

OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 8 November 2006¹**I — Introduction**

communications sectors (93/38/EEC, also of 14 June 1993) ('the Directives').⁵

1. The Commission has brought an action under Article 226 EC, seeking a declaration from the Court of Justice that Italy has failed to fulfil its obligations under Articles 43 EC and 49 EC and under the Council Directives concerning the coordination of procedures for the award of public service contracts (92/50/EEC of 18 June 1992),² public supply contracts (93/36/EEC of 14 June 1993),³ and public works contracts (93/37/EEC, also of 14 June 1993),⁴ and coordinating the procurement procedures of entities operating in the water, energy, transport and tele-

2. The Commission claims that the infringement is entailed by Articles 2(1) and (5), 17(12), 27(2), 28(4), 30(6a), 37b, and 37c(1) of Law No 109 of 11 February 1994, *Legge quadro in materia di lavori pubblici* (Framework Law on public contracts).⁶ It alleges that it consists specifically in: (1) the exclusion of mixed contracts from Law No 109/94 if the ancillary works represent more than 50 % of the price; (2) the award of contracts directly to the holder of a building permit or development plan in cases where the works do not exceed the financial thresholds provided for in Directive 93/37; (3) the procedure for awarding contracts for the design, supervision and inspection of works

1 — Original language: Spanish.

2 — OJ 1992 L 209, p. 1; amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1), and by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1); repealed, except for Article 41, with effect from 31 January 2006, by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the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).

3 — OJ 1993 L 199, p. 1; likewise amended and repealed by the directives referred to in the previous footnote.

4 — OJ 1993 L 199, p. 54; also amended and appealed by the directives cited in footnote 2.

5 — OJ 1993 L 199, p. 84; amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1), and by Commission Directive 2001/78; repealed by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

6 — GURI No 41 of 19 February 1994; amended on a number of occasions.

the value of which is below the Community thresholds; (4) the award of contracts for the supervision of works to the project designer when neither the contracting authority nor any other public authority is able to perform that role; (5) the method of awarding inspection contracts to third parties; and (6) the system of awarding contracts for privately financed works.

3. Those complaints raise two issues of general interest which need to be discussed in more detail; first, the criteria for determining whether the Community provisions on procurement must apply to mixed contracts, and, second, the application of the principles of transparency and equal treatment to the award of contracts whose value is lower than the thresholds set in the Directives.

Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State’.

5. The first paragraph of Article 49 EC provides: ‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended’.

II — The legal framework

2. The Directives on public contracts

A — *The Community legislation*

1. The EC Treaty

4. The first paragraph of Article 43 EC provides: ‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a

6. Directives 92/50, 93/36, 93/37 and 93/38 were adopted in order to provide simultaneously for the application to the field of public contracts of the principles of freedom of establishment and freedom to provide services enshrined in Articles 43 EC and 49 EC. Of all the provisions included in those Directives, the most notable are the ones which define the scope of each Directive by setting different thresholds for the exclusion of works with values below the amounts set (Article 7 of Directive 92/50, Article 5 of Directive 93/36, Article 6 of Directive 93/37 and Article 14 of Directive 93/38).

7. I will refer to other specific provisions as I analyse the grounds of failure to fulfil obligations.

10. Article 3(3) of Legislative Decree No 157 of 17 March 1995⁸ lays down the same provision for mixed works and service contracts and for service contracts which include ancillary works.

B — *The Italian legislation*

8. The Directives were transposed into Italian law by Law No 109/94, which was amended by Article 7 of Law No 166 of 1 August 2002.⁷

2. Urban development works

1. Mixed contracts

9. Article 2(1) of Law No 109/94, which delimits the scope of the Law, defines public works as construction, demolition, restoration, restructuring, refurbishment and maintenance, and provides that the Law applies to mixed works, supply and service contracts and to supply and service contracts which include ancillary works the value of which exceeds 50% of the total value of the contract.

11. Article 2(5) of Law No 109/94 excludes from the scope of the Law: a) works carried out directly by private persons which are set off against fees payable in respect of building permits; b) works arising from the obligations laid down in Article 28(5) of Law No 1150 of 17 August 1942;⁹ and c) works which are analogous to the foregoing. If the value, which is assessed individually where there are a number of works, exceeds the Community thresholds, the contract must be awarded in accordance with Directive 93/37.

12. In that regard, it is apparent from Articles 1 and 31 of Law No 1150/42, and from

⁷ — Disposizioni in materia di infrastrutture e trasporti, GURI No 181 of 3 August 2002.

⁸ — Attuazione della direttiva 92/50/CEE in materia di appalti pubblici di servizi, GURI No 104 of 6 May 1995.

⁹ — Legge urbanistica, GURI No 244 of 16 October 1942.

Articles 3 and 11 of Law No 10 of 28 January 1977,¹⁰ that the holder of a building permit may carry out urban development works himself and offset the whole or part of the cost against the urban development fees due.

3. Contracts for the design, supervision and inspection of works the value of which is below the Community thresholds

13. Under Article 17(12) of Law No 109/94, the competent authorities may award contracts for the design and supervision of works with a value of less than EUR 100 000 to the persons referred to in subparagraph (1) (d), (e), (f) and (g), after verifying the experience and professional capacity of the person selected and stating reasons for the choice.

14. In addition, under Article 30(6a) of Law No 109/94, responsibility for the inspection of works falls to the technical departments of the tendering entities or to the supervisory bodies referred to in Article 30(6a)(a) or, where the value is below the Community thresholds, to persons trusted by the awarding authority.

4. The supervision of works

15. Under Article 27(2) of Law No 109/94, provided that the contracting authority does not, in the cases referred to in Article 17(4), assume responsibility for the supervision of works, that authority must award the contract for supervision services, in the following order, to (1) other public authorities; (2) the project designer, in accordance with Article 17(4); or (3) other persons who have been pre-selected pursuant to national rules.

5. Inspection services

16. Under Article 28(4) of Law No 109/94, inspection services are to be entrusted to one, two or three highly qualified technicians expert in the particular field concerned, by reference to the type, complexity and value of the works; they are to be selected from the contracting authority's own organisation unless it is established and certified that there is a lack of persons who satisfy the aforesaid requirements.

17. Those provisions must be read in conjunction with Article 188 of Presidential Decree No 554 of 21 December 1999,¹¹

¹⁰ — Norme per la edificabilità dei suoli, GURI No 27 of 29 January 1977.

