JUDGMENT OF THE COURT

31 October 2017*

(Public procurement – Directive 89/665/EEC – Directive 2004/18/EC – Claim for compensation - Culpability – Gravity of the breach - Burden of proof — Verification of the tender submitted – Principles of effectiveness, equal treatment, transparency and proportionality)

In Case E-16/16,

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Frostating Court of Appeal (*Frostating lagmannsrett*), in a case pending before it between

Fosen-Linjen AS

and

AtB AS

concerning the interpretation of 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 in particular Article 1(1) and Article 2(1)(c) thereof,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Benedikt Bogason (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Fosen-Linjen AS ("Fosen-Linjen"), represented by Anders Thue, advocate;

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* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- AtB AS ("AtB"), represented by Goud Helge Homme Fjellheim, advocate;

- the Norwegian Government, represented by Helge Røstum, advocate at the Attorney General (Civil Affairs), Carsten Anker and Dag Sørlie Lund, Senior Advisers, Ministry of Foreign Affairs, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Øyvind Bø and Marlene Lie Hakkebo, members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission (the "Commission"), represented by Ken Mifsud Bonnici and Adrián Tokár, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Fosen-Linjen, represented by Anders Thue and Jan Magne Juuhl-Langseth, advocate; AtB, represented by Goud Helge Homme Fjellheim; the Norwegian Government, represented by Helge Røstum; ESA, represented by Øyvind Bø and Marlene Lie Hakkebo; and the Commission, represented by Adrián Tokár; at the hearing on 3 May 2017,

gives the following

Judgment

I Legal background

EEA law

1 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) ("the Remedies Directive"), is referred to at point 5 of Annex XVI (Procurement) to the Agreement on the European Economic Area ("the EEA Agreement").

2 The first four recitals in the preamble to the Remedies Directive read:

> *Whereas Community Directives on public procurement, in particular Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as last amended by Directive 89/440/EEC, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts as last amended by Directive 88/295/EEC, do not contain any specific provisions ensuring their effective application;*
>
> *Whereas the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with*

the relevant Community provisions particularly at a stage when infringements can be corrected;

Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement, or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

3 The sixth recital in the preamble to the Remedies Directive reads:

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

4 At the relevant time, Article 1(1) of the Remedies Directive read:

This Directive applies to contracts referred to in 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, unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

...

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

5 Article 2(1)(c) of the Remedies Directive reads:

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

...

(c) award damages to persons harmed by an infringement.

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6 Directive 2004/18/EC of the European Parliament and of the Council 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, and Norwegian EEA Supplement 2009 No 34, p. 216) was inserted to point 2 of Annex XVI to the EEA Agreement by Joint Committee Decision No 68/2006 of 2 June 2006 (OJ 2006 L 245, p. 22, and EEA Supplement 2006 No 44, p. 18), which entered into force on 18 April 2007. Directive 2004/18/EC applied in the EEA at the relevant time. It has since been repealed and replaced by Directive 2014/24/EU (OJ 2014 L 94, p. 65).

7 The first recital in the preamble to Directive 2004/18/EC reads:

> *On the occasion of new amendments being made to Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, which are necessary to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directives should, in the interests of clarity, be recast. This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2.*

8 The second recital in the preamble to Directive 2004/18/EC reads:

> *The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.*

9 The fourth recital in the preamble to Directive 2004/18/EC reads:

> *Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.*

10 The forty-sixth recital in the preamble to Directive 2004/18/EC reads:

> *Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.*
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> *To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.*
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> *Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.*
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> *In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of*

particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

11 Article 41(1) of Directive 2004/18/EC reads:

Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

National law

12 The Norwegian rules for tender procedures were, at the relevant time, set out, *inter alia*, in the Act of 16 July 1999 No 69 on Public Procurement (*lov om offentlige anskaffelser*) ("the Procurement Act") and the Regulation of 7 April 2006 No 402 on Public Procurement (*forskrift om offentlige anskaffelser*) ("the national procurement regulation").

13 Section 11 of the Procurement Act provides:

In case of a breach of this Act or regulations issued in pursuance of this Act, the plaintiff is entitled to damages to cover the loss suffered as a consequence of the breach.

14 Under Norwegian damages law, the positive contract interest (that is a loss of reasonably expected profits; *lucrum cessans*) has traditionally not been considered protected during the pre-contractual phase. However, in a judgment of 2001, the Supreme Court of Norway (*Norges Høyesterett*) concluded that an aggrieved tenderer is entitled to damages on three conditions (Rt. 2001 p. 1062). First, the contracting authority must have committed a material error. Second, the tenderer must have suffered financial loss. Third, there must be a high degree of probability that there is an adequate causal link between the error committed and the loss incurred.

15 In a judgment of 2008, the Supreme Court of Norway found that the threshold for liability under Norwegian law is not higher than the threshold for liability for breach of EEA law by an EEA State (Rt. 2008 p. 1705).

II Facts and procedure

Background

16 According to the reference, Fosen-Linjen is a small, local undertaking, established in 1999. The company has operated two minor ferry services for approximately 15 years.

There are a number of ferry operators active in Norway: some major, such as Norled AS ("Norled"), and some minor local operators besides Fosen-Linjen.

17 The public transport services in Sør-Trøndelag county are administered through AtB, which is a company furnished with the tasks of planning (i.e. the overall coordination and planning of routes), promotion (including the sale of tickets) and procurement of public transport services. The overall responsibility for public transport services in the county lies with Sør-Trøndelag County Authority (*Sør-Trøndelag fylkeskommune*).

18 AtB does not operate the actual services, but instead procures transport services from privately owned operators, and acts as their contracting authority. It receives significant subsidies from the county in order to finance the operation of the service network.

