



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

20 March 2018\*

(Failure of a Member State to fulfil obligations — Directives 92/50/EEC and 2004/18/EC — Public service contracts — State printing office — Production of identity documents and other official documents — Award of contracts to an undertaking governed by private law without a procurement procedure first being conducted — Special security measures — Protection of the essential interests of the Member States)

In Case C-187/16,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 4 April 2016,

**European Commission**, represented by A. Tokár and B.-R. Killmann, acting as Agents,

applicant,

v

**Republic of Austria**, represented by M. Fruhmann, acting as Agent,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen (Rapporteur), T. von Danwitz, J.L. da Cruz Vilaça, A. Rosas and J. Malenovský, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby, M. Berger, A. Prechal, C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: J. Kokott,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2017,

after hearing the Opinion of the Advocate General at the sitting on 20 July 2017,

gives the following

\* Language of the case: German.

## Judgment

- 1 By its application, the European Commission asks the Court to declare that, first, by awarding service contracts for the production of documents such as chip passports, emergency passports, residence permits, identity cards, fireworks display permits, credit card-sized driving licences and credit card-sized vehicle registration certificates directly to Österreichische Staatsdruckerei GmbH ('ÖS') and, second, by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, the Republic of Austria has failed to fulfil its obligations under Articles 49 and 56 TFEU, Article 4 and Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), read in conjunction with Articles 11 to 37 of that directive, and Article 14 and Article 20 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), read in conjunction with Articles 23 to 55 of that directive.

### Legal context

#### *EU law*

- 2 For the award of public contracts which have as their object 'publishing and printing services on a fee or contract basis', both Directive 92/50 and Directive 2004/18 require the conduct of award procedures in accordance with EU law.

#### *Directive 92/50*

- 3 The 14<sup>th</sup> recital of Directive 92/50 is worded as follows:

'Whereas ... in the field of services, the same derogations as in [Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)] and [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)] should apply as regards State security or secrecy and the priority of other procurement rules such as those pursuant to international agreements, those concerning the stationing of troops, or the rules of international organisations'.

- 4 Article 1(a) of that directive provides, inter alia, that '*public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'.

- 5 Article 3(1) of that directive states:

'In awarding public service contracts ... contracting authorities shall apply procedures adapted to the provisions of this Directive.'

- 6 Article 4(2) of that directive provides:

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

7 Article 8 of Directive 92/50 provides:

‘Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.’

8 Titles III to VI contain Articles 11 to 37 of that directive.

9 Annex I A to that directive covers inter alia, in Category No 15, ‘Publishing and printing services on a fee or contract basis’.

*Directive 2004/18*

10 Article 14 of Directive 2004/18, entitled ‘Secret contracts and contracts requiring special security measures’, provides:

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

11 Article 20 of that directive, entitled ‘Service contracts listed in Annex II A’, provides:

‘Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.’

12 That annex covers inter alia, in Category No 15, ‘Publishing and printing services on a fee or contract basis’.

*Regulation (EC) No 2252/2004*

13 In accordance with Article 3(2) of Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ 2004 L 385, p. 1):

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

*Austrian law*

*The StDrG*

14 Paragraph 1a of the Bundesgesetz zur Neuordnung der Rechtsverhältnisse der Österreichischen Staatsdruckerei (Federal law on the reorganisation of the legal relationships of the ÖS, *Bundesgesetzblatt I*, 1/1997, ‘the StDrG’) is worded as follows:

‘... The company ... shall trade under the name “Österreichische Staatsdruckerei GmbH”; it shall undertake the manufacture of print products for the federal offices in the manufacturing process for which secrecy or compliance with security rules (security printing) is necessary. ...’

15 Paragraph 2(2) of the StDrG provides:

‘The company shall undertake, in any event, the following tasks:

1. The manufacture of print products for the federal offices in the manufacturing process for which secrecy or compliance with security rules (security printing) is necessary ...’

16 Paragraph 2(3) of the StDrG provides:

‘The federal bodies shall entrust [ÖS] exclusively ... with the manufacture of the products referred to in Paragraph 2(2)(1) ... unless, for factual or legal reasons, [that] company is unable duly to carry out these tasks at a reasonable price, or if the product in question is offered to a federal body by a third party, with the same supply and contractual conditions, at a lower price. ...’