¹¹ — Regolamento d'attuazione della Legge quadro in materia di Lavori Pubblici 11 Febbraio 1994 n° 109, e successive modificazioni, GURI No 98 of 28 April 2000.

which adds to Law No 109/94. It appears from paragraphs 1, 3, 8, 9, 11, 12 and 13 of Article 188 that, within 30 days of the conclusion of the works, the contracting authority must entrust the inspection of the works to its staff, by reference to the type, category, complexity and value of the works and certain other pre-established criteria. If no one meets the requirements stipulated, the authority must use the services of external specialists included in lists held by the Ministero dei Lavori Pubblici (Ministry of Public Works) and by the regional and provincial governments, from which the authority must select a person who meets the conditions stated and who has been qualified for at least 10 years — in the case of structural works or works with a value equal to or in excess of five million euros — or for at least five years — in the case of works with a value of below one million euros. In addition, the contracting authority must make that person subject to a number of restrictions. In the absence of such lists, the contracting authority is entitled to award the contract on a discretionary basis to whoever satisfies the requirements laid down.

6. Privately financed works

18. Articles 37a, 37b and 37c of Law No 109/94 govern the award of contracts for public works financed wholly or partly by private persons.

19. Article 37a permits such persons to submit proposals for public works and works in the public interest, and to conclude the relevant contracts, under which they assume the financing and management of those works. To that end, the contracting authority is required to publish an indicative notice sufficiently in advance.

20. Article 37b sets out the procedure for selection of the promoter. First, the proposals are evaluated, having regard to the construction, the planning, the environment, the quality of the design, its functional nature, its objective, its accessibility to users, the return, the management and maintenance costs, the duration of the concession, the time-limits for carrying out the works, the charges and the method for updating them, and the economic value of the plans. Having established that no factors exist which would preclude the execution of the works and after hearing representations from any promoters who so request, it is decided whether any of the proposals is in the public interest, in which case Article 37c(1) provides for a restricted procedure to obtain two further offers. The concession is awarded under a negotiated procedure in which the promoter's proposal competes with the other two proposals, subject to the special rule, laid down at the end of Article 37c, that the award may be made to the promoter who, during the course of the procedure, adapts his proposal to the amendments suggested by the contracting authority.

III — The pre-litigation procedure

21. After receiving a number of complaints regarding the effects of Law No 109/94 and obtaining details of the proposed amendments to that Law, on 12 April 2002 the Commission wrote to the Italian authorities stating that a number of provisions were incompatible with Community law.

22. In a letter dated 17 June 2002 and at a meeting held in Rome on 23 July 2002, Italy indicated its willingness to amend Law No 109/94 in the manner requested.

23. Following the adoption of the amendments under Law No 166/2002, the Commission took the view that certain provisions of that Law conflicted with Community law and, on 19 December 2002, the Commission sent a letter of formal notice. Unconvinced by the reply to that letter, the Commission sent a reasoned opinion on 15 October 2003 and then brought an action before the Court under Article 226 EC seeking a declaration that Italy has failed to fulfil its obligations.

IV — The procedure before the Court

24. In the application, which was received at the Court registry on 24 September 2004, the Commission seeks a declaration that, 'by adopting Articles 2(1), 17(12), 27(2), 30(6a), 37b and 37c(1) of Law No 109 of 11 February 1994, as most recently amended by Article 7 of Law No 166 of 1 August 2002; Article 2(5) of Law No 109/94, as most recently amended by Law No 166/2002, to be read in conjunction with Law No 1150 of 1942 and Law No 10 of 1977, as amended and supplemented; Article 28(4) of Law No 109/94, to be read in conjunction with Article 188 of Presidential Decree No 554 of 21 December 1999 and Article 7 of Law No 166/2002, and Article 3(3) of Legislative Decree No 157 of 17 March 1995, the Italian Republic has failed to fulfil its obligations under Directives 93/37/EEC, 93/36/EEC, 92/50/EEC and 93/38/EEC, Articles 43 and 49 EC and the principles of transparency and equal treatment to which they give expression'. The Commission also claims that the defendant must be ordered to pay the costs.

25. In the defence, lodged on 16 December 2004, Italy seeks the dismissal of the Commission's action and, in the alternative, the approval of the amendments made to the Italian legislation criticised in the reasoned opinion, together with the dismissal of the complaint relating to Article 2(5) of Law No 109/94.

26. The reply was lodged on 26 January 2005 and the rejoinder was lodged on 16 March 2005.

and which aim to attain more effectively the objectives proposed by the parties.

27. By order of 6 April 2004, the President of the Court granted leave for the Netherlands (which submitted a statement in intervention on 14 July 2005) and Finland (which submitted a statement in intervention on 18 July 2005) to intervene in support of Italy,¹² which lodged a response to the statements in intervention on 14 September 2005.

30. There are numerous possible combinations, depending on the extent of the contractual obligation concerned,¹⁴ because a single legal transaction may encompass several different transactions, a contract may have more than one object and, in that connection, each object may relate to a different activity.

28. On conclusion of the written stage of the proceedings, since none of the parties requested a hearing, the case became ready for the preparation of this Opinion on 11 July 2006.

31. The main difficulty lies in selecting the relevant provisions, which give rise to certain effects such as the application of more rigorous procedures or the exclusion of certain tenderers.

V — Mixed contracts

29. Freedom of contract allows new contractual forms to emerge, which combine elements from different standard contracts¹³

32. The selection may be based on the combination criterion, by using provisions from different sources in different parts of the same contract, on the absorption crite-

12 — France was also given leave to intervene but did not submit observations.

13 — In the view of Larenz, K., *Metodología de la ciencia del derecho*, Ariel, Barcelona, 1994, p. 456, the standard contract, as an expression of intention, is used 'for a more specific description of certain kinds of legal relationship, in particular those concerning individual rights and compulsory contractual relationships'.

14 — Moreno Molina, J.A. and Pleite Guadamillas, F., *El nuevo reglamento de contratación de las administraciones públicas (Repercusión práctica, novedades, concordancias y formularios adaptados)*, La Ley, Madrid, 2002, p. 36, state that such contracts provide examples of rich and complex casuistry.

tion, complying with the contractual rules to which the predominant element belongs.¹⁵

installation operations, is governed by Directive 93/36.¹⁷

33. The first criterion emphasises the specific nature of each type but the extensive practical difficulties it entails mean that it is not normally used, except, for example, in contracts which, behind a unitary structural appearance, combine a number of different contractual types.

