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Judgment of the Court of 28 October 1999.
Commission of the European Communities v Republic of Austria.
Failure of a Member State to fulfil its obligations - Public works contracts - Admissibility - Compatibility with Community law of conditions governing invitations to tender - Failure to publish a contract notice in the Official Journal of the European Communities.
Case C-328/96.
European Court reports 1999 Page I-07479

1 Actions for failure to fulfil obligations - Pre-litigation procedure - Subject-matter - Reasoned opinion - Content
(EC Treaty, Art. 169 (now Art. 226 EC))
2 Actions for failure to fulfil obligations - Pre-litigation procedure - Purpose - Time granted to the Member State concerned - Requirement that a reasonable length of time be allowed - Criteria for assessment
(EC Treaty, Art. 169 (now Art. 226 EC))
3 Approximation of laws - Review procedures relating to the award of public supply and public works contracts - Directive 89/665 - Procedure enabling the Commission to take preventive action where there has been a clear and manifest infringement of the Community rules on public procurement - Unrelated to the infringement procedure under Article 169 of the Treaty (now Article 226 EC)
(EC Treaty, Art. 169 (now Art. 226 EC); Council Directive 89/665)
4 Approximation of laws - Procedures for the award of public works contracts - Directive 93/37 - Where the Community rules are infringed by a contracting authority controlled and financed by one of the States within a Member State with a federal structure - Infringement imputable to the Member State
(Council Directive 93/37, Art. 1(b))

1 Since the subject-matter of an action brought under Article 169 of the Treaty (now Article 226 EC) is delimited by the pre-litigation procedure provided for therein, the action cannot be founded on any complaints other than those formulated in the reasoned opinion delivered by the Commission. Although the Commission is not obliged to indicate in the reasoned opinion the measures to be taken to eliminate the alleged infringement, it must, if it intends to make the failure to adopt a certain measure the subject-matter of its infringement action, specifically indicate to the Member State concerned that that measure must be adopted.
2 In the context of an action for failure to fulfil obligations, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, effectively to put forward its

defence to the complaints made by the Commission.
In view of the fact that the pre-litigation procedure has thus a dual purpose, the Commission must allow Member States a reasonable period to reply to letters of formal notice and to comply with reasoned opinions, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case. Thus, very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts.
3 The procedure by which, pursuant to Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, the Commission may - where it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed - take up the matter with a Member State, constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty (now Article 226 EC). It follows that the detailed provisions to which that special procedure is subject cannot affect the admissibility of an action brought under that provision.
4 A Member State which has a federal structure may be held liable for the actions of a contracting authority - within the meaning of Article 1(b), second subparagraph, of Directive 93/37 concerning the coordination of procedures for the award of public works contracts - all the activities of which are controlled and financed by one of the component States. If the actions of such a contracting authority were not imputable to the Member State concerned, the provisions of Community law governing the award of public contracts would be deprived of their effectiveness.

In Case C-328/96,
Commission of the European Communities, represented by H. van Lier, Legal Adviser, and, C. Claudia Schmidt, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,
applicant,
v
Republic of Austria, represented by W. Okresek, Sektionschef in the Chancellery, acting as Agent, with an address for service in Luxembourg at the Austrian Embassy, 3 Rue des Bains,
defendant,
"APPLICATION for a declaration that in connection with the building at Sankt Pölten of a new administrative and cultural centre for the Land of Lower Austria the Republic of Austria, in awarding contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) as well as under Article 30 of the EC Treaty (now, after amendment, Article 28 EC),
THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón (Presidents of Chambers), C. Gulmann (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and M. Wathelet, Judges,
Advocate General: S. Alber,
Registrar: D. Louterman-Hubeau, Principal Administrator,
having regard to the Report for the Hearing,
after hearing oral argument from the parties at the hearing on 10 November 1998, at which the Commission was represented by H. van Lier, assisted by B. Wägenbaur, Rechtsanwalt, Hamburg, and the Republic of Austria by W. Okresek and C. Kleiser, of the Amt der Niederösterreichischen Landesregierung, Sankt Pölten, acting as Agent,
after hearing the Opinion of the Advocate General at the sitting on 19 January 1999,
gives the following
Judgment

