps it might be otherwise for a potential supplier located in (say) Sweden or Denmark. However, the Commission has not suggested that price differences between catering equipment in different Member States are very pronounced. Still less has it submitted any evidence to that effect. It therefore seems to me that the Court would find it difficult, on the material before it, to be able to state with confidence that it would be beneficial to the contracting authority and to potentially interested suppliers in other (neighbouring) Member States to impose a requirement, derived from Community law, to publicise the contract in certain other Member States.

95. More generally, are contracting authorities *required* by the transparency obligation to assess market interest in individual neighbouring Member States and then to determine, using that assessment, in which States and in what form the contract ought to have been publicised? [64] Put another way: might there be compelling reasons for holding that a contracting authority should carry out a detailed market assessment, and in consequence sometimes ensure a higher degree of publicity than that required under national law?

96. I do not think that the transparency obligation under Community law should be construed as imposing such a requirement for contracts below the threshold. Contracting authorities would be required, for each low value contract of 'potential' significance (however that is to be defined) to assess market interest in an unspecified (and unspecifiable) selection of Member States at the risk of being penalised [65] if they fail to do so correctly. Such a situation is the antithesis of legal certainty. It seems to me that such a requirement is, moreover, likely to hit small contracting authorities (such as local authorities), who would tend to have lower value contracts to place, more often

63 — I acknowledge that the contracting authority invited a representative of a supplier located in another Member State to make an offer in 2000. However, there is nothing to suggest that the representative itself was not located in Finland. If that was the case, the supplier and its representative were in a different position from catering equipment suppliers in the Community without representatives in Finland.

64 — This is the position expressly adopted by the Commission in its communication: see points 1.3 and 2.1.2.

65 — The Commission offers reassurance in its communication (at point 1.3) that '[w]hen [it] becomes aware of a potential violation ... it will assess the Internal Market relevance of the contract in question ... Infringement proceedings ... will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market'. Leaving to one side the question of whether the present infringement proceedings objectively satisfy that test, it is clear that a disappointed competitor would be at perfect liberty to bring proceedings before the national courts and seek a reference under Article 234 EC.

than large contracting authorities. If I am right, it would impose on them a disproportionate and unrealistic burden.

97. In my view, the benefit of avoiding legal uncertainty which follows from the approach I have suggested outweighs the marginal benefit to the integration of public procurement markets which detailed Community law requirements for publicising low value contracts could perhaps bring.

98. I therefore consider that what constitutes a sufficient degree of publicity for low value contracts is a matter for national law.[66] If, upon analysis, the Commission takes the view that applicable national rules on public procurement in a particular Member State fail to provide for sufficient transparency and thus jeopardise the application of the principle of equal treatment, it will no doubt bring infringement proceedings against the Member State in question. In that way, the Commission's and the Court's resources might also perhaps be more effectively employed than by scrutinising infringements allegedly committed in awarding individual low value contracts.

99. I therefore conclude that the Commission's application should be dismissed.

Costs

100. In its pleadings, Finland has asked for costs. Although the way in which the proceedings have been defended by Finland has not been entirely informative, I see no reason for the Court to depart from the normal practice. Therefore pursuant to Article 69(2) of the Rules of Procedure the Commission as the unsuccessful party should be ordered to bear the costs. The intervening Member States must be ordered to bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

66 — It is to be noted that Advocate General Ruiz-Jarabo Colomer in point 62 of his Opinion in Case C-412/04 *Commission* v *Italy*, delivered on 8 November 2006, has similarly taken the view that the setting of precise rules regarding disclosure of tenders in order to satisfy the transparency obligation is a matter for each Member State, subject to certain limits.

Conclusion

101. I therefore propose that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the application;

— order the Commission to bear its own and Finland's costs;

— order the intervening Member States to bear their own costs.