— A contract which covers services and includes ancillary works is governed by Directive 92/50.¹⁸

34. The second criterion is generally used in more complex situations, such as the ones which are specifically referred to in the Directives and are based on the object of the contract:

— A contract which covers a public works concession must comply with the advertising rules specifically laid down in Directive 93/37.¹⁹

— A contract which covers products and services where the value of the services exceeds that of the products is governed by Directive 92/50.¹⁶

35. In addition, Directive 92/50 provides that, where contracts cover services listed in both Annex I A and Annex I B, the value of those services determines which provisions must be applied to the award of the contracts²⁰ (Article 10).²¹ Directive 93/38 contains a similar provision (Article 17).

— A contract which covers products, where the supply of those products entails, as an incidental matter, siting and

17 — Second subparagraph of Article 1(2)(c) of Directive 2004/18.

18 — Third subparagraph of Article 1(2)(d) of Directive 2004/18.

19 — Article 1(3) and Title III (Articles 56 to 65) of Directive 2004/18.

20 — In points 31 to 36 of the Opinion in Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, Advocate General Mischo outlines the differences between that approach, where provisions within the Directive itself are selected, and the previous approaches, which involved stating the applicable Directive. In the judgment in that case, the Court pointed out that Directive 92/50 supplies an unequivocal test for the determination of the regime applicable to a contract composed of several services, based on their value (paragraph 52), and dismissed the view that regard should be had to the main object of the contract (paragraph 49).

21 — Article 22 of Directive 2004/18.

15 — García Macho, R., *Comentarios a la Ley de contratos de las administraciones públicas y a la Ley sobre procedimientos de contratación en los sectores especiales*, Tirant lo Blanch, Valencia, 2003, p. 91.

16 — Second subparagraph of Article 1(2)(d) of Directive 2004/18.

36. However, the alternatives referred to do not exhaust all the possibilities so that, in the light of the lacunae in the Directives, which, moreover, do not set out a common framework for all contracts,²² the legislatures of the Member States must adopt provisions applicable to the other types of mixed contracts, for which purpose they have a wide margin of discretion, subject to the Directives and the Treaty.

37. It is important to point out that the Directives are founded on the concept of the main object of the contract, and, where there is more than one object or a number of activities are combined, on the object or activity with the highest financial value. It is possible to determine the material scope of the Directives by taking both those factors into account.

38. The main object of the contract is framed as the essential element around which the contract is centred.²³ Thus, in *Gestión Hotelera Internacional*,²⁴ in relation to a contract for the assignment of prop-

erty and also the performance of works,²⁵ the Court held that it was inappropriate to treat those works as the main object of the contract when they were incidental in nature, although that was a factor which must be determined by the national court (paragraphs 26 to 29). That judgment must be qualified, however, because the classification of operations or works as ancillary (sixteenth recital in the preamble to Directive 92/50 and Article 1(a), *in fine*, of Directive 93/36) does not convert that quality into the one that defines the system. Accordingly, the judgment must be construed as meaning that ancillary contractual obligations may not be used to identify the applicable provisions, which must be determined in accordance with the prevalence criterion.²⁶

39. The value of the contract is framed as an impartial criterion which is useful when it comes to selecting the predominant object or activity, having regard to its primary function which is to determine whether or not contracts are covered by the Directives. In that connection, the Court held in *Teckal*,²⁷ on the basis of an *a contrario* interpretation of Article 2 of Directive 92/50, that a contract

22 — Irrespective of the civil laws of the Member States. Messineo, F., *Doctrina general del contrato*, volume I, Rubinzal-Culzoni, Buenos Aires, 1985, p. 382, considers the problem inherent in that legal sphere by reference to Article 1323 of the Italian Civil Code which provides: 'all contracts, even where they do not fall into the categories which are governed by specific provisions, are subject to the general provisions contained in this title' (the second title of the section on obligations).

23 — Article 1(a) of Directives 93/36 and 93/37; Article 1(4) of Directive 93/38; Recital 10 and Article 1(2) of Directive 2004/18.

24 — Case C-331/92 [1994] ECR I-1329.

25 — In point 19 of the Opinion in the case, Advocate General Lenz stated that the question referred for a preliminary ruling concerned the award of a concession to open and operate a casino, and a concession to operate a hotel, which required an obligation to be entered into for carrying out conversion work.

26 — Greco, G., 'Contratti "misti" e appalti comunitari', *Rivista italiana di diritto pubblico comunitario*, 1994, p. 1265, argues that the prevalence criterion is more suited to identifying the provisions applicable to the majority of mixed contracts because the criterion of ancillary obligations is often inadequate.

27 — Case C-107/98 [1999] ECR I-8121.

for products and services is governed by the provisions on products if the value of those items exceeds that of the services (paragraph 38), a finding upheld in *Carbot-ermo and Consorzio Alisei*²⁸ (paragraphs 31 and 47).

VI — The Community principles in relation to excluded contracts

A — *The action for failure to fulfil obligations on the grounds of infringement of the Community principles*

40. It is clear from Article 10 EC that membership of the Community entails two obligations for the Member States. One of those obligations is positive and requires the Member States to take ‘all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising’ out of the Treaty or ‘resulting from action taken by the institutions’, while the other is negative and requires Member States ‘to abstain from any measure which could jeopardise the attainment of the objectives’ pursued. Under Articles 226 EC and 227 EC, the Commission and the Member States may bring the matter before the Court where they consider that another Member State has failed to fulfil its obligations.

41. Accordingly, the action for an infringement of Community law has a wide material scope because it does not apply only to secondary law where directives provide a rich source of such proceedings.

42. Those considerations explain why the application does not contain any submissions concerning the infringement by the Italian legislation of specific provisions of the Directives on public contracts and focuses instead on the claim that the Italian legislation breaches the Community principles enshrined in Articles 43 EC and 49 EC.

43. In other words, since the legal provisions governing public contracts vary depending on whether the national implementing measures define those contracts in such a way that they fall within the scope of the Directives, the Commission bases its complaint on the absence of an express provision requiring compliance with the principles of transparency and equal treatment when awarding contracts which are excluded on the grounds of their value.

B — *The principles of transparency and equal treatment in relation to excluded contracts*

44. In previous Opinions I have argued that the development of open competi-

²⁸ — Case C-340/04 [2006] ECR I-4137.

tion in the field of public contracts will be achieved if those who wish to be awarded public contracts participate on an equal footing without any unjustified discrimination whatsoever, and that it is not sufficient for the procedure to be governed by objective criteria because the principle of transparency must also apply.²⁹

45. The Court has already considered the effect of the principles of transparency and equal treatment on the award of contracts which, on account of their value, are excluded from the scope of the Directives and, consequently, from that of national implementing provisions.