1 By application lodged at the Registry of the Court on 7 October 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, in connection with the building at Sankt Pölten of a new administrative and cultural centre for the Land of Lower Austria, the Republic of Austria, in awarding contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, had failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) as well as under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).
Facts and prelitigation procedure
2 According to the case-file, in 1986 the Government of the Land of Lower Austria decided to transfer its headquarters, which until then had been in Vienna, to Sankt Pölten.
3 The works for completing this big project, which comprises the complete construction of new buildings to house the government and the administration as well as the construction of a cultural centre at Sankt Pölten, commenced in 1992. Completion was scheduled for 1996, when Austria's millennium was to be commemorated.
4 At the beginning of February 1995, the Commission was informed, following a complaint, of an invitation to tender concerning a public supply contract, to be awarded in connection with the project, published in the Niederösterreichisches Amtsblatt (Lower Austrian Official Gazette). That invitation to tender was based on the Allgemeine Angebots- und Vertragsbedingungen (General Tendering Contract Conditions, hereinafter referred to as `the AAVB'), which the Commission considered to be contrary to Community law for infringement, in particular, of the advertising rules, the rules regarding specifications and the obligations to provide information to and for the protection of tenderers.
5 In a letter of 12 April 1995, the Commission informed the Austrian Government of its findings.
6 A few months later, the Commission received, not the expected amendments, but the notification of a Law relating to the awarding of contracts, enacted on 31 March 1995 by the Land of Lower Austria, which also raised objections because in practice it excluded from its scope of application the contracts relating to the project in question.
7 At the end of November 1995, the situation concerning those contracts was examined at a

meeting between Austrian officials and Commission officials. In view of the fact that, at that time, contracts of considerable value were still to be awarded, the Commission insisted that Community law had to be observed with immediate effect. The Austrian authorities undertook to carry out the required amendments. However, they said that it was necessary to have a sufficiently reasonable transition period owing to technical problems linked to the adaptation.

8 The Commission considered that this statement was insufficient, at least with regard to the amendment of the AAVB and contract-awarding practices, which could be adapted immediately by a simple decision of the contracting authority, namely Niederösterreichische Landeshauptstadt Planungsgesellschaft mbH (hereinafter `Nöplan').

9 In those circumstances, the Commission, by letter of 15 December 1995, decided to initiate against the Republic of Austria the procedure provided for in Article 169 of the Treaty by requiring it to submit it observations on the alleged infringements within a period of one week from receipt of its letter.

10 By letter of 22 December 1995, the Austrian Government replied that the AAVB had been amended in the way required by the Commission, that Nöplan had taken the decision `to apply with immediate effect the Community directives to all invitations to tender' and that a draft Law amending the Law relating to the award of contracts enacted by the Land of Lower Austria had been drawn up.

11 The Commission took the view that that document did not make it clear that measures had been adopted to bring all the alleged infringements to an end. It therefore issued a reasoned opinion on 21 February 1996 in which it requested the Republic of Austria to take all the measures required to comply with it within a period of 14 days from its notification.

12 In its reply of 22 March 1996, the Austrian Government stated in particular that:

- contract-awarding practices had been amended on 6 February 1996, so that as from that date current awards had been suspended and observance of Community law was ensured for contract-award procedures which had still not been completed by that date;
- contracts of a total value of about ATS 360 million, awarded between 27 November 1995 (the date of the meeting between the Austrian officials and the Commission officials) and 6 February 1996, could not, for various reasons, be suspended or cancelled.

13 The Commission, taking the view that those contracts had been awarded in breach of Community law and that the conduct of the Republic of Austria was not justified, decided to bring this action.

The relevant law

The Community rules

14 In Article 8(1), Directive 93/37 provides:

`The contracting authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer who so requests of the reasons for rejection of his application or his tender, and, in the case of a tender, the name of the successful tenderer.'