17 Under the heading ‘Supervision of security printing’, Paragraph 6(1) of the StDrG provides that business and work processes relating to the manufacture, processing and storage of security printing products are subject to supervision by the federal minister responsible for the security printing product in question.

18 In accordance with Paragraph 6(2) of the StDrG, ÖS is required to take all security measures in connection with the manufacture, processing and storage of security printing products that are necessary to prevent abuse.

19 Pursuant to Paragraph 6(3) of that law, ÖS must grant the federal minister responsible for the security printing product in question access to its business premises and an opportunity to inspect the relevant business records in so far as is necessary for the purposes of supervision.

*The ministerial regulation relating to passports*

20 The production of chip passports, which include service passports and diplomatic passports, of identity cards and of emergency passports is governed by the Verordnung der Bundesministerin für Inneres über die Gestaltung der Reisepässe und Passersatz (Regulation of the Federal Minister for the Interior on the design of passports and passport substitutes, *Bundesgesetzblatt* 861/1995, ‘the ministerial regulation relating to passports’).

21 Annexes A, D and E to the ministerial regulation relating to passports contain specimens of the passports, service passports and diplomatic passports to be produced, which contain on their last page the reference ‘PRINT by ÖSD’.

22 As regards, more specifically, identity cards, Paragraph 5 of the ministerial regulation relating to passports provides for their protection against counterfeiting or forgery.

23 It thus follows from an application of Paragraph 2(3) of the StDrG in conjunction with the ministerial regulation relating to passports that, subject to the exceptions set out in that provision, chip passports, identity passports and emergency passports must be produced by ÖS.

*The ministerial regulation relating to residence permits*

24 Pursuant to Paragraph 3(3), Paragraph 10a(2) and Paragraph 10c(2) of the Verordnung der Bundesministerin für Inneres zur Durchführung des Niederlassungs- und Aufenthaltsgesetzes (Regulation of the Federal Minister for the Interior implementing the Law on settlement and

residence, *Bundesgesetzblatt II*, 451/2005), registration certificates, documents certifying permanent residence, certificates attesting submission of an application and documents certifying lawful residence must be produced exclusively by ÖS.

*The ministerial regulation relating to credit card-sized driving licences*

- 25 The format of credit card-sized driving licences is governed by the Verordnung des Bundesministers für Wissenschaft und Verkehr über die Durchführung des Führerscheingesetzes (Regulation of the Federal Minister for Science and Transport on the implementation of the Law on driving licences, *Bundesgesetzblatt II*, 320/1997).
- 26 In accordance with Paragraph 1(2) of that ministerial regulation, driving licences must contain features protecting them against counterfeiting or forgery.
- 27 That provision also states that credit card-sized driving licences can be produced only by a service provider designated by the competent federal minister.
- 28 In view of Paragraph 2(3) of the StDrG, subject to the exceptions set out in that provision, that service provider can only be ÖS.

*The ministerial regulation relating to credit card-sized vehicle registration certificates*

- 29 The format of credit card-sized vehicle registration certificates is governed by the Verordnung des Bundesministers für Wissenschaft und Verkehr, mit der Bestimmungen über die Einrichtung von Zulassungsstellen festgelegt werden (Regulation of the Federal Minister for Science and Transport on the establishment of vehicle registration offices, *Bundesgesetzblatt II*, 464/1998).
- 30 Paragraph 13(1a) of that ministerial regulation provides for features protecting those vehicle registration certificates against counterfeiting or forgery.
- 31 Paragraph 13(3) of that ministerial regulation states that vehicle registration certificates can be produced only by a service provider designated by the competent federal minister.
- 32 In view of Paragraph 2(3) of the StDrG, subject to the exceptions set out in that provision, that service provider can only be ÖS.