46. In *Teleaustria and Telefonadress*,³⁰ the Court held that, where contracts are excluded from the scope of Directive 93/38, 'the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular' (paragraph 60). In accordance with the judgment

in *Unitron Scandinavia and 3-S*,³¹ the principle of transparency 'implies ... an obligation of transparency' in order to ensure that it is observed (paragraph 31) and, in accordance with *Teleaustria and Telefonadress*, that obligation of transparency ensures, 'for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed' (paragraph 62). Therefore, as the Court declared in *Parking Brixen*,³² a complete lack of any call for competition 'does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency' (paragraph 50), although, in *Coname*,³³ the Court pointed out that transparency does not imply an obligation to 'hold an invitation to tender' (paragraph 21).

47. Those findings, which have since been upheld,³⁴ are therefore based on the distinction between contracts which fall within the scope of the Directives and must be governed by the procedures laid down therein, and contracts which do not fall within the scope of those Directives and are subject only to the fundamental principles.³⁵

29 — Points 24 to 29 and 21 to 26, respectively, of my Opinions in Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 and in Case C-331/04 *ATI EAC and Others* [2005] ECR I-10109.

30 — Case C-324/98 [2000] ECR I-10745. The judgment principally addressed the question whether, in the light of its specific object, namely 'the production and publication of printed and electronically accessible lists of telephone subscribers (telephone directories)' (paragraph 19), the contract at issue in the proceedings fell within the scope of Directive 93/38 rather than that of Directive 92/50 (paragraphs 31 to 40).

31 — Case C-275/98 [1999] ECR I-8291.

32 — Case C-458/03 [2005] ECR I-8585.

33 — Case C-231/03 [2005] ECR I-7287.

34 — *Inter alia*, in the judgment in Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 18.

35 — See in that regard, the Order of the Court in Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraphs 19 to 21.

C — *The scope of the obligation to comply with the principles of transparency and equal treatment*

48. Having established that contracts which are excluded from the specific provisions must be awarded in accordance with the principles of transparency and equal treatment, it is necessary to define that obligation and establish whether it must be enshrined in legislation.

49. The Court did not dispel that uncertainty in *Coname*, despite the detailed analysis undertaken by Advocate General Stix-Hackl in the Opinion in that case. However, there are a number of cases pending in which the debate may be rekindled.³⁶

50. Unlike those cases, which concern specific contracts, the present case is broader in scope and requires an examination of the Directives and of the Treaty.

36 — Case C-507/03 *Commission v Ireland* and Case C-532/03 *Commission v Ireland*, which concern the complaint that service contracts were awarded without publication of a prior notice. Advocate General Stix-Hackl delivered the Opinions in both cases on 14 September 2006. Also, Case C-195/04 *Commission v Finland*, in which the hearing was held on 8 June and the infringement relates to the award of a contract for institutional kitchen equipment.

1. Reference to the Directives

51. The Court made clear in *Stadt Halle and RPL Lochau*³⁷ that the principal objective of the Community rules in the field of public procurement is, in addition to the free movement of goods and services, the opening-up to undistorted competition in all the Member States (paragraph 44).³⁸

52. However, an analysis of the Directives reveals the absence of a complete body of law at Community level,³⁹ because, first, the Directives essentially govern procurement, although they also have an effect on other stages, such as performance of the contract; second, the Directives exclude certain contracts; and, finally, the Directives do not contain any general provisions with which the excluded contracts are required to comply.

53. The restriction of the scope of the Directives to the preparatory stages, the procedure and the methods of awarding contracts, as

37 — Case C-26/03 [2005] ECR I-1.

38 — Although those rules also fulfil other objectives, such as protecting the financial interests of the contracting authority by enabling price screening. See García-Trevijano Garnica, J.A., 'Disposiciones comunes a los contratos administrativos. En especial, el precio y su revisión', *Derecho de los contratos públicos. Estudio sistemático de la Ley 13/1995, de 18 de mayo, de contratos de las Administraciones Públicas*, coordinated by Pendás, B., Praxis, Barcelona, 1995, p. 258.

39 — Millett, T., 'Les marchés publics en droit communautaire', *Revue du Marché commun et de l'Union européenne*, no 452, October-November 2001, p. 630. Piñar Mañas, J.L. notes, in the collective work *Comentario a la Ley de contratos de las administraciones públicas*, 2nd ed., Civitas, Madrid, 2004, p. 79, that, nevertheless, the Directives are creating 'a move towards a common system of procurement'.

indicated by their titles, is justified by the fact that those are the stages which affect the free movement of goods, freedom of establishment, freedom to provide services, and the principles derived from those freedoms.

54. It is also possible to explain the exclusion of certain contracts on the grounds that they have a sensitive object, such as contracts which are secret or are subject to stringent security measures; that they fall within the scope of other directives, such as telecommunications contracts; or that they have a modest value.

55. However, it is more difficult to understand why none of the Community legislation on public procurement contains stipulations concerning equal opportunities, the prohibition of discrimination, transparency and advertising, subject to the necessary exclusions,⁴⁰ because such stipulations would benefit the aims of the Community without creating insuperable difficulties.

56. The legislatures of the Member States have the power to fill that gap but they are

not required to introduce rules which have not even been adopted in secondary legislation. It is therefore important to recall that Article 249 EC provides that '[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods', from which it follows that, while transposition must extend to the whole of a directive, it nevertheless extends to the directive alone.

57. Accordingly, as Community law currently stands, neither the objective, the subject-matter, nor the effectiveness of the Directives require that legislation adopted by the Member States in relation to contracts excluded from the scope of the Directives must refer expressly to the principles on which the latter are founded.

2. Reference to the Treaty

58. In *Commission v Italy*,⁴¹ the Court found that Articles 43 EC and 49 EC embody specific instances of the principle of equal treatment (paragraph 8), which, as the Court

40 — Article 2 of Directive 2004/18 requires contracting authorities to 'treat economic operators equally and non-discriminatorily' and to act 'in a transparent way', while Articles 4 to 6 set out rules governing all public contracts and relating to 'economic operators', 'conditions relating to agreements concluded within the World Trade Organisation', and 'confidentiality'. However, Article 7 provides that those articles, like the other provisions of the Directive, apply only to public contracts 'which are not excluded'.

41 — Case C-3/88 [1989] ECR 4035.

held in *Commission v Belgium*,⁴² means that all tenderers must have equality of opportunity when they formulate their tenders, irrespective of their nationality (paragraphs 33 and 54).