15 Article 10(6) of the same directive provides, as regards the technical specifications contained in the contractual clauses relating to a given contract:

`Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain undertakings. In particular, the indication of trade marks, patents, types, or of a specific origin or production shall be prohibited. However, if such indication is accompanied by the words "or equivalent", it shall be authorised in cases where the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to

all parties concerned.'
16 Article 11 of Council Directive 93/37/EEC lays down the common advertising rules which contracting authorities must observe in relation to contracts which they intend to award. In particular, the first paragraph of Article 11(6) and Article 11(11) provide:
`6. The notices referred to in paragraphs 1 to 5 shall be drawn up in accordance with the models given in Annexes IV, V and VI and shall specify the information requested in those Annexes.
...
11. The notice shall not be published in the official journals or in the press of the country of the contracting authority before the date of dispatch to the Official Journal of the European Communities and it shall mention this date. It shall not contain information other than that published in the Official Journal of the European Communities.'
17 Article 12(1) of this Directive further provides:
`In open procedures the time limit for the receipt of tenders, fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice.'
18 Article 24 of Directive 93/37 lays down criteria for qualitative selection of contractors, that is to say legitimate reasons for which a contractor may be excluded from participation in a contract.
19 Finally, Article 30 of the Directive lays down criteria for the award of contracts. Paragraph (1) provides:
`The criteria on which the contracting authorities shall base the award of contracts shall be:
(a) either the lowest price only;
(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.'
20 Article 1(1) and (3) of Directive 89/665 provides:
`1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 72/62/EEC, decisions taken by the contracting authorities may be reviewed effectively [...] on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.
2. ...
3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. ...'
21 Article 2(1)(c) of the Directive provides:
`1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
...
(c) award damages to persons harmed by an infringement.'
The conditions governing invitations to tender for the contracts in question
22 According to the case-file, in their version of 1 January 1995, the AAVB contained in particular the following points:
- point 2.5, entitled `Selection of tenders by the contract-awarding authority', provided that the contract-awarding authority reserved the right in all cases to select or to reject any tender without this giving rise, for tenderers, to any right, in particular for loss of profits. It was also provided that the contract- awarding authority was at liberty to decide on the award of the contract and that tenderers could not derive rights either from the statutory provisions or from standard ÖNORM A 2050. The contract-awarding authority was not under any

obligation to give the reasons for which it had refused or awarded a contract.
- point 2.10 of the AAVB, entitled `Samples of specified/tendered products/makes/materials,' stated that, where materials were technically equivalent and offered at the same price, materials originating from Lower Austria or supplies from Lower Austrian firms would be preferred.
23 Moreover, a notice published in the Niederösterreichisches Amtsblatt of 6 January 1995, concerning the contract relating to the centralised management system for the Sankt Pölten administrative centre, contained the following clauses in the specifications for the work: `The operating system for the administrative centre must meet IEEE 1003.X (POSIX) standards and must therefore be a UNIfied eXtension System V - product (Unix is a registered trade mark of the company AT&T)' (page 60 of the notice inviting tenders). As operating systems for the Unix command system, OS/2, Windows or Windows-NT are accepted (page 61 of the notice inviting tenders). As technical specifications of the system interfaces, OSF or X/OPEN were also required as well as, for the user interfaces for the operating software, OSF/Motiv, Unix and X-Windows.
24 According to the same notice, the period allowed for submission of tenders was set at three weeks.
Admissibility
25 The Austrian Government raises five objections of inadmissibility to the action. They are (i) that the complaint on which the action is based is inadmissible, (ii) that the infringements alleged in the reasoned opinion have ceased, (iii) that the time-limits set during the pre-litigation procedure were too short, (iv) that the form of order sought is too imprecise and (v) that the alleged infringements are irreparable.
The alleged inadmissibility of the complaint on which the action is based
26 The Austrian Government considers that the Commission's complaint, as defined in the form of order sought, relates to `contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled'. That claim, in the form of order sought, was not contained in the reasoned opinion.
27 It should be observed that the objection of inadmissibility raised by the Republic of Austria is based on a reading of the claim contained in the application to the effect that the subject-matter of the application is the failure by the Republic of Austria to fulfil its obligation to cancel, as far as possible, the contracts concluded before 6 February 1996 but still not fully performed by the end of the period set in the reasoned opinion.
28 It must therefore be determined whether that definition of the subject-matter of the action is correct.
29 A reading of the form of order sought, as set out in paragraph 1 of this judgment, in the light of the submissions in, in particular, part II of the application, entitled `Subject-matter of the application' and setting out the alleged infringements, shows first of all that the Commission complains that the Republic of Austria has infringed a number of provisions of Community law in procedures for the award of contracts which took place under the version of the AAVB in force on 1 January 1995, in so far as those procedures led to contracts which were concluded before
6 February 1996 but which on 7 March 1996 had still not been fully performed.
30 In this part of its application, the Commission does not set out any complaint regarding the fact that the Republic of Austria did not cancel contracts which had been concluded.
31 It is only in part I of the application, setting out the facts and the pre-litigation procedure, that the Commission sets forth, as one of the aims of initiating the Treaty infringement proceedings, the aim of `ensuring, as far as possible, the annulment of contracts concluded in breach of Community law but still not performed'. At the end of that same part, it explains