The tender procedure

19 In June 2012, Sør-Trøndelag County Council (*Fylkestinget i Sør-Trøndelag*) decided to assign to AtB the task of preparing tender specifications and carrying out a tender procedure for the procurement of ferry services.

20 The tender procedure notice was published on 5 June 2013. Tenders were invited for two lots, both for a contract period of ten years and with a unilateral option for AtB to extend the contract for up to two years. The tender procedure was carried out using the negotiated procedure in accordance with the rules laid down in Part II of the national procurement regulation. The deadline for submitting tenders was 14 October 2013.

21 The dispute at issue relates to the first lot concerning the service between Brekstad and Valset. Two ferries were requested for that lot.

22 Tenders were received from Fosen-Linjen, Norled and Boreal Transport Nord AS. After an extensive round of questions, responses and negotiations, Norled and Fosen-Linjen submitted revised tenders in November 2013.

23 AtB evaluated the tenders. The award criteria were "price" (50 per cent), "environment" (25 per cent) and "quality" (25 per cent). A score was awarded to each criterion on a scale from one to ten, and then weighted in accordance with the weight assigned to that criterion in the tender specifications. This process was in accordance with the rules on procurement procedure as set out in the tender specifications.

24 Under the criterion concerning quality, tenderers were required to submit, inter alia, a description of the tendered vessels.

25 The evaluation of the award criterion environment was based on the tenderers' specification of fuel oil consumption for the two ferries for the Brekstad-Valset service. The tenderers were not required to demonstrate how the fuel oil consumption value was calculated or to state the assumptions upon which the calculations were based.

26 Further questions relating to the documentation requirement for the environment criterion were discussed at a tender conference in June 2013. AtB then introduced a new

contractual penalty to apply during the contract period. According to the contractual term, deviations of more than 10 per cent from the fuel oil consumption specified in the tender during the performance of the contract would trigger a penalty charge of NOK 1 per litre. Although the question concerning the award criterion environment was raised a second time, no documentation requirements were introduced.

27 By letter of 17 December 2013, AtB informed the interested parties that Norled would be awarded the contract. Norled had been awarded a score of 9.39 points, Fosen-Linjen 9.06 points and the third tenderer 5.73 points. Fosen-Linjen was ranked first in terms of price, Fosen-Linjen and Norled were ranked equally in terms of quality, and Norled was considered best with regard to the criterion of environment.

28 Following a complaint made by Fosen-Linjen, the points awarded were re-evaluated and by letter of 15 January 2014, the parties were informed that 9.16 points were given to Norled, 9.06 to Fosen-Linjen and 5.52 to the third tenderer.

29 On 3 January 2014, Fosen-Linjen brought a case before Sør-Trøndelag District Court (*Sør-Trøndelag tingrett*) and requested that court to issue an interim measure to stop the signing of the contract between AtB and Norled. The District Court prohibited the contract's signature. AtB appealed the District Court's decision, but it was upheld by Frostating Court of Appeal in an order of 17 March 2014.

30 In its appeal, AtB had argued that, as regards the verification requirements, it had, "a good basis for ascertaining that Norled had stated a realistic fuel oil consumption". This assessment was based on "its own competence and experience". However, that argument is no longer maintained by AtB.

31 By a letter of 30 April 2014, AtB informed the tenderers that it had decided to cancel the tender procedure following the Court of Appeal's order. AtB referred to the Court of Appeal's finding that it had failed to establish a reasonable basis for evaluation and that it had committed an error by not verifying the reasonableness of Norled's stated fuel oil consumption. The letter finally set out that AtB lacked grounds on which to reject Norled's tender, as it had breached its obligation to provide guidance to Norled. Fosen-Linjen did not contest this decision before the courts. Subsequently, AtB signed a contract with Norled for the operation of the Brekstad-Valset ferry service for 2015 and 2016. A new invitation to tender for this service was announced at the beginning of 2016 and concerned the service's operation from 2019 to 2029. Fosen-Linjen did not submit a tender in this procedure.

32 In February 2014, Fosen-Linjen brought an action against AtB. In the subsequent proceedings, it claimed damages for positive contract interest (loss of profit – *lucrum cessans*) or, in the alternative, for negative contract interest (costs of bidding – *damnum emergens*).

33 By a judgment of 2 October 2015, the District Court found in favour of AtB and rejected the claim for damages with regard to both the negative and the positive contract interest sought.

34 The District Court held that there is a requirement under EEA law that award criteria should be linked to documentation. In the case at issue, the contracting authority had failed to require the necessary documentation. The District Court found that AtB, in the tender specifications, had not requested information about any of the parameters that were important for the calculation of fuel oil consumption, such as hull resistance, propulsive efficiency, transmission loss, hotel load and ship resistance. Furthermore, it held that none of the tenderers had understood the tender specifications to mean that they were required to document fuel oil consumption at the time of submitting the tender.

35 On 30 October 2015, Fosen-Linjen brought an appeal against the District Court's judgment before Frostating Court of Appeal.

36 By a letter of 24 October 2016, registered at the Court on 31 October 2016, the Court of Appeal referred the following questions to the Court:

1. *Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts, is conditional on*

   (a) the existence of culpability and a requirement that the contracting authority's conduct must deviate markedly from a justifiable course of action?

   (b) the existence of a material error where culpability on the part of the contracting authority is part of a more comprehensive overall assessment?

   (c) the contracting authority having committed a material, gross and obvious error?