59. The publication of a call for tenders is the key element from the point of view of the principles laid down in the Treaty, which, however, does not contain any guidance which might indicate the manner in which notices must be published. The Court has not intervened in this matter, except to offer minimal guidance. Thus, as concerns the case-law already cited, the Court held in *Parking Brixen* that '[i]t is for the concession-granting public authority to evaluate, subject to review by the competent courts, the appropriateness of the detailed arrangements of the call for competition to the particularities of the public service concession in question' but a complete lack of any call for tenders is incompatible with the principles of the Treaty (paragraph 50, which cites paragraphs 61 and 62 of the judgment in *Teleaustria and Telefonadress*),⁴³ an approach which may be applied to any type of contract.

60. In *Coname*, the Court analysed the direct award by an Italian local authority of the

service covering the maintenance, operation and monitoring of the methane gas network, and held that regard must be had to the principles referred to. Since the contract concerned did not fall within the scope of any of the Directives, the Court applied primary law (paragraph 16), and pointed out that infringement of the principle of transparency amounted to indirect discrimination contrary to Articles 43 EC and 49 EC (paragraphs 17 to 19), which was justified by 'special circumstances, such as a very modest economic interest at stake', so that 'it could reasonably be maintained that an undertaking located' in another Member State 'would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed' (paragraph 20).

61. In a wider context, in the Opinion in *Coname*, Advocate General Stix-Hackl expressed uncertainty as to whether the fundamental freedoms require uniform rules for all awards (point 70), and proposed a simplified set of rules which assesses the different categories on the basis of their relevance to the internal market (point 75 et seq).

62. From the foregoing I conclude, first of all, that regard must always be had to the principles of equal treatment and transparency as laid down in the Treaty, without

42 — Case C-87/94 [1996] ECR I-2043.

43 — In point 43 of the Opinion in that case, Advocate General Fennelly states that 'substantive compliance with the principle of non-discrimination on grounds of nationality requires that the award of concessions respect a minimum degree of publicity and transparency' but does not require 'the awarding entity to apply by analogy the provisions of the most relevant ... directives'.

the need for provisions of secondary law or national law calling for observance those principles;⁴⁴ and, second, that the degree of publication of a call for tenders is currently a matter for each Member State, subject to certain restrictions.

contrary to case-law which, in the *Coname* judgment, allows direct awards in certain situations without the need to hold an invitation to tender (point 21).

65. In any event, it remains possible to monitor observance of those principles by individual acts as was the case in, for example, in the *Parking Brixen* and *Coname* judgments.⁴⁵

D — *Corollary*

63. In the light of the analysis carried out, it is my view that neither the Directives nor the Treaty require the Member States expressly to lay down general provisions for excluded contracts, concerning the application of the principles of equal treatment and transparency or publicity which are essential to free competition. Any action by the Member States in that regard would be voluntary rather than the result of an obligation arising from membership of the Union.

VII — Examination of the grounds of failure to fulfil obligations

A — *Preliminary point*

64. To conclude otherwise would give rise to the significant practical difficulties set out in the *Coname* Opinion, such as the choice of the means of publication and the minimum content of the notice (points 96 and 97), because the Directives make a distinction based on the financial value of the activities concerned. Such an approach would also be

66. At the beginning of this Opinion, I stated that the Commission complains that Italy has failed to fulfil its obligations in the field of public contracts by excluding certain procurement procedures from the rules and provisions of Community law, essentially in two ways; first, by providing that the value of ancillary works is the sole criterion for determining whether mixed contracts fall within the scope of the Community legislation; and,

⁴⁴ — However, the Italian legislature included a reference to those principles in the 2005 amendment, which I will discuss below.

⁴⁵ — Cases C-507/03, C-532/03 and C-195/04, cited in footnote 36, in which judgment is pending.

second, by failing to provide that the principles of transparency and equal treatment enshrined in Articles 43 EC and 49 EC must be observed in the award of contracts whose value is below the thresholds laid down in the Directives.

69. Accordingly, in the case before the Court, regard must be had to the legislation in force at the end of the two-month period allowed in the reasoned opinion of 15 October 2003, but not to any legislation adopted subsequently.

67. Although the defendant Government specifically contests the claim that the provisions of Italian law governing works carried out by private persons which are deductible from urban development fees are incompatible with Community law, it submits that the other infringements detailed by the plaintiff were rectified as a result of the amendments introduced by Law No 62/2005 of 18 April, *Legge comunitaria* 2004.⁴⁶

68. Suffice it to recall the case-law of the Court to the effect that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes.⁴⁷

B — *Definition of mixed contracts*

70. Mixed works, supply and service contracts and mixed supply and service contracts which include ancillary works must comply with the Italian implementing legislation if those works constitute more than 50% of the price (Article 2(1) of Law No 109/94 and, similarly, Article 3(3) of Legislative Decree No 157/95). The financial evaluation of a component of that type of contract is, therefore, the exclusive criterion for application of the Law.

71. The Commission cites the *Gestión Hotelera Internacional* judgment in support of its contention that application of the Community provisions must be determined by reference to the principal object of the contract as defined, *inter alia* and not exclusively, by the financial value of the activities concerned because to do otherwise would lead to the exclusion of mixed contracts with a value in excess of the thresholds laid down in Directives 92/50 and 93/36 but,

⁴⁶ — Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee, supplemento ordinario to GURI No 96 of 27 April 2005.

⁴⁷ — Judgments in Case C-200/88 *Commission v Greece* [1990] ECR I-4299, paragraph 13; Case C-133/94 *Commission v Belgium* [1996] ECR I-2323, paragraph 17; Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraph 23; and Case C-333/01 *Commission v Spain* [2003] ECR I-2623, paragraph 8.

simply because the works, although ancillary, constitute the predominant component of the price, below the thresholds fixed in Directive 93/37.

72. The defendant cites a circular from the Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport)⁴⁸ and the amendment of Law No 109/94 as evidence that, in mixed contracts, the value of ancillary works is not taken into account, with the result that the financial aspect is also the predominant, albeit not the only, criterion for the purpose of selecting the applicable legislation.

73. In my opinion, for the reasons set out, the amendments cited cannot be taken into account. Furthermore, as the Commission states in the reply, a circular lacks the authority to override a legal provision and is not sufficient evidence to deny the existence of an infringement, because, as the Court has held, '[m]ere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations flowing from Community law'.⁴⁹

74. It is clear from those considerations that the Directives preclude the value of the works from being, in all cases, the criterion which determines the legal provisions applicable to mixed contracts because, otherwise, contracts whose primary purpose is services or supply might be excluded from the scope of the Community legislation merely by reason of the lower value of their primary obligations.