*The ministerial regulation relating to fireworks display permits*

- 33 In accordance with Paragraph 8 of the Verordnung der Bundesministerin für Inneres über die Durchführung des Pyrotechnikgesetzes 2010 (Regulation of the Federal Minister for the Interior on the implementation of the Law on fireworks 2010, *Bundesgesetzblatt II*, 499/2009), the application form for a fireworks display permit must conform to the specimen in Annex II to that regulation. That specimen requires the application to be addressed to ÖS.
- 34 Paragraph 9 of that regulation provides for the protection of fireworks display permits against counterfeiting or forgery.

## Pre-litigation procedure

- 35 By its letter of formal notice dated 6 April 2011, the Commission made the Republic of Austria aware of its doubts as to the compatibility with the FEU Treaty and with Directives 92/50 and 2004/18 of the direct award to ÖS of certain public service contracts relating to the printing of official documents, namely, chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, paper and credit card-sized vehicle registration certificates, fireworks display permits, boatmasters' certificates, security document forms, labels for narcotic substances and moped licences.
- 36 In that regard, the Commission specified that ÖS, a company governed by private law, provided, by the printing of those documents, a supply of services which should have been awarded in accordance with Directive 92/50 or Directive 2004/18, to the extent that the supply falls within the scope of one of those directives, or in conformity with the freedom of establishment and the freedom to provide services as enshrined in Articles 49 and 56 TFEU, to the extent that it does not fall within the scope of those directives.
- 37 In its reply of 7 June 2011, the Republic of Austria argued that the service contracts in question protect its essential security interests and consequently do not fall within the scope of either the FEU Treaty or Directives 92/50 and 2004/18. It added that the direct award to ÖS alone of the printing contracts for the documents in question was justified by the need to protect secret information, to safeguard the authenticity and veracity of those documents, to ensure the provision of those documents and to guarantee the protection of sensitive data.
- 38 By letters of 17 July 2012 and 28 March 2013, the Republic of Austria supplemented its reply to the letter of formal notice.
- 39 Taking the view that the responses provided by that Member State were unsatisfactory, the Commission, by letter of 11 July 2014, sent it a reasoned opinion. In that reasoned opinion, the Commission stated that the Republic of Austria had not proved that the direct award to ÖS of the printing contracts for chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, credit card-sized vehicle registration certificates and fireworks display permits was justified by the protection of its security interests, and that it was possible to organise a public call for tenders in such a way that only undertakings which specialised in the printing of documents subject to special security requirements and were supervised accordingly could be considered.
- 40 On the other hand, the Commission withdrew its complaints in relation to moped licences, paper vehicle registration certificates, boatmasters' certificates, security document forms and labels for narcotic substances, either because those documents had been abolished or because their production was put out to tender.
- 41 The Republic of Austria responded to the reasoned opinion by letter of 10 September 2014. In essence, that Member State again relied on national security interests and emphasised that the performance of the printing contracts in question was closely linked to public order and the institutional operation of that State. It argued in particular that the observance of security requirements could be enforced against undertakings other than ÖS only by means of civil law, whereas, by law, the Austrian public authorities enjoyed special supervisory powers in relation to ÖS.
- 42 As regards the printing contracts for fireworks display permits, the Republic of Austria stated that the value of those contracts is so small that their performance is not of interest to other undertakings, with the result that the award of those contracts does not fall within the scope of the freedoms enshrined in the FEU Treaty.

43 Since it was not satisfied with the responses provided by the Republic of Austria, the Commission brought the present action.

### **The action**

44 The action brought by the Commission relates to, first, printing service contracts for chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates and, second, a printing service contract for fireworks display permits.

### ***The printing service contracts for chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates***

#### *Arguments of the parties*

45 The Commission notes that, since the estimated value of the contracts in question exceeds the thresholds applicable pursuant to Directives 92/50 and 2004/18, those contracts fall within the material scope of those directives. Consequently, in relation to those contracts, the procurement procedures provided for in Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and in Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive, should have been applied by the Republic of Austria.

46 The Commission argues, in essence, that the derogations laid down in Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, relied on by the Republic of Austria, must be interpreted strictly.

47 Furthermore, those articles cannot confer on the Member States the power to derogate from the provisions of the FEU Treaty or from Directives 92/50 and 2004/18 by simply invoking their essential security interests.