2. *Should Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, be interpreted to mean that a breach of an EEA procurement law provision under which the contracting authority is not free to exercise discretion, constitutes in itself a sufficiently qualified breach that may trigger a right to damages on certain conditions?*

3. *Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts is conditional on the supplier that brings the case and claims compensation proving with a clear, that is qualified preponderance of evidence, that [said supplier] should have been awarded the contract had the contracting authority not committed the error?*

4. *Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules whereby the contracting authority can free itself of the claim for damages by invoking that the tender procedure should in any case have been cancelled as a consequence of an error committed by the contracting authority, other than the error invoked by the plaintiff, when that error was not in fact invoked during the tender procedure? If such other error can be invoked by the contracting authority, does Directive 89/665/EEC preclude a national rule whereby the supplier that brings the action has the burden of proof for the non-existence of such an error?*

5. *What requirements does the EEA law principle of equal treatment place on the contracting authority's effective verification of the information provided in the tenders linked to the award criteria? Will the requirement for effective verification be met if the contracting authority is able to verify that the properties offered in the tender appear to have been reliably determined on the basis of the documentation provided in the tender? How accurately must the contracting authority be able to verify the properties of the contract object offered in the tender? If the tenderer commits himself to a certain consumption figure for the tendered object, and this figure is incorporated in the tender evaluation, is the contracting authority's verification obligation met if he is able to verify that this figure is reliable with a certain uncertainty margin, for example in the order of plus/minus 20%?*

6. *When the contracting authority is to verify the information provided by a tenderer in connection with an award criterion, can the requirement for effective verification of the tenders under the principle of equal treatment be met by the contracting authority having regard to documentation provided elsewhere in the tender?*

37 In its request, the referring court expresses its difficulty in reconciling the judgments of the Court of Justice of the European Union ("ECJ") in *Commission* v *Portugal* (C-275/03, EU:C:2004:632) and *Strabag and Others* (C-314/09, EU:C:2010:567) with the same court's judgment in *Combinatie Spijker and Others* (C-568/08, EU:C:2010:751). The referring court also states that the parties disagree as to the documentation requirements and the notion of effective verification of information implied by the ECJ's judgment in *EVN and Wienstrom* (C-448/01, EU:C:2003:651).

38 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Admissibility

Observations submitted to the Court

39 *AtB* maintains that some of the questions are hypothetical. In particular, as regards the first, second, fourth, fifth and sixth questions, AtB considers that these questions, in one way or another, either do not correctly reflect the provisions at issue in the present case or the relevant facts. The *Norwegian Government* likewise submits that the second, and parts of the fifth and sixth question are irrelevant or hypothetical.

40 *ESA* contends that the third question relates to the national rules on causality and is limited to the positive contract interest only. However, where a tender procedure is lawfully cancelled, tenderers can neither claim a right to be awarded the contract nor damages for the loss of profits. A right to be awarded a contract with the corresponding right to claim damages for positive contract interest will only exist where there are exceptional circumstances, or the tender procedure has been completed and the contract has been unlawfully awarded to another tenderer. In the case at issue, the tender procedure was cancelled, and the request from the national court indicates that there are no such exceptional circumstances present that would give rise to a claim for damages for positive contract interest under EEA law. The third question is consequently hypothetical and inadmissible.

Findings of the Court

41 Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment.

42 Article 34 SCA establishes a cooperation between the Court and the national courts and tribunals. That cooperation is intended to contribute to a homogeneous interpretation of EEA law by providing assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, paragraph 27 and case law cited).

43 Questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Synnøve Finden*, cited above, paragraph 28 and case law cited).

44 The Court does not find any of the exceptions from the presumption of relevance applicable in the case at hand. The questions referred are thus admissible.

IV Answers of the Court

45 The Court of Appeal has referred six questions. The first two questions concern, in essence, the conditions for claiming damages in the context of a tender procedure. They will therefore be addressed together. The third question relates to the burden of proof when claiming damages for positive contract interest. The fourth question concerns what arguments a contracting authority can rely upon as defence against liability, and the burden of proof in that regard. By its final two questions, the Court of Appeal seeks to ascertain, in essence, the extent to which the principle of equal treatment entails a requirement of documentation and of effective verification of information provided in tenders. As they are related, the Court will address the final two questions together.

First and second questions

Preliminary remarks

46 In its first question, the referring court asks whether Articles 1(1), 2(1)(c) of the Remedies Directive, or other provisions of that Directive preclude rules making the award of damages conditional on certain criteria. These are referred to in sub-question 1(a) as culpability and a requirement that the contracting authority's conduct "must deviate markedly from a justifiable course of action"; in sub-question 1(b) as the existence of a "material error" where culpability is part of a more comprehensive overall assessment; and in sub-question 1(c) as the existence of a "material, gross and obvious error". By its second question, the Court of Appeal asks whether a breach of a provision of EEA procurement law, which leaves no discretion to the contracting authority, could constitute in itself a "sufficiently qualified breach" triggering a right to damages.

47 It appears disputed whether, and to what extent, these questions correctly reflect the conditions stemming from national law and their interpretation by national courts.

48 The Court finds it appropriate to address the first and second questions together.

Observations submitted to the Court

49 *Fosen-Linjen* submits that the criteria of EEA State liability cannot be applied to damage claims related to a tender procedure. However, even were the State liability rules to apply under the Remedies Directive, they would have to be construed in line with the principle of effectiveness. The Court should follow the approach adopted by the ECJ in *Strabag and Others*, which would be fully compliant with the approach adopted in *Combinatie*. A breach of a national public procurement rule transposing EEA law, according to which a contracting authority may not exercise any discretion, in itself constitutes a sufficiently serious breach that gives a right to damages under the Remedies Directive if the other conditions for claiming damages are fulfilled. Since AtB went on to sign a two-year contract with Norled, without a competitive tendering procedure, Fosen-Linjen contends that it had no other remedy available than to seek damages.