that it brought this action owing to the failure by the Republic of Austria to cancel contracts concluded in breach of Community law.

32 In those circumstances, the action brought by the Commission must be understood as relating to the Republic of Austria's Treaty infringement resulting from the breach of provisions of Community law affecting the procedures for the award of contracts which took place under the version of the AAVB in force on 1 January 1995. The references made in part I and in the form of order sought to the contracts concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled serve at any rate the purpose of defining the contracts to which this complaint relates.

33 In so far as the purpose of those references, beyond that of defining the contracts at which the complaint in the application relating to the breach of provisions of Community law is directed, is also to complain that the Republic of Austria failed to fulfil its obligation to cancel the contracts concluded before 6 February 1996 in so far as they could reasonably have been cancelled, it must be ascertained whether such a complaint was set out in the reasoned opinion.

34 According to settled case-law, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission. The subject-matter of an action brought under Article 169 of the Treaty is therefore delimited by the pre-litigation procedure provided for by that article. Consequently, the action cannot be founded on any complaints other than those formulated in the reasoned opinion (Case C-206/96 Commission v Luxembourg [1998] ECR I-3401, paragraph 13).

35 In its reasoned opinion, the Commission set out the various infringements, committed in the conduct of contract-awarding procedures, of which the Republic of Austria was accused. It was also pointed out that the reply given by the Austrian authorities to the notice calling for its observations did not refer to `the contracts for which an award procedure had already been initiated, by means in particular of national publication, but which had not yet been the subject of an award decision' and pointed out that it was for the `Austrian authorities to take all appropriate measures to rectify the infringement in question' indicating that `this was also the case for contracts for which a definitive decision has still not been taken' or `for which a contract-awarding procedure has not yet been initiated'.

36 It follows that, although, in its reasoned opinion of 21 February 1996, the Commission was referring to the infringements committed in the contract-awarding procedures conducted under the version of the AAVB in force on 1 January 1995, it nowhere expressly referred to an obligation to cancel contracts concluded before 6 February 1996 in so far as this was reasonably possible.

37 That finding is, moreover, corroborated by the circumstance that, in the letter of formal notice of 15 December 1995, the Commission expressly referred `to those lots already awarded' and requested the Republic of Austria `to suspend the legal effects of the contracts already awarded contrary to Community law'. The fact that such a passage did not appear in the reasoned opinion therefore prompts the conclusion that the corresponding complaint was abandoned by the Commission in that opinion.

38 The Commission maintains, however, that the fact that in its reasoned opinion it requested the Austrian Government to take `all appropriate measures to rectify the infringement in question' was sufficient because, according to the case-law of the Court (Case C-247/89 Commission v Portugal [1991] ECR I-3659, paragraph 22), the Commission is not obliged to set out in its reasoned opinion the measures or steps to be taken to eliminate the infringement in question. It also points out that, in its reply to the reasoned opinion, the

Austrian Government devoted a section to the `contracts already awarded', which indicated that the government had already addressed itself, in the pre-litigation procedure, to that claim.

39 It must be observed in this regard that, although, according to the case-law of the Court, the Commission is not obliged to indicate in the reasoned opinion the measures or steps to be taken to eliminate the infringement in question (see the judgment in Case C-247/89 Commission v Portugal, cited above, paragraph 22), that does not mean that it is not obliged to indicate in its reasoned opinion the complaints which will be the subject of its application to the Court (see, to this effect, Commission v Luxembourg, cited above, paragraph 13). Thus, the Commission must specifically indicate to the Member State concerned that it must adopt a certain measure if it intends to make the failure to adopt that measure the subject-matter of its infringement action. That procedural requirement, specific to the proceedings brought before the Court, does not, however, limit the rights which individuals have under the Community legal order and which may be invoked directly before the national court.