48 Accordingly, the mere assertion by the Republic of Austria that the service contracts in question require special security measures or that a derogation from the provisions of EU law is necessary to protect the essential security interests of that Member State is insufficient to show the existence of circumstances justifying the application of Article 4(2) of Directive 92/50 or Article 14 of Directive 2004/18.

49 Furthermore, the Commission states that ÖS is a limited liability company governed by private law, the sole shareholder of which is Österreichische Staatsdruckerei Holding AG whose shares are listed on the stock market and held by private individuals. Moreover, unlike the earlier legislative provisions, the StDrG no longer contains any special mechanism for State supervision. At the hearing, the Commission explained in that regard that the Austrian authorities are vested with supervisory powers which are stipulated in a contract entered into with ÖS.

50 According to the Commission, the Republic of Austria does not show that a call for tenders is completely impossible on the basis that it would seriously undermine compliance with the obligation of confidentiality and the security and supervision arrangements. Whilst the need to safeguard the authenticity and veracity of documents serving as proof of the identity of individuals, to protect personal data, and to guarantee supply for the purposes of the printing of the documents concerned is a matter of public interest, such an interest, however, does not systematically correspond to an essential security interest.

- 51 As regards the need for a guaranteed supply of official documents, pleaded by the Republic of Austria, the Commission considers that such a guarantee is not a security interest and may be achieved, where appropriate, by entering into a number of framework contracts.
- 52 The Commission accepts that a Member State may take measures to avoid the forgery of official documents. Nevertheless, there is nothing to indicate that those objectives would be undermined if the printing of documents were assigned to other printing companies, even those located in other Member States, since the confidentiality of the processed data necessary for the printing of those documents may be guaranteed by an obligation of confidentiality on the part of the undertakings taking part in an award procedure.
- 53 The centralised performance of the contracts in question can be achieved by making the printing of all secure documents subject to a call for tenders since the opportunities for supervision by the Austrian authorities can be included in the contract entered into with the successful undertaking.
- 54 As regards confidence in the undertaking carrying out the printing service in relation to residence permits, the Commission contends that the argument put forward by the Republic of Austria cannot be accepted since the Austrian authorities can also award printing contracts for secure documents to undertakings other than ÖS, in particular when the latter is not in a position to perform those contracts.
- 55 The Republic of Austria disputes the claim that it has failed to fulfil its obligations. It argues that, pursuant to Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, the contracts in question do not fall within the scope of those directives. It is entitled to protect its essential security interests and to attach special security measures to the performance of the contracts in question, in accordance with the legal and administrative provisions in force in Austria.
- 56 At the hearing, the Republic of Austria stated that the derogations laid down in Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18 apply irrespective of the derogation laid down in Article 346(1)(a) TFEU.
- 57 It notes, in essence, that security policy is an essential element of State sovereignty and that it is for the Member States to define their essential security interests and to determine whether security measures are necessary, the Member States having wide discretion in that regard.
- 58 The Republic of Austria highlights certain aspects of its essential interests in the field of public security which are important when printing secure documents. In that regard, it is necessary, according to it, first, to safeguard the authenticity and veracity of the documents serving to prove the identity of a person since identity documents are documents which are closely linked to the public order and institutional operation of the State. Next, it is necessary to ensure the protection of the sensitive personal data. Lastly, it is also a question of ensuring security of supply.
- 59 In the first place, as regards the need to safeguard the authenticity and veracity of identity documents, the Republic of Austria argues that that imperative requires a high technical level of security to be set in order to avoid any risk of forgeries, in particular in the context of the fight against terrorism and crime.
- 60 In the second place, as regards the protection of sensitive personal data, since identity documents contain such information, in particular biometric data, the protection of those documents requires high security requirements. In that regard, the Republic of Austria disputes the Commission's argument that only individual interests are at issue here since, according to that Member State, interference with such data should, on the contrary, be regarded as being, in particular in the context of the fight against terrorism, a threat to internal public security and accordingly should be prevented by all possible means.