50 *AtB* doubts whether the contract at issue has a cross-border element. Accordingly, it addresses the issues only in the alternative. AtB submits that the award of damages depends on national law. In Norway, these conditions have been established by case law. The conditions for loss of profit differ substantially from the conditions for awarding damages for the costs of bidding. However, none of the conditions mentioned by the referring court corresponds to the basis of liability applied in Norwegian law.

51 As regards the conditions of liability, *AtB* invites the Court to base its findings on *Combinatie*, as opposed to *Strabag and Others* which develops the approach taken in *Brasserie du Pêcheur* (C-46/93 and C-48/93, EU:C:1996:79) to the effect that national law cannot make liability dependent upon a condition based on any concept of fault going beyond that of a "sufficiently serious breach". Of particular importance is the principle of effectiveness. The combined effect of the remedies available is decisive in determining whether a national review procedure is effective.

52 According to *AtB, Strabag and Others* concerned a provision governing damages for costs incurred. Establishing strict liability for the loss of profit would be considerably more burdensome while adding no greater deterrent effect than liability based on a sufficiently serious error. The conditions under Norwegian law for damages in such cases do not render it practically impossible or excessively difficult to exercise the rights conferred by EEA procurement law. Accordingly, they must be considered sufficiently effective. The contracting authority enjoys a broad discretion in the decision to cancel an award procedure even in the context of procedures fully covered by Directive 2004/18/EC.

53 Upon a question from the bench as to whether the contracting authority acts in the exercise of public authority (*acta juri imperii*) or as a merchant, i.e. conducting a commercial act (*acta juri gestionis*), AtB submitted that the award of a public contract is a commercial act. Upon further questions from the bench, AtB nevertheless contended that it was only *Combinatie* which was relevant to establish State liability in such cases.

54 The *Norwegian Government* argued that Article 2(1)(c) of the Remedies Directive does not set out any specific requirements for the award of damages. Thus, recourse must be had to the principle of State liability. A lack of discretion may imply that a breach is "sufficiently serious". A misinterpretation of EEA law on public contracts cannot in itself be regarded as a "sufficiently serious breach" triggering liability. It would be necessary also to consider the degree of clarity and precision of the provision infringed. In the Norwegian Government's view, Norwegian law complies with the condition that there has to be a "sufficiently serious breach".

55 Following a statement from the bench that State liability usually concerns wrongdoing by the legislature, by the government, or by the courts, the Norwegian Government submitted that *Combinatie* reiterated that the Remedies Directive gives concrete expression to the principle of State liability in the context of public procurement.

56 *ESA* maintains that in the absence of EEA law governing the matter, it is for the legal order of each EEA State to determine the criteria for the award of damages arising from

an infringement of EEA public procurement law. Following *Combinatie*, Article 2(1)(c) of the Remedies Directive is to be considered an expression of the principle of State liability. A national rule limiting the right to damages to infringements committed with *culpa* is, however, clearly precluded by Article 2(1)(c) of the Remedies Directive. In determining whether a breach is "sufficiently serious", national courts need to take into account a number of factors. However, while some of the conditions described by the referring court in the first question may play a certain role in the overall assessment, EEA States cannot limit the scope of State liability by adopting additional conditions or tests. As regards the second question, ESA submits that a breach of a rule that affords no discretion to the State in implementation will be enough to establish a "sufficiently serious" breach where the rule is clear and unequivocal. Thus, one of the factors to be taken into account in the referring court's assessment is the clarity of the infringed rule.

57 Upon a question from the bench as to whether State liability establishes a high threshold for damage claims, in particular with a view to the judgments in *Brasserie du Pêcheur*, cited above, or *Dr Jürgen Tschannett*, Case E-6/00 [2000-2001] EFTA Ct. Rep. 203, ESA submitted that the condition of "sufficiently serious breach" does not always provide for a high threshold. If the criterion is correctly applied, the rule itself is clear and where it leaves no discretion to the contracting authority, the criterion of "sufficiently serious breach" should be considered as being fulfilled.

58 The *Commission* argues that a simple breach of a sufficiently clear rule of European law, which does not leave discretion to the contracting authority, should be considered sufficient. The rules in the field of public procurement have been subject to extensive harmonisation since the 1970s and the ECJ has found many of the rules established by public procurement directives to be sufficiently clear and precise to have direct effect. The contracting authorities are, moreover, obliged to establish award criteria and formulate them in a manner that is both clear and precise. They are also obliged to apply the criteria that they themselves formulated. Accordingly, these criteria limit the contracting authorities' own discretion. *Strabag and Others* does not limit damages to cases where the contracting authority is at fault or where the breach of public procurement law is particularly serious.

59 At the hearing, the Commission added that the attempt to "re-import" a condition from general principles to the Remedies Directive is a matter of concern. The Remedies Directive harmonises remedies. The general principle of State liability should apply only by default where there is no such harmonization. As damages are frequently the only remedy available, they should not be made more difficult or less advantageous to obtain than the other types of remedies provided for by the Remedies Directive. This was confirmed by the ECJ in *Strabag and Others*. The Remedies Directive is clear on the point that any infringement of public procurement law should be followed up and should not be left unattended because the breach is not "sufficiently serious".

60 Also at the hearing, the Commission further maintained that in *Combinatie* the national court also had doubts as to whom the illegality under public procurement law was attributable. In particular, it was questionable whether it was attributable to the contracting authority, a court, or a third party. This was an issue that was to be decided

under Dutch law. Accordingly, *Combinatie* rightfully provides a rather reserved view on the issue of damages.