40 The fact that, in its reply to the reasoned opinion, the Austrian Government referred at length to the contracts already awarded and also explained the reasons for which the contracts concerned could not, in its view, be cancelled is not relevant in considering whether the omission in the reasoned opinion of the complaint relating to the failure to cancel the contracts already concluded was remedied. The safeguarding of the rights of the defence depends solely on the complaints contained in the application being identical to those in the reasoned opinion, and not on arguments taken up, spontaneously or following informal contacts in the reply which the Member State gives to the opinion.

41 Having regard to the foregoing considerations, it must be held that the Commission's complaint, in so far as it could be interpreted as seeking a declaration that the Republic of Austria ought, in any event, to have cancelled the contracts concluded in breach of Community law before 6 February 1996, must be held to be inadmissible.

Cessation of the infringements in question

42 The Austrian Government explains that, on 7 March 1996, the date on which the period set in the reasoned opinion expired, it had entirely brought to an end the infringements alleged in the reasoned opinion, since the AAVB had been amended in the way sought by the Commission and contract-awarding practice had also been amended after 6 February 1996.

43 Having regard to the findings in paragraphs 32 and 41 above, it must be determined whether, on the date on which the period set in the reasoned opinion expired, the Republic of Austria had brought to an end the alleged infringement arising from the breach of Community law affecting the contract-awarding procedures conducted under the version of the AAVB applying from 1 January 1995.

44 Although it is true that the Republic of Austria has, from 12 December 1995, amended the AAVB in the way indicated by the Commission and that, from 6 February 1996, it has applied the new version of the AAVB to all procedures already underway on that date, it is also established that it has done nothing in relation to the contract-awarding procedures conducted entirely under the version of the AAVB applying on 1 January 1995, so that any effects contrary to Community law produced by these procedures still subsisted on the date on which the period set in the reasoned opinion expired.

45 This objection of inadmissibility must therefore be dismissed.

Setting of excessively short periods in the pre-litigation procedure

46 The Austrian Government contests the admissibility of the action on the ground that the period of one week set for replying to the letter of formal notice and the period of 14 days set for complying with the reasoned opinion were unreasonably short.

47 It argues first of all that there was no urgency, since the situation objected to by the

Commission antedated 6 February and was therefore entirely in the past and that the Commission was aware of this when it issued its reasoned opinion, since the Austrian authorities had informed it in writing, on 7 February 1996, that their contract-awarding practices had been adapted to Community law. Moreover, the Commission itself took almost a month to address to the Republic of Austria the reasoned opinion the sending of which had already been announced in a press release on 25 January 1996.

48 Secondly, the Republic of Austria contends that the periods set did not take account of the time needed for coordination between the federal authorities, the Land of Lower Austria and Nöplan following a re-evaluation of the legal position by the Land of the procedures objected to.

49 Lastly, in assessing whether the period set by the Commission in its reasoned opinion was reasonable, reference must be made to Article 3(3) of Directive 89/665, which mentions a period of 21 days.

50 The Commission replies that the periods set were justified having regard to the situation to which it was objecting. In particular, the period set in the letter of formal notice was justified because, following information received from the Austrian authorities themselves, at the beginning of December 1995 there were still contracts of considerable value to be awarded and it was therefore necessary to obtain as quickly as possible an assurance from the Austrian Government that those contracts would be awarded in compliance with Community law and that the existing infringements would be remedied. The period set in the reasoned opinion was also appropriate because the reply to the letter of formal notice did not seem to provide a guarantee that the Austrian Government was prepared to remedy all the infringements complained of, especially since it had not complied with the Commission's request to send it a list of, in particular, the contracts which were still to be published.

51 It must be observed in this regard that, according to the case-law of the Court, the dual purpose of the pre-litigation procedure (see paragraph 34 above) requires the Commission to allow Member States a reasonable period to reply to letters of formal notice and to comply with reasoned opinions, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case. Thus, very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts (judgment in Case 293/85 Commission v Belgium [1988] ECR 305, paragraph 14).