- 61 In the third place, the quick receipt of the official documents in question requires the State to have a guaranteed supply. If undertakings other than ÖS were entrusted with the printing of identity documents that would have a lasting negative effect on the Republic of Austria's security strategy since, if it were impossible to provide the number of passports necessary, provisional passports would admittedly be printed, but in less secure conditions.
- 62 The Republic of Austria submits that, in a context of terrorist threats and activity, only a printing company under the effective supervision of the State must be empowered to produce identity documents.
- 63 The Republic of Austria notes that the centralisation of all relevant supplies in the field of security in the hands of a single supplier also constitutes an essential element of security strategy. In that regard, it argues that it is clear from Article 3(2) of Regulation No 2252/2004 and, more specifically, from the requirement to designate 'one body having responsibility for printing passports and travel documents', that such documents cannot be manufactured by more than one body. Furthermore, in order to avoid sensitive security information from being spread, a centralisation of printing for the documents in question is an appropriate measure.
- 64 According to the Republic of Austria, the strategy that it pursues, which consists in awarding the contracts at issue to a single contractor having its production site or sites in Austria, seeks, in the first place, to prevent knowledge of the security measures being spread among other contractors, whether they operate in Austria or in another Member State.
- 65 In the second place, such an award has the objective of more effective supervision of that printing company by the national authorities in the exercise of their administrative supervisory powers. The Republic of Austria argues that supervision implemented judicially, which would result in penalties for a failure to comply with the security conditions under contractual provisions following potentially protracted proceedings, would not be as effective as State supervision.
- 66 With regard to the Commission's complaint that it is for the Republic of Austria to show that a call for tenders is completely impossible, that Member State argues that neither Article 4(2) of Directive 92/50 nor Article 14 of Directive 2004/18 contains such a condition.
- 67 Furthermore, the Republic of Austria did not merely invoke interests relating to its security, but identified the interests to be protected and the measures taken for the protection of those interests.
- 68 Lastly, at the hearing, the Republic of Austria argued that the contracts in question cannot be performed in the context of a call for tenders since undertakings established in other Member States cannot entirely escape intervention by the authorities of their respective States and those undertakings are sometimes required to cooperate with those authorities or the intelligence services of those States, which would be the case even if they performed the contracts from an establishment located in Austria, with the result that sensitive information would be at risk of being disclosed.

### *Findings of the Court*

- 69 It should be noted at the outset that, as is clear from the case file before the Court, since the first contracts awarded to ÖS which are the subject matter of the present action date from 2004, those contracts may fall within the scope of Directive 92/50, while the contracts awarded to that undertaking between 31 January 2006 and 12 September 2014, when the period prescribed in the reasoned opinion expired, may fall within the scope of Directive 2004/18, the latter directive having repealed and replaced the relevant provisions of Directive 92/50 from 31 January 2006.

- 70 Moreover, first, the contracts in question are contracts which have as their object services referred to in Annex I A to Directive 92/50 and Annex II A to Directive 2004/18 and, more specifically, publishing and printing services on a fee or contract basis. Second, it is agreed between the parties that the estimated value of those contracts exceeds the thresholds for the application of those directives.
- 71 Pursuant to Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive, given that the printing of the documents in question constitutes a publishing and printing service on a fee or contract basis, that service is, in principle, subject to the obligation to conduct a procurement procedure in accordance with the requirements of those articles.
- 72 However, first, under Article 346(1)(a) TFEU, no Member State is to be obliged to supply information the disclosure of which it considers to be contrary to its essential security interests. As the Advocate General observed in point 42 of her Opinion, that provision, given the general nature of its wording, is intended to apply, inter alia, in the field of non-military public contracts, such as the printing contracts in question in the present action.
- 73 Second, it is clear from Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, which are drafted in almost identical terms, that those directives do not apply to services when, inter alia, their execution must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of that Member State's essential interests so requires.
- 74 Those derogations are relied on in the present proceedings by the Republic of Austria in order to justify the direct award to ÖS of the printing service contracts in question.
- 75 In that regard, it should be noted that, as the Republic of Austria argues, it is for the Member States to define their essential security interests and, in the present case, for the Austrian authorities to define the security measures necessary for the protection of the public security of that Member State in the context of the printing of identity documents and other official documents such as those at issue in the present case (see, by analogy, judgment of 16 October 2003, *Commission v Belgium*, C-252/01, EU:C:2003:547, paragraph 30).
- 76 Nevertheless, it should also be noted that, as the Court has previously held, measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken, inter alia, in the interests of public security (see, to that effect, judgment of 8 April 2008, *Commission v Italy*, C-337/05, EU:C:2008:203, paragraph 42 and the case-law cited).
- 77 Moreover, the derogations at issue in the present action must, in accordance with the settled case-law relating to derogations from fundamental freedoms, be interpreted strictly (see, by analogy, as regards Article 346(1)(b) TFEU, judgment of 7 June 2012, *Insinööritoimisto InsTiimi*, C-615/10, EU:C:2012:324, paragraph 35 and the case-law cited).
- 78 Furthermore, even though Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, upon which the Republic of Austria principally relies, afford the Member States discretion in deciding the measures considered to be necessary for the protection of their essential security interests, those articles cannot, however, be construed as conferring on Member States the power to derogate from the provisions of the FEU Treaty simply by invoking those interests. A Member State which wishes to avail itself of those derogations must show that such derogation is necessary in order to protect its essential security interests. Such a requirement also applies to the extent that that Member State relies, in addition, on Article 346(1)(a) TFEU (see, by analogy, judgment of 4 September 2014, *Schiebel Aircraft*, C-474/12, EU:C:2014:2139, paragraph 34).