Findings of the Court

61 It follows from its first and second recitals that the purpose of Directive 2004/18/EC is to simplify and modernise the national procedures for the award of public contracts, in order to facilitate the freedom of movement of goods, the freedom of establishment, the freedom to provide services and the opening-up of such contracts to competition (compare *Ambisig* v *AICP*, C-46/15, EU:C:2016:530, paragraph 51).

62 The system established by Directive 2004/18/EC aims, as is apparent from the second, fourth and forty-sixth recitals thereof, to avoid distortions of competition between private tenderers and to ensure compliance with the principles of transparency, non-discrimination and equal treatment (compare *Ambisig*, cited above, paragraph 38).

63 The risk of a distortion of competition brought about by the preferential treatment of some operators in relation to others is always present where a contracting authority decides to entrust an undertaking with the operation of certain services (compare the opinion of Advocate General Kokott in *Auroux and Others*, C-220/05, EU:C:2007:31, point 43).

64 Furthermore, a contracting body, in a case such as the one at issue, does not exercise an act of public authority (*actum jure imperii*) when conducting a tender procedure. This is contrary to the situation where the national legislature transposes EEA law on public procurement or where the national courts render judgments applying the principles set out therein. Rather, a tender procedure aims at the conclusion of a contract *inter partes*, which encompasses a commercial act. Upon a question from the bench, this was acknowledged by AtB at the hearing.

65 Thus, although Directive 2004/18/EC contains essentially procedural norms, which provide a framework for the efficacy and prudence of public spending, these rules are also intended to protect the interests of traders (compare, for example, *Commission* v *Germany*, C-20/01 and C-28/01, EU:C:2003:220, paragraph 35).

66 The Remedies Directive is closely related to Directive 2004/18/EC and aims, as can be inferred from its first, second and third recital, at providing adequate remedies that ensure compliance with the relevant EEA provisions on public contracts.

67 Another fundamental objective of the Remedies Directive is to create the framework conditions under which tenderers can seek remedies in the context of public procurement procedures, in a way that is as uniform as possible for all undertakings active on the internal market. Thereby, as is also apparent from the third and fourth recitals to the Remedies Directive, equal conditions shall be secured. This will ultimately contribute to the opening-up of procurement markets to competition across the EEA.

68 Furthermore, the provisions of the Remedies Directive are intended to protect tenderers from arbitrary behaviour on part of the contracting authority, and are designed to ensure the effective application of EEA rules in the award of public contracts (compare *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 59).

69 In order to achieve this outcome, Article 1(1) of the Remedies Directive obliges the EEA States to take the measures necessary to ensure that contracting authorities' decisions may be reviewed effectively and as rapidly as possible. Article 2(1)(c) of the Remedies Directive states that the measures taken concerning such review procedures must include provision for powers to award damages to those harmed by an infringement of public procurement law. However, neither Articles 1(1), 2(1)(c) nor any other provisions of the Remedies Directive lay down any conditions for the award of damages as a remedy in the field of public procurement.

70 Therefore, in the absence of EEA rules on this matter it is for the legal order of each EEA State, in principle, to determine the criteria on the basis of which harm caused by an infringement of EEA law on the award of public contracts must be assessed. The national rules laying down these conditions must nevertheless comply with the principles of equivalence and effectiveness (compare the judgment in *Combinatie*, cited above, paragraph 90, and case law cited).

71 However, it must be noted, that the wording of Articles 1(1) and 2(1), as well as the sixth recital in the preamble to the Remedies Directive in no way indicate that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed should have specific features (compare *Strabag and Others*, cited above, paragraph 35).

72 The Remedies Directive must, moreover, be interpreted in the light of fundamental rights, in particular the right to an effective judicial remedy.

73 In this regard, the Court recalls, that while it is preferable that a breach of public procurement law will be corrected before a public contract takes effect, there may be cases where such a breach can only be remedied by way of damages. For instance, the second subparagraph of Article 2(6) of the Remedies Directive reserves to the EEA States the right to limit the powers of the body responsible for review procedures, after the conclusion of a contract following its award, to the award of damages.

74 Against the background of the fundamental right to an effective judicial remedy, it must be possible for unsuccessful tenderers to obtain a judgment finding a breach of the EEA rules on public procurement law, even in circumstances in which the other remedies provided for by the Remedies Directive are excluded.

75 Indeed, the remedy of damages provided for in Article 2(1)(c) of the Remedies Directive can constitute, where appropriate, a procedural alternative, which is compatible with the principle of effectiveness underlying the objective pursued by that directive of ensuring effective review procedures, only where the possibility of damages is no more dependent than the other legal remedies provided for in Article 2(1) on a finding that

the contracting authority is at fault (compare *Strabag and Others*, cited above, paragraph 39).

76 As such, damages seek to achieve a three-fold objective: to compensate for any losses suffered; to restore confidence in the effectiveness of the applicable legal framework; and to deter contracting authorities from acting in such a manner, which will improve future compliance with the applicable rules. Liability through damages may also provide a strong incentive for diligence in the preparation of the tender procedure, which will, ultimately, prevent the waste of resources and compel the contracting authority to evaluate the particular market's features. Were liability to be excluded, this may lead to a lack of restraint of the contracting authority.

77 Accordingly, it has already been established that a national rule making the award of damages conditional on proof of fault or fraud would make actions for damages more difficult and costly, thereby impairing the full effectiveness of the public procurement rules. Article 2(1)(c) of the Remedies Directive therefore precludes national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable (compare *Commission* v *Portugal*, C-70/06, EU:C:2008:3, paragraph 42; and *Strabag and Others*, cited above, paragraph 45). The same must apply where there exists a general exclusion or a limitation of the remedy of damages to only specific cases. This would be the case, for example, if only breaches of a certain gravity would be considered sufficient to trigger the contracting authority's liability, whereas minor breaches would allow the contracting authority to incur no liability.