52 The question to be examined is therefore whether the shortness of the periods set by the Commission was justified in view of the particular circumstances of this case.

53 As regards, first of all, the one-week period set in the letter of formal notice, it must be concluded that, as the Commission quite rightly indicated without being effectively contradicted by the Austrian Government, the situation objected to was urgent, having regard to the contracts of considerable value which were still in the process of being awarded during the pre-litigation procedure on the basis of procedures which the Commission considered to be contrary to Community law.

54 Moreover, the adaptation to Community law of contract-awarding practices did not require any time-consuming coordination between the various authorities or departments since a simple decision by the contracting authority would have been sufficient. Besides, the Austrian authorities had already been informed of the Commission's complaints from the time of the meeting which had taken place at the end of November 1995.

55 Next, as regards the 14-day period set in the reasoned opinion, it is common ground that, at the time when that opinion was adopted, the Republic of Austria had not sent to the Commission the list of contract awards completed under the version of the AAVB in force

on 1 January 1995, so that the Commission was unable to assess to what extent the notification made by the Republic of Austria on 7 February 1996 concerning the adaptation to Community law of contract-awarding practice with effect from 6 February 1996 was capable of guaranteeing that there would be no more contract-awarding procedures contrary to Community law. Similarly, the fact that the Commission issued its reasoned opinion nearly a month after the reports concerning the opinion appeared in the press, though regrettable, was not such as to detract from the urgency of the situation in question.

56 It follows that the periods set by the Commission in the letter of formal notice and in the reasoned opinion must be regarded as reasonable.

57 As regards the argument which the Austrian Government bases on Article 3(3) of Directive 89/665, it is sufficient to reiterate that the special procedure under that directive is a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 169 of the Treaty (see Case C-353/96 Commission v Ireland [1998] ECR I-8565, paragraph 22). It follows that the detailed provisions to which that special procedure is subject cannot affect the admissibility of an action brought under Article 169 of the Treaty.

58 Consequently, this objection of inadmissibility must be dismissed.

Imprecise nature of the form of order sought

59 The Austrian Government contends that the action is inadmissible on the ground that in the form of order it seeks and at several places in its application the Commission refers both to the possibility of cancellation without indicating, in the part of the application devoted to its legal assessment, the criteria on the basis of which that possibility is to be assessed.

60 It is sufficient to observe that this objection has become devoid of purpose since in paragraph 41 above the Court held that, in so far as the Commission's application is to be understood as based on a complaint that the contracts concluded were not cancelled, it is inadmissible.

The objection that the alleged infringements are irreparable

61 The Austrian Government contests the admissibility of the application on the ground that the alleged infringement, consisting of a failure to cancel contracts already awarded, is by its nature incapable of being made good.

62 In any event, this objection is also devoid of purpose for the reason indicated in paragraph 60 above.

Substance

63 The Commission observes first of all that, as from the time of its accession to the European Union on 1 January 1995, the Republic of Austria was bound to observe Community legislation, which include the directives relating to the award of public contracts.

64 It contends, secondly, that, during the procedures for the award of contracts under the version of the AAVB in force as from 1 January 1995, the Republic of Austria infringed a number of provisions of Community law.

65 First of all, it infringed several provisions of Directive 93/37. Thus, it appears from the AAVB, in the version in force on 1 January 1995, and from the contract notice published in the Niederösterreichisches Amtsblatt of 6 January 1995 concerning the contract for the centralised management system for the Sankt Pölten administrative centre that Nöplan had not respected either the advertising rules laid down in Article 11(6) and (11) of that directive or the provision concerning a minimum period for the receipt of tenders laid down in Article 12 of that directive.

66 It also emerges from the AAVB, in particular point 2.5, that Nöplan had likewise not respected the obligation to provide reasons to tenderers whose applications were rejected, laid down in Article 8 of Directive 93/37.