75. The Directives refer to the object of the contract but do not confuse it with either the aim or the activities entailed,⁵⁰ even though the latter define the object. In addition, where there is more than one object, the Directives classify them by reference to the value of the activities concerned, because the Directives define their scope in terms of easily ascertainable financial amounts.

76. It is not appropriate to carry out an *a contrario* interpretation or, as the Italian provisions do, to have regard to the value of ancillary works, and, for the reasons stated, I consider that the claim of infringement is well-founded.

48 — Circular No B1/2316 of 18 December 2003, GURI No 79 of 3 April 2004.

49 — Judgments in Case C-80/92 *Commission v Belgium* [1994] ECR I-1019, paragraph 20; Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685, paragraph 18; Case C-159/99 *Commission v Italy* [2001] ECR I-4007, paragraph 32; Case C-394/00 *Commission v Ireland* [2002] ECR I-581, paragraph 11; Case C-415/01 *Commission v Belgium* [2003] ECR I-2081, paragraph 21; and Case C-296/01 *Commission v France* [2003] ECR I-13909, paragraph 54.

50 — In point 37 of the Opinion in *Gestión Hotelera Internacional*, Advocate General Lenz states that the fact that a primary obligation is non-assignable converts it into the main object of the contract.

C — *Urban development works*

77. Works carried out by private persons (a) which are deductible from charges arising from building permits, (b) which require the assumption of certain legal obligations, and (c) which are analogous to the works in the first two categories, are not required to comply with Law No 109/94. However, if the value of the activities, assessed on an individual basis, exceeds the Community thresholds, such contracts are awarded in accordance with Directive 93/37 (Article 2(5) of the Law No 109/94).

78. The Commission claims, first, that those provisions, in conjunction with Law No 1150/42 and Law No 10/77, allow for a contract to be awarded directly to the holder of a building permit or development plan but fail to uphold the principles of transparency and equal treatment enshrined in the EC Treaty, principles which must be observed even if the value of the contract is below the Community thresholds. Second, the Commission submits that the determination of whether the threshold has been attained must take account of all the activities covered by the contract, rather than just one of them.

79. The Italian Government strenuously denies that the Italian legislation gives rise to the infringement complained of. First, it has lodged a circular from the Minis-

tero delle Infrastrutture e dei Trasporti⁵¹ and a circular from the Dipartimento per le Politiche Comunitarie (Department of Community Policy attached to the aforementioned ministry),⁵² which give details of the provisions adopted to ensure compliance with the Community legislation. Second, the Italian Government describes as excessive the requirement that there must be a reference to the relevant provisions of the Treaty and to the case-law of the Court in the implementing provisions. Third, the Italian Government points to the special nature of urban development works where the builder acts in place of the local authority. Finally, the Italian Government disputes the interpretation of the judgment in *Ordine degli Architetti and Others*⁵³ cited by the Commission, because, in the opinion of the Italian Government, it did not analyse the different types of works executed by the private person concerned as the agent of the contracting authority.

1. The principles of transparency and equal treatment

80. For the reasons stated, the complaint to the effect that national provisions do not contain a general reference to the obligation

51 — Circular No 462 of 18 December 2001, *Sentenza della Corte di giustizia europea (Sesta Sezione) 12 luglio 2001 (c.n. 399/98) sulla realizzazione diretta da parte di un privato di opere di urbanizzazione a scomputo del contributo di concessione dovuto. Appalto di lavori pubblici, ai sensi della direttiva 93/37. Indirizzi e chiarimenti operativi*, GURI No 300 of 28 December 2001.

52 — Circular No 8756 of 6 June 2002, *Normativa applicabile agli appalti pubblici 'sottosoglia'*, GURI No 178 of 31 July 2002.

53 — Case C-399/98 [2001] ECR I-5409.

to comply with the principles of transparency and equality cannot be upheld. The flexible nature of those principles means that the assessment as to whether they have been infringed must be based on the circumstances of each award of a contract.

81. Accordingly, Italy has not committed the alleged infringement.

2. The scope of the Italian legislation

82. The other complaint in the application concerning the award of works contracts to the holder of a building permit or development plan relates to the fact that the procurement procedures concerned must be followed in all cases where an agreement between a contracting authority and a private person covers works whose value, assessed individually, is in excess of the Community thresholds.

83. The Commission claims that that rule is contrary to Directive 93/37, because it leads to the exclusion of contracts whose total value exceeds the thresholds, on the grounds that the individual cost of each component operation is below that threshold.

84. As I have pointed out, the Italian Government draws attention to the special nature of urban development works and the characteristics of the contested procurement procedure but fails to take account of the fact that the procedure at issue in the present proceedings must be assessed pursuant to the Directives on public contracts. Placing the emphasis on one legal sphere — the national one — while ignoring the other sphere — the Community one — causes the situation to become distorted. Moreover, as I have already observed, in *Ordine degli Architetti and Others*, the Court held that the special nature of urban development works is not sufficient to exclude the application of the Directives (paragraph 66).

85. Article 1 of Directive 93/37 provides definitions of ‘public works contracts’ (paragraph (a))⁵⁴ and ‘a work’ (paragraph (c));⁵⁵ Article 6(3) of that Directive provides for the case where a work is subdivided into several lots, each one the subject of a contract; while Article 6(4) prohibits a work or a contract from being split up in order to avoid the application of the Directive.⁵⁶

54 — ‘[C]ontracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority’.

55 — ‘[T]he outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function’.

56 — Similar provisions are contained in Article 7 of the Directive, Article 5 of Directive 93/36, Article 14 of Directive 93/38 and Article 9 of Directive 2004/18, concerning the Methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems.

86. Thus, those provisions supply definitions and rules which must be interpreted in accordance with Community law,⁵⁷ and that is appropriate context in which to view the judgment in *Ordine degli Architetti and Others*, pursuant to which Directive 93/37 must be applied to cases where ‘the holder of a building permit or approved development plan’ executes ‘infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit ... where the value of that work is the same as or exceeds the ceiling fixed by the Directive’.

88. In addition, Directive 93/37 defines the term ‘a work’, the existence of which, pursuant to the judgment in *Commission v France*,⁶¹ must be assessed in the light of the economic and technical function of the result of the works concerned (paragraph 36). The total value obtained, where appropriate, by adding together lots, determines whether the Community provisions apply and, as I have already indicated, the particular features of urban development works cannot serve as objective grounds to justify splitting up a contract.