78 Moreover, a limitation of the possibilities to claim damages could entail a reduction in the willingness of contracting authorities to comply with the relevant conditions of EEA public contract law, or to decrease their diligence in conducting a tender procedure. A requirement that only a breach of a certain gravity may give rise to damages could also run contrary to the objective of creating equal conditions for the remedies available in the context of public procurement. Depending on the circumstances, a breach of the same provision on EEA public procurement could lead to liability in one EEA State while not giving rise to damages in another EEA State. In such circumstances, economic operators would encounter substantial difficulties in assessing the potential liability of contracting authorities in different EEA States.

79 Thus, a rule requiring a breach of a certain type or gravity would ultimately, substantially undermine the goal of effective and rapid judicial protection sought by the Remedies Directive. It would also interfere with the objectives pursued by Directive 2004/18/EC, namely to guarantee the free movement of services and to ensure open and undistorted competition in this field in all EEA States.

80 Therefore, the gravity of a breach of the EEA rules on public contracts is irrelevant for the award of damages. Moreover, it is not decisive for the award of damages pursuant to Article 2(1)(c) of the Remedies Directive, whether the breach of a provision of public procurement law was due to culpability and conduct deviating markedly from a

justifiable course of action, or whether it occurred on basis of a material error, or whether it is attributable to the existence of a material, gross and obvious error.

81 Nevertheless, a claim for damages can only succeed if certain other conditions are fulfilled, such as the condition that there must be a sufficient causal link between the infringement committed and the damage incurred.

82 In view of the foregoing, the answer to the first and second questions must be that the award of damages according to Article 2(1)(c) of the Remedies Directive does not depend on whether the breach of a provision of public procurement law was due to culpability and conduct deviating markedly from a justifiable course of action, or whether it occurred on basis of a material error, or whether it is attributable to the existence of a material, gross and obvious error. A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of the Remedies Directive, provided that the other conditions for the award of damages are met including, in particular, the existence of a causal link.

Third question

Observations submitted to the Court

83 *Fosen-Linjen* argues that the Court should follow the approach set out by the ECJ in *Strabag and Others* and C-275/03 *Commission* v *Portugal* when assessing the third question. The Remedies Directive and the principle of effectiveness, consequently, preclude a national rule on standard of proof as described in that question.

84 *AtB* contends that the conditions for awarding damages under Norwegian law comply with the principles of equivalence and effectiveness. The standard of proof required to be met under Norwegian law in a claim for damages for loss of profit and for costs of bidding is considerably lower than in many other European countries and lower than the level set by the case law of the General Court.

85 The *Norwegian Government* maintains that under the principle of State liability, there is a requirement for a "direct causal link" between the breach of an EEA legal rule and the damage incurred; however, what constitutes a "direct causal link" is a matter subject to the procedural autonomy of the EEA States. The General Court has consistently held that for an aggrieved tenderer to be awarded damages for positive contract interest, the tenderer must prove with a level of probability that comes close to certainty that he would have been awarded the contract had the rules on public contracts been complied with. In this regard, the protection of the rights enjoyed by individuals cannot vary depending on whether a national authority or a Community authority is responsible for the damage. Accordingly, EEA law does not preclude a causation requirement in respect of claims for the positive contract interest resulting from a breach of EEA law on public contracts as described in the third question.

86 *ESA* submits that the third question is limited to claims for damages for positive contract interest. In this regard, it is for the legal order of each EEA State to determine the rules on causation, subject to the principles of equivalence and effectiveness. The request does not seem to raise any particular issue regarding equivalence. As regards effectiveness, a breach of EEA public procurement law will only cause the tenderer a loss of profits if he had a right to be awarded the contract in the first place. A right to be awarded the contract with a corresponding claim for damages for positive contract interest will only exist in exceptional circumstances. In the case at issue, there are no such exceptional circumstances. In ESA's view, a rule such as that described in the question, does not appear to be in conflict with the principle of effectiveness.

87 The *Commission*, likewise, understands that the third question relates to positive contract interest only. The standard of proof is largely unregulated by EU public procurement law. Hence, the standard of proof is a question left to the procedural autonomy of the Member States, which are bound by the principles of effectiveness and equivalence.

Findings of the Court

88 By its third question, the referring court essentially seeks guidance on the standard of burden of proof in relation to claims seeking compensation for loss of profit. According to the request, the aggrieved tenderer is required to prove with "clear, that is, qualified preponderance of evidence", that he would have been awarded the contract, had the contracting authority not committed the error.

89 In the absence of specific EEA provisions on the requirement of causation it is for the legal order of each EEA State to lay down the respective conditions in this respect, which are subject to the principles of equivalence and effectiveness. The rules governing causation and the burden of proof must thus be no less favourable than those governing similar domestic actions and they must not render practically impossible or excessively difficult the exercise of the right to damages under Article 2(1)(c) of the Remedies Directive.

90 It follows from the principle of effectiveness and the right to damages under Article 2(1)(c) of the Remedies Directive that a person harmed by an infringement of public procurement law must, in principle, be able also to seek compensation for loss of profit. Nevertheless, there is a clear distinction between an award of damages based on the costs of bidding and an award based on the loss of profit. The third question appears to relate predominately, as both ESA and the Commission submitted, to the burden of proof in relation to an alleged loss of profit.

91 It is a prerequisite for the fulfilment of the requirement of a direct causal link that the aggrieved tenderer has suffered an actual loss of profits. Such a loss could not exist where the aggrieved tenderer had no valid claim to the contract.