- 79 Accordingly, a Member State which wishes to avail itself of those derogations must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided for by Directives 92/50 and 2004/18 (see, by analogy, judgment of 8 April 2008, *Commission v Italy*, C-337/05, EU:C:2008:203, paragraph 53).
- 80 In the present case, although the Republic of Austria has admittedly identified the essential security interests which it considers must be protected and the guarantees inherent in the protection of those interests, it is however necessary to verify, having regard to what is noted in paragraph 75 and 76 above, whether that Member State has shown that the objectives it pursues could not have been attained within a competitive tendering procedure as provided for by those two directives.
- 81 In that regard, the Republic of Austria submits, in the first place, that the protection of essential national security interests necessitates the centralised performance of the printing contracts for official documents by means of their award to a single undertaking.
- 82 While accepting that the centralised performance of the contracts in question could be regarded, for the reasons put forward by the Republic of Austria, as a means of protecting its essential national security interests, it should be noted that compliance with the procurement procedures laid down, respectively, in Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and in Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive, does not preclude the performance of the contracts in question from being entrusted to a single operator.
- 83 Although, as the Republic of Austria notes, the Member States have an obligation to comply with the requirements of Article 3(2) of Regulation No 2252/2004, which requires them to designate a single body having responsibility for printing passports and travel documents, that provision confines itself to laying down an obligation to designate such a single body, without ruling out in any way a procurement procedure first being conducted for the purposes of such designation.
- 84 As regards, in the second place, the Republic of Austria's argument alleging the need for the Austrian authorities to be able to ensure, in the exercise of the powers conferred on them by Paragraph 6(3) of the StDrG, effective administrative supervision of a single contractor having its production and storage premises in the territory of that Member State, in the present case supervision of ÖS, it should be noted that, although, admittedly, the contractor entrusted with performance of the printing contract in question must meet the security requirements in order to ensure the confidentiality of the information to be protected, the Republic of Austria does not show that the administrative supervision of ÖS that may be carried out by the Austrian authorities pursuant to that provision is the only means of ensuring that confidentiality and that it is necessary, to that end, to dispense with the application of the provisions relating to public procurement laid down by Directives 92/50 and 2004/18.
- 85 In that regard, it does not appear that such administrative supervision could not be exercised over undertakings established in Austria other than ÖS. Furthermore, the Republic of Austria does not show that verification of respect for the confidentiality of the information which would be communicated for the printing of the official documents at issue would be less well safeguarded if that printing were awarded, in the context of a tendering procedure, to other undertakings having confidentiality and security arrangements imposed on them under a contractual mechanism subject to the rules of private law, whether those undertakings are established in Austria or in other Member States.