67 Next, it follows in particular from point 2.5 of the AAVB that no account had been taken of either the qualitative selection criteria laid down by Directive 93/37, such as the grounds for exclusion laid down in Article 24, in the determination whether an undertaking fulfilled the conditions necessary for being able to participate in a tendering procedure, or of the criteria for the award of contracts laid down in Article 30 of that Directive.
68 Finally, as regards the technical aspect, Nöplan had, at least as regards the procedure for awarding the contract relating to the centralised management system for the Sankt Pölten administrative centre, infringed Article 10(6) of Directive 93/37 in so far as it included in the tender documents a specific specification concerning the operating system for the building control centre which had the effect of favouring `Unix products'.
69 Thirdly, the Commission complains that the Republic of Austria infringed its obligations under Article 30 of the Treaty. It claims that this is the case with regard to the insertion of the technical specification favouring `Unix products' which in its view entails an obstacle to the free movement of goods.
70 According to the Commission, the same applies as regards the preference which point 2.10 of the AAVB accords, in the case of equivalent tenders, to materials produced in Lower Austria or to Austrian undertakings.
71 Lastly, the Commission contends that the Republic of Austria infringed Directive 89/665. In particular, point 2.5 of the AAVB absolutely excludes from the outset all the rights which tenderers might assert in a selection procedure, which is contrary to the principles relating to the protection of tenderers laid down in Article 1(1) and (3) and Article 2(1)(c) of that directive.
72 The Austrian Government confines its defence to contesting the applicability of Directives 89/665 and 93/37 on the ground that, in its application, the Commission failed to indicate the legal reason for which Nöplan, as an independent legal entity and therefore itself a contracting authority within the meaning of the second subparagraph of Article 1(b) of Directive 93/37, should have applied those directives directly. That question is of decisive importance, because the law of Lower Austria then in force concerning the award of public contracts had expressly excluded the Sankt Pölten project from its scope. Moreover, the Commission has not explained the reason for which Nöplan's conduct was imputable to the Republic of Austria.
73 The Austrian Government also maintains that the Commission also fails to indicate in its application the reason for which the construction of the new Sankt Pölten administrative and cultural centre, which it clearly considers to be a single project, in accordance with Article 1(c) and 6(3) and (4) of Directive 93/97, ought to have been subject, from the accession of the Republic of Austria to the European Union, to Directives 89/665 and 93/37.
74 The Court observes in this regard that it is common ground that Nöplan is a contracting authority within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 and that, as the Austrian Government itself admits in its defence, it has not contested the detailed analysis made by the Commission in the reasoned opinion of the relationship between the Land of Lower Austria and Nöplan whereby the Land of Lower Austria controls and finances all activities regarding the construction of the administrative centre. In those circumstances, Nöplan was under an obligation to respect the Community provisions governing the awarding of contracts, irrespective of any possibility for the operators concerned to invoke against it provisions governing the awarding of contracts which have direct effect.
75 As regards the question whether the Republic of Austria may be held liable for the actions of Nöplan as contracting authority, it is sufficient to state that the Community directives governing the award of public contracts would be deprived of their effectiveness if the actions of a contracting authority such as Nöplan were not imputable to the Member

State concerned (see, to this effect, Commission v Ireland, cited above, paragraph 23).
76 Finally, it is clear from the case-file that, contrary to the assertions of the Austrian Government, the Commission did not in any way suggest that the construction of the new administrative and cultural centre at Sankt Pölten was to be regarded as a single project. On the contrary, in all the stages of these proceedings, it indicated to the Austrian Government that, having regard to the fact that the value of the contracts still to be awarded, from 1 January 1995, the date on which the Republic of Austria acceded to the European Union, exceeded the threshold laid down in Directive 93/37, that Member State had to comply with the Community provisions on the award of public contracts.
77 It follows that the objections made by the Republic of Austria to the applicability of Directives 89/665 and 93/37 must be dismissed.
78 The Austrian Government has not contested the substance of the infringements of which it is accused.
79 Having regard to the foregoing, it must be held that, in connection with the building at Sankt Pölten of the new administrative and cultural centre for the Land of Lower Austria, the Republic of Austria, in awarding the contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, has failed to fulfil its obligations under Directives 93/37 and 89/665 and under Article 30 of the Treaty.

Costs
80 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Republic of Austria has failed in its submission, it must be ordered to pay the costs.

On those grounds,
THE COURT
hereby declares:
1. In connection with the building at Sankt Pölten of the new administrative and cultural centre for the Land of Lower Austria, the Republic of Austria, in awarding the contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled, has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, under Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).
2. The Republic of Austria is ordered to pay the costs.