92 The principle of effectiveness precludes a national rule making it impossible or excessively difficult to obtain damages for the loss of profits. However, requiring that a

tenderer must provide proof with "clear, that is, qualified preponderance" that the tenderer would have been awarded the contract had public procurement law not been breached, does not by itself fail the test of effectiveness.

93 It is for the referring court to assess whether the requirement under the disputed national rule complies with the principle of effectiveness.

94 The answer to the third question must therefore be, that the Remedies Directive does not preclude a requirement according to which the award of damages is conditional on the aggrieved tenderer proving with clear, that is, qualified preponderance of evidence, that he should have been awarded the contract had the contracting authority not committed the error, as long as the principles of equivalence and effectiveness are respected.

Fourth question

Observations submitted to the Court

95 *Fosen-Linjen* argues that factual causation is decisive. The ECJ's judgment in *GAT*, C-315/01, EU:C:2003:360, sets out that applications for damages cannot be dismissed on the basis of other errors invoked by the contracting authority. In the present case, the decisive factor is whether Fosen-Linjen would have been awarded the contract, had the contracting authority not committed the error and, consequently, Norled's tender would have been rejected. Even if other errors were relevant in the assessment of the existence of a causal link, it would be for the contracting authority to prove such errors. A national rule whereby the burden of proof is shifted to the tenderer would constitute an excessive burden on him, as there are, in principle, no limits as to what other errors and circumstances may be invoked by the contracting authority to "navigate" out of damages liability in a particular case.

96 *AtB* is of the view that the fourth question concerns the issue of whether damages for loss of profit can be awarded, when the award procedure was lawfully terminated, even if AtB was not obliged to terminate the procedure. However, if the award procedure was lawfully cancelled, there is no causal link between the error and the alleged loss of profit. The Remedies Directive does not regulate the condition of a causal link. Moreover, it would be contrary to the main objectives of Directive 2004/18/EC to compensate an aggrieved tenderer for the loss of profit, which would have been linked to a contract that he should never have been awarded. This could even amount to unjust enrichment of the aggrieved tenderer. In this regard, *GAT* is not relevant. AtB further submits that it is not willing to compensate Fosen-Linjen's bid costs, as Fosen-Linjen chose to submit a tender even though it knew that the award criterion "environment" was not accompanied by an effective documentation requirement.

97 The *Norwegian Government* maintains that relevant EEA law does not preclude a contracting authority from exonerating itself from a claim for damages for positive contract interest by invoking arguments for cancellation other than the argument mentioned in the cancellation decision. A claimant cannot be entitled to damages for

positive contract interest where the conclusion of that contract would be unlawful under EEA law on public contracts. Moreover, a national rule as described in the fourth question is neither precluded by the Remedies Directive itself, nor by the principle of effectiveness.

98 *ESA* submits that the fourth question is limited to claims for damages for the loss of profit; the circumstances described in this question would be ineffective in a case that concerns the costs of bidding. There is no direct causal link between the breach of EEA law and any lost profits where the contract could not have been lawfully concluded. As regards the second part of the fourth question, which relates to the burden of proof, ESA submits that it is for the legal order of each EEA State to determine the rules on causation and that the request does not raise any particular issues as regards the principle of equivalence or effectiveness.

99 In the *Commission's* view, the ECJ's judgment in *GAT* dealt with a similar issue. The only difference between *GAT* and the present case is that in the present case the contracting authority eventually cancelled the tender procedure and re-opened the competition. Therefore, any aggrieved tenderer had another chance to apply for the contract. This may have an impact on the determination of the extent of the damage suffered by the aggrieved tenderer. However, this does not have a bearing on the potential illegality of the original award decision and the fact that the aggrieved tenderer could have suffered damage because of that decision.

Findings of the Court

100 By its fourth question, the referring court essentially seeks guidance as to whether national rules, according to which the contracting authority may free itself from the claim for damages by invoking errors, other than those relied on by the aggrieved party, as a reason for cancelling the tender procedure, are in compliance with EEA law on public procurement. The second part of the fourth question relates to the national provisions on the burden of proof in that context.

101 At the outset, the Court notes that there must be a balance between the different interests at stake. While liability of the contracting authority for any errors committed promotes, in principle, the overall compliance with the applicable legal framework, exaggerated liability of the contracting authority could lead to excessive avoidance costs, reduce the flexibility of the applicable framework and may even lead to the unjust enrichment of an unsuccessful tenderer. Furthermore, excessive liability may provide an incentive for a contracting authority to complete award procedures, that were evidently unlawful, or impinge upon the freedom to contract.

102 As for the costs of bidding, it cannot be decisive for the award of damages whether the error invoked by the claimant is the same error as that invoked by the contracting authority and which led it to cancel the award procedure. A tenderer harmed by a contracting authority's error, cannot be denied the right to claim damages for the harm caused by that decision on the grounds that the award procedure was defective, in any event, owing to another unlawful decision (compare *GAT*, cited above, paragraph 54).

103 Other factors may, however, be relevant for the assessment of a claim for compensation for the costs of bidding, such as whether a reasonably well-informed tenderer of normal diligence showed ordinary care in the preparation of the bid, or whether the tender was submitted in good faith. However, these factors must not make it impossible or excessively difficult for a claimant to obtain compensation for the costs of bidding.

104 AtB has submitted that Fosen-Linjen's bid costs are not recoverable as it chose to submit a tender even though it knew that one of the award criteria was unlawful. However, it appears that AtB was itself unaware, or at least uncertain, as to whether the environment award criterion it applied was lawful. In such circumstances, it appears unlikely that a well-informed tenderer of normal diligence could have been aware of the unlawfulness of the award criterion at issue.