87. However, that judgment must be qualified because public works which entail urban development works may be executed directly by the contracting authority or by a third party in accordance with the law or an agreement, in which case there is a contract governed by Community law⁵⁸ and the holder of a building permit or development plan, acting as the *alter ego* of the contracting authority,⁵⁹ is bound by the same requirements of publicity and competition.⁶⁰

89. It is clear from the foregoing considerations that urban development works which are subject to Directive 93/37 must also comply with the rules laid down in that directive governing the calculation of the value of contracts. Provisions such as Article 2(5) of Law No 109/94, which alter those rules by stipulating a single general criterion which has the detrimental effect of circumventing the Community provisions and precluding, on objective grounds relating to the value of the works, the undertakings of other Member States from submitting tenders in public

57 — Huelin Martínez de Velasco, J., ‘Las obras de urbanización y los contratos públicos de obras. A propósito de la sentencia Scala 2001’, *Cuadernos de Derecho local*, no 4, 2004, p. 19 et seq.

58 — In the Opinion in *Ordine degli Architetti and Others*, Advocate General Léger correctly states that an essential element of the contractual relationship is missing where ‘a party called on to carry out development works is simply identified by law’ (point 68).

59 — Fernández Rodríguez, T.R., ‘La sentencia del TJCE de 12 de julio de 2001 (asunto “proyecto Scala 2001”) y su impacto en el ordenamiento urbanístico español’, *Documentación Administrativa*, nos 261-262, September 2001-April 2002, p. 23.

60 — Huelin Martínez de Velasco, J., op. cit., p. 28.

61 — Case C-16/98 [2000] ECR I-8315. Although in that case the Court analysed Directive 93/38, the findings concerning analogous provisions may be applied to Directive 93/37.

procurement procedures in which they wish to participate, cannot therefore be upheld.⁶²

90. Article 2(5) of Italian Law No 109/94 accordingly infringes Directive 93/37.

D — *The award of contracts for the design, supervision and inspection of works the value of which is below the Community thresholds*

91. Under Law No 109/94, contracts for the design, supervision and inspection of works the value of which is below the thresholds set in the Directives may be awarded to persons trusted by the contracting authority (Articles 17(12) and 30(6a)).

62 — See the judgment in *Commission v France*, cited in footnote 61, in particular points 38 to 47. In the Opinion in that case, Advocate General Jacobs put forward the view that a series of operations to be carried out within a specified period on a group of networks having a shared economic and technical function must itself be regarded as intended to fulfil a shared economic and technical function (point 72). That view may be applied to urban development works, as may the finding of the Court in the judgment in Case C-385/02 *Commission v Italy* [2004] ECR I-8121 to the effect that 'merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor' (paragraph 21).

92. The Commission claims that the principles of non-discrimination, equal treatment, proportionality and transparency must also be applied to contracts which do not fall within the scope of the Directives and that those principles are infringed where the procurement procedure is not advertised at all, an infringement which is not remedied by the requirement to confirm the experience and professional capacity of the person selected and to state reasons for the selection.

93. The defendant cites the amendment of Law No 109/94, which inserts a specific reference to the Community principles, and repeats its previous assertion that the references to the Treaty and the case-law of the Court required by the plaintiff are unreasonable.

94. Since the arguments raised in connection with this complaint are similar to the ones put forward concerning Article 2(5) of Law No 109/94, it is advisable to settle the matter in the same way, that is, by holding that Community law does not currently require that the obligation to observe the Community principles in the case of excluded contracts must be explicitly enshrined in legislation governing the award of those contracts, subject always to the right to scrutinise each procedure and to bring an action for infringement of the principles before national courts or the Court of Justice.

95. Therefore, it is appropriate to find that Articles 17(12) and 30(6a) of Law No 109/94 do not constitute the infringement of Community law complained of in the present proceedings.

the tender notice, and that the value of the supervision services must have been calculated in the budget.

E — The award of contracts for the supervision of works

96. The contracting authority is responsible for the supervision of works but where neither that authority nor other public authorities are able to carry out that task, it is awarded to the project designer (Article 27(2) of Law No 109/94).

99. Identical considerations to the ones already set out with regard to the previous complaints are relevant to the application of the principles of transparency and equal treatment to contracts for the supervision of works whose value does not exceed the Community thresholds, because the same factors are involved. In that connection, the infringement complained of by the Commission cannot be upheld.

97. The Commission complains that the general nature of that provision infringes Directives 92/50 and 93/38, the aim of which is to ensure publicity and competition in procurement procedures for supervision services both where the Community thresholds are exceeded, because the Directives so provide, and where those thresholds are not reached, in accordance with the principles of the Treaty.

100. A different solution must apply to contracts which, by reason of their value, are subject to procurement procedures because the Community provisions are precise in that regard. In those cases, there must be strict compliance with all the provisions, however convenient it may be not to hold a call for competition, because Article 11(1) of Directive 92/50 and Article 4(1) of Directive 93/38 make it absolutely clear that contracts must be awarded in accordance with the procedures defined therein (open, restricted and negotiated),⁶³ with the result

98. The Italian Government draws attention to the difficulties which its system avoids but adds that, with a view to addressing the complaints put forward, it has amended Law No 109/94 by introducing a number of safeguards which provide that the contracting authority may only award the contract to the project designer if it indicates as much in

⁶³ — Also, Article 6(1) of Directive 93/36 and Article 7(1) of Directive 93/37.

that, as the case-law has made clear, only the exceptions provided for are permitted.⁶⁴

101. Contracts for the supervision of works are included in category 12 of Annex I A to Directive 92/50 and of Annex XVI A to Directive 93/38, from which it follows that those contracts must be awarded in accordance with the procedures laid down in those Directives.

102. For all the reasons stated, it is clear that Article 27(2) of Law No 109/94 infringes Directives 92/50 and 93/38.

F — The award of contracts for inspection services

103. Inspection services are carried out by the departments of the contracting authority but, where it is established and certified that there are no qualified staff (Article 28(4) of Law No 109/94), the contract is awarded to third parties included in the lists held by the public authorities (Article 188 of Presidential Decree No 554/99).

104. The complaint put forward by the Commission in that connection repeats the claim, set out in section VII E of this Opinion, that the procedures laid down in Directives 92/50 and 93/38 must be applied where the value of the contract exceeds the relevant thresholds and that the principles laid down in the Treaty must be respected in all other cases.

105. The Italian Government cites the future repeal of the regulatory provisions (specifically, of Article 188(8) to (11) of Presidential Decree No 554/99).⁶⁵

106. That expression by the Italian Government of its good intentions in the fullness of time notwithstanding, this complaint must be resolved in the same way as the preceding one. Accordingly, the claim concerning Article 43 EC and Article 49 EC cannot be upheld, while, on the other hand, contracts for inspection services, which are included in category 12 of Annex I A to Directive 92/50 and of Annex XVI A to Directive 93/38, must be awarded in accordance with the Directives.