- 86 In particular, it would be possible to require the contractual partner chosen in the context of a procurement procedure to accept security controls, visits or inspections at the premises of that undertaking, regardless of whether the undertaking is established in Austria or in another Member State, or to comply with technical requirements as regards confidentiality, even particularly high ones, in the performance of the contracts in question.
- 87 As regards, in the third place, the requirement, relied on by the Republic of Austria, to ensure guaranteed provision, it should be noted that, whilst the official documents in question are closely linked to public order and the institutional operation of the State, which require that guaranteed provision be ensured, that Member State has, however, failed to show that the supposed objective could not be ensured in the context of a call for tenders and that such guaranteed provision would be jeopardised if the printing of those documents were entrusted to other undertakings, including, as the case may be, undertakings established in other Member States.
- 88 As regards, in the fourth place, the need to guarantee the trustworthiness of the successful tenderer, although the Member States need to be able to satisfy themselves that, for the award of public contracts such as those at issue in the present case, only reliable undertakings are awarded those contracts within the framework of a system which ensures compliance with special secrecy and security standards as regards the printing of the documents in question, the Republic of Austria has not, however, established that the confidentiality of the data communicated could not be sufficiently guaranteed if the printing of those documents were awarded to an undertaking other than ÖS following a tendering procedure.
- 89 In that regard, it should be noted that the Court has held that the requirement to impose an obligation of confidentiality does not in itself prevent the use of a competitive tendering procedure for the award of a contract (see, to that effect, judgment of 8 April 2008, *Commission v Italy*, C-337/05, EU:C:2008:203, paragraph 52).
- 90 Furthermore, the Court has also held that the confidential nature of data can be protected by a duty of secrecy, without it being necessary to contravene public procurement procedures (see, by analogy, judgment of 5 December 1989, *Commission v Italy*, C-3/88, EU:C:1989:606, paragraph 15).
- 91 As the Advocate General noted in point 68 of her Opinion, there is nothing to prevent the contracting authority from imposing particularly high requirements for the suitability and reliability of contractors, formulating tender specifications and service contracts accordingly and requiring the necessary proof from potential candidates.
- 92 In that regard, the Republic of Austria argued at the hearing that there is a risk that sensitive information will be disclosed since undertakings established outside that Member State cannot entirely escape intervention by the authorities of their respective Member States, inasmuch as, in some cases, they are themselves required, pursuant to the laws applicable in those States, to cooperate with those authorities or with the intelligence services of those States, even when performing public contracts from an establishment located in Austria.
- 93 It must, however, be pointed out that it is permissible for the Austrian authorities to insert into the conditions governing calls for tenders for the award of the contracts in question clauses obliging the successful tenderer to maintain general confidentiality, and to stipulate that a candidate undertaking which is not in a position, due in particular to the law of its Member State, to provide sufficient guarantees as regards compliance with that obligation vis-à-vis the authorities of that State will be excluded from the award procedure. It is also permissible for the Austrian authorities to provide for the application of penalties against the successful tenderer, in particular contractual penalties, if there is a failure to comply with such an obligation during the performance of the contract in question.

- 94 In that regard, the Republic of Austria has not shown that the objective of preventing the disclosure of sensitive information relating to the production of the official documents in question could not have been achieved within a competitive tendering procedure as provided for, respectively, in Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and in Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive.
- 95 It follows that the failure to comply with the procurement procedures laid down by those directives is disproportionate having regard to that objective.
- 96 In the light of all of the foregoing, Article 346(1)(a) TFEU, Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18 cannot be effectively relied on by the Republic of Austria in order to justify the failure to comply with the procurement procedures laid down by those two directives.