107. For all the reasons stated, Article 28(4) of Law No 109/94, in conjunction with

⁶⁴ — Judgments in Case C-71/92 *Commission v Spain* [1993] ECR I-5923, paragraph 10; *Teckal*, paragraph 43; and *Carbotermo and Consorzio Alisei*, point 45.

⁶⁵ — In the rejoinder the defendant contends that, in judgment No 302/03 (paragraph 5.1), the Corte Costituzionale (Constitutional Court) held that Article 188(8) to (10) of the Decree is unconstitutional.

Article 188 of Presidential Decree No 554/99, is incompatible with Directives 92/50 and 93/38.

G — *Privately financed works*

108. Contracting authorities allow third parties to execute public works which may be exploited commercially. In the first stage of the procedure, the authorities publish a notice inviting private persons, who then acquire the status of promoters, to submit proposals for the award of concessions under which those persons assume all or part of the costs and, by way of consideration, undertake to operate the concession. Once the proposals submitted have been evaluated, those which are in the public interest are chosen in the second stage when, in the case of each proposal chosen, a restricted procedure is commenced with a view to selecting two further offers. Those offers are used as points of reference in the negotiated procedure which leads to the award of the concession and favours the promoter who is able to adapt his proposal to the specifications of the contracting authority (Articles 37a, 37b and 37c of Law No 109/94).

109. The Commission complains, first, that the procedure described constitutes an infringement by Italy of the principle of equal treatment, since the promoter obtains two advantages in the procedure vis-à-vis the

other competitors, even where his original proposal is not as suitable, because he participates automatically in the procedure and has priority in the selection process. It would be possible to excuse the infringement if all the participants were aware of those advantages and of the selection criteria, but it is not obligatory to state those matters in the initial notice. Second, the Commission complains that, since the notice has only been compulsory with effect from 18 August 2002, the date on which Law No 166/2002 entered into force, procedures which have already been held lead to outcomes which are incompatible with the general Community provisions.

110. The defendant contends that both complaints have been addressed in the amendment of Law No 109/94, which provides that the notice must state the advantages of the promoter, and refers to a regulatory provision governing procedures which were already underway on 31 January 2004 and in which the notices did not contain that statement.

111. Although the Italian Government does not dispute the claims advanced in the application, the burden of proving the alleged infringement falls on the Commission and it must do so without relying on any presumption,⁶⁶ although, once sufficient

⁶⁶ — Judgments in Case 96/81 *Commission v Netherlands* [1982] ECR 1791, paragraph 6; Case C-408/97 *Commission v Netherlands* [2000] ECR I-6417, point 15; and Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraph 41.

evidence has been adduced, the Member State concerned must challenge that evidence in substance and in detail.⁶⁷

112. The two claims appear to be well-founded in principle. In the case of the first claim, because, as the Commission states, the national legislation accords to the promoter of the works certain advantages which the other candidates do not receive and are unable to do anything about. In that connection, the Court held in *Commission v Belgium* that, when a contracting entity takes into account an amendment to the initial tenders of only one tenderer, that tenderer enjoys an advantage over his competitors, which breaches the principle of the equal treatment of tenderers and impairs the transparency of the procedure (paragraph 56). Furthermore, the Commission cites a number of specific cases where the notice failed to state the advantages or stipulate the objective selection criteria.⁶⁸

113. The second claim appears to be founded on the grounds that the subsequent correction of defects in the situation giving rise to the infringement is insufficient from a temporal point of view.

114. Further to the considerations set out in the foregoing points, it is appropriate to uphold the claim that Articles 37b and 37c(1) of Law No 109/94 infringe the principle of equal treatment enshrined in Articles 43 EC and 49 EC.

H — Conclusion

115. It may be concluded from the foregoing that:

— Article 2(1) of Law No 109/94 is incompatible with Directives 92/50, 93/36, 93/37 and 93/38;

— Article 2(5) of Law No 109/94, in conjunction with Laws No 1150/1942 and No 10/1977, infringes Directive 93/37;

— Article 27(2) of Law No 109/94 infringes Directives 92/50 and 93/38;

67 — Judgment in Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraphs 84 and 86.

68 — Point 87 of the application and footnote 12 which illustrates it.

- Article 28(4) of Law No 109/94, in conjunction with Article 188 of Presidential Decree No 554/99, infringes Directives 92/50 and 93/38; and
- Articles 37b and 37c(1) of Law No 109/94 are incompatible with Articles 43 EC and 49 EC.

pay the costs if they have been applied for in the other party's pleadings. In accordance with Article 69(3) of the Rules of Procedure, where the claims are upheld in part, the Court may order that the costs be shared or that each party bear his own costs.

116. However, Article 2(5), Article 17(12), Article 27(2), and Article 30(6a) of Law No 109/94 do not infringe Articles 43 EC and 49 EC.

118. In view of the fact that the Commission and the Italian Republic have each applied for costs to be awarded against the other, and since I propose that the action be allowed in part, Italy should bear half the costs of the Commission which should, in turn, bear half the costs of that Member State.

VIII — Costs

117. Article 69(2) of the Rules of Procedure of the Court of Justice provides that the unsuccessful party must be ordered to

119. Pursuant to the first paragraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in these proceedings must bear their own costs.

IX — Conclusion

120. In the light of the foregoing considerations, I propose that the Court of Justice:

- (1) declare that, by adopting Articles 37b and 37c(1) of Law No 109/1994 of 11 February 1994, the Italian Republic has failed to fulfil its obligations

under Articles 43 EC and 49 EC; that, by adopting Article 2(1) of Law No 109 of 11 February 1994, the Italian Republic has failed to fulfil its obligations under Council Directives 92/50/EEC of 18 June 1992, and 93/36/EEC, 93/37/EEC and 93/38/EEC of 14 June 1993, relating, respectively, to the coordination of procedures for the award of public service contracts, public supply contracts, public works contracts, and the procurement procedures in the water, energy, transport and telecommunications sectors; that, by adopting Article 2(5) of Law No 109/94, the Italian Republic has failed to fulfil its obligations under Directive 93/37; and that, by adopting Articles 27(2) and 28(4) of Law No 109/94, the Italian Republic has failed to fulfil its obligations under Directives 92/50 and 93/38;

- (2) dismiss the remainder of action;
- (3) order the Italian Republic to pay half the Commission's costs;
- (4) order the Commission to pay half the Italian Republic's costs;
- (5) order the Republic of Finland and the Kingdom of the Netherlands to bear their own costs.