### ***The printing service contract for fireworks display permits***

#### *Arguments of the parties*

- 97 The Commission argues that, in so far as the value of the contract for producing fireworks display permits does not exceed the thresholds laid down by those directives, it must nonetheless be entered into in conformity with the principles laid down by the FEU Treaty, in particular the principles of freedom of establishment and the freedom to provide services.
- 98 According to the Commission, the general principles of equal treatment and non-discrimination on grounds of nationality, from which the obligation of transparency arises, require that that contract be the subject of a notice with a sufficient degree of publicity.
- 99 The Commission explains that, even if the value of a contract for the production of fireworks display permits seems relatively low, such a contract could, taking account of its technical characteristics, attract interest from undertakings in other Member States. There is therefore certain cross-border interest since the market of undertakings which produce secure identity documents is specialised, limited and internationalised and geographic proximity does not constitute a requirement for the performance of a contract for the production of secure documents.
- 100 Furthermore, the Commission highlights the fact that ÖS itself has been entrusted by a number of Member States with the printing of visas and passports, which is a strong indication of the existence of certain cross-border interest.
- 101 The Republic of Austria contends that, as regards a contract with a value below the threshold laid down by EU law, the fundamental principles relied on by the Commission do not apply. In view of the low value of that contract, certain cross-border interest is not established by the Commission.
- 102 In addition, the fact that ÖS manufactures secure documents for other Member States does not show that there is certain cross-border interest in the printing service contracts relating to fireworks display permits.

#### *Findings of the Court*

- 103 It is agreed between the parties that the estimated value of the contract for the production of fireworks display permits is EUR 56 000, namely, an amount which is well below the thresholds laid down by Directives 92/50 and 2004/18 for public service contracts. Accordingly, there was no obligation flowing from those directives to conduct a procurement procedure.

- 104 Nonetheless, according to settled case-law, the award of contracts which, in view of their value, do not fall within the scope of the directives on the award of public contracts is subject to the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have certain cross-border interest (judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 19 and the case-law cited).
- 105 In that regard, it should be noted that it is for the Commission to establish that the contract in question has certain interest for an undertaking located in a Member State other than that of the contracting authority in question, and the Commission is unable to rely on any presumption for that purpose (see, to that effect, judgment of 13 November 2007, *Commission v Ireland*, C-507/03, EU:C:2007:676, paragraphs 32 and 33 and the case-law cited).
- 106 With regard to the objective criteria which may indicate certain cross-border interest, the Court has previously held that such criteria may be, inter alia, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract and the specific characteristics of the products concerned (see, to that effect, judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 20 and the case-law cited).
- 107 Whilst, as the Commission argued, the existence of such cross-border interest cannot be determined solely on the basis of the value of the contract, an overall assessment of other criteria and of all the relevant circumstances of the case being necessary, it should be noted that the contract for the production of fireworks display permits is distinguished not only by its relatively low value but also by its very technical nature, furthermore requiring compliance with special security measures with the costs that the implementation of such measures entails.
- 108 The argument put forward by the Commission, that the fact that ÖS has been entrusted by a number of foreign States with the printing of visas and passports is a strong indication of the existence of certain cross-border interest, is irrelevant with regard to the printing of fireworks display permits.
- 109 In those circumstances, the information provided by the Commission is not sufficient to show that that contract had certain cross-border interest.
- 110 Since the Commission has failed to prove its contentions, its action must be dismissed inasmuch as it relates to the printing service contract for the fireworks display permits in question.
- 111 In the light of all of the foregoing, it must be held that, first, by having awarded, without an EU-wide call for tenders, service contracts for the production of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates directly to ÖS and, second, by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, the Republic of Austria has failed to fulfil its obligations under Article 4(2) and Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and Article 14 and Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive.
- 112 The action must be dismissed as to the remainder.

### Costs

- 113 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

- 114 In the present case, the Commission and the Republic of Austria applied, respectively, for the other party to be ordered to pay the costs.
- 115 Under Article 138(3) of the Rules of Procedure, if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs. In the present case, since the Commission's action has been successful, save as regards printing service contracts for fireworks display permits, the Republic of Austria should be ordered, pursuant to that provision, to bear its own costs and to pay four fifths of the Commission's costs.
- 116 The Commission must bear one fifth of its own costs.

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

1. **Declares that, by having awarded, without an EU-wide call for tenders, service contracts for the production of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates directly to Österreichische Staatsdruckerei GmbH and by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, without an EU-wide call for tenders, the Republic of Austria has failed to fulfil its obligations under Article 4(2) and Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Articles 11 to 37 of that directive, and Article 14 and Article 20 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in conjunction with Articles 23 to 55 of that directive;**
2. **Dismisses the action as to the remainder;**
3. **Orders the Republic of Austria to bear its own costs and to pay four fifths of the costs of the European Commission, and the Commission to bear one fifth of its own costs.**

[Signatures]