105 As regards claims for compensation of loss of profit, it must be noted that Article 41(1) of Directive 2004/18/EC implicitly provides an option not to award a contract. Consequently, there is no obligation on the contracting authority to carry the award procedure to its conclusion. The contracting authority may cancel the award procedure provided that its cancellation complies with EEA law, the authority notifies its reasons for the withdrawal, and the decision to withdraw is subject to judicial review (compare *HI*, C-92/00, EU:C:2002:379, paragraphs 40 and 41 and paragraphs 48 to 51).

106 There may be instances, for example, in which a procedural defect may only reasonably be remedied by cancelling the tender procedure and conducting it anew, in order to comply with the principles of equal treatment, transparency and open competition (compare *EVN and Wienstrom*, cited above, paragraph 95).

107 The existence of such an error entails that it would have been in breach of EEA public procurement law to conclude a contract with the aggrieved tenderer. Consequently, in such circumstances there is no direct causal link between the infringement committed and the damage suffered in relation to the positive contract interest. It is of no significance whether or not that error was invoked by the contracting authority at the outset or only at a later stage of the proceedings.

108 The Remedies Directive does not govern the burden of proof in an aggrieved tenderer's claim for damages. It is therefore, in principle, for the legal order of each EEA State to determine the rules on the burden of proof, subject to the principles of equivalence and effectiveness.

109 It must however be recalled that a decision to cancel an award procedure must be open to judicial review and comply with EEA law. It is for the contracting authority to provide reasons for its decision to withdraw the procedure in order to enable effective judicial review of that decision (compare, by analogy, *HI*, cited above, paragraph 53; and the opinion of Advocate General Poiares Maduro in *Commission* v *Greece*, C-250/07, EU:C:2008:734, point 28). Thus, where a contracting authority invokes an error as a defence against a claim for damages because it led it to cancel the award procedure, it must bear the burden of proof for the existence of that error and justify that the decision to withdraw complies with EEA law.

110 The answer to the fourth question must therefore be that the Remedies Directive does not preclude national law that exempts a contracting authority from liability for positive contract interest where the tender procedure, due to an error by the contracting authority, was cancelled in compliance with EEA public procurement law, even where that error was not invoked during the tender procedure and is different from the error invoked by the claimant. It is for the contracting authority to prove the existence of such an error and justify its decision to withdraw the tender procedure.

Fifth and sixth questions

Preliminary remarks

111 By its fifth and sixth questions, the referring court seeks to ascertain the relevant factors, linked to the principle of equal treatment, in determining whether a contracting authority's verification requirement of an award criterion complies with EEA public procurement law. The referring court asks, in particular, how accurate the information provided in the tender must be; whether a contractual penalty may, to an extent, substitute the requirement for effective verification, and whether the contracting authority may take documentation provided elsewhere in the tender into account. Due to the related nature of these questions and sub-questions, the Court will assess the fifth and the sixth questions together.

Observations submitted to the Court

112 *Fosen-Linjen* submits that the documentation requirement was addressed by the ECJ in *EVN and Wienstrom*, a ruling which was based on the fundamental principles of equal treatment and transparency. *EVN and Wienstrom* must be read as requiring the contracting authority to request documentation in the tender, which can serve as a means to check the accuracy of the information received in a reasonable manner, and requiring it to actually carry out such an evaluation. The principles of equal treatment and transparency cannot necessitate that the requested documentation is specifically attached to the award criterion at issue, when the contracting authority actually requested the same documentation from all tenderers and checked the information against the background of that documentation. Moreover, EEA law does not require contracting authorities to opt for one particular means of documentation insofar as there are other relevant, reasonable and reliable means of checking the accuracy of the information provided.

113 *AtB* is of the view that, according to *EVN and Wienstrom*, the lack of documentation rendered the award criterion "environment" in the present case unlawful. The tender procedure must be cancelled if a contracting authority has included an unlawful award criterion in the procurement documents. However, if it can be established that an error had no impact on the outcome of the award procedure, the contracting authority is not obliged to terminate that procedure.

114 The *Norwegian Government* submits that the principle of equal treatment requires that, in order to be lawful, an award criterion must be accompanied by documentation from the tenderer such as to enable the contracting authority to effectively verify whether the

information provided by the tenderer under that award criterion is correct and accurate. The principle of equal treatment cannot, however, form the basis for imposing a particularly strict and specific verification requirement. Accordingly, it must be sufficient that the tenderer provides documentation that enables the contracting authority to verify, with a reasonable degree of reliability, that the information given under the award criterion is correct and accurate. As regards the sixth question, the Norwegian Government submits that the principle of equal treatment does not preclude the requirement for documentation being met by having regard to documentation presented elsewhere in the tender if that documentation is sufficient for the contracting authority to verify with a reasonable degree of reliability that the information is correct and accurate.

115 *ESA* argues that EEA public procurement law does not contain a general obligation to verify the information relating to award criteria. However, contracting authorities must comply at all times with the principle of equal treatment. This principle precludes a contracting authority from, *inter alia*, arbitrarily verifying information submitted by one of the tenderers only. As regards the sixth question, ESA submits that a tender is a single item. Therefore, the contracting authority may base a verification of information on documentation provided elsewhere in the tender. However, the contracting authority must comply with the principle of equal treatment at all times.

116 The *Commission* is of the view that regard must be had to the fact that the procedure at issue was a negotiated procedure. Given that adaptations of the tender are a standard feature of a negotiated procedure, it does not seem problematic that the contracting authority may rely on information provided elsewhere in the tender as long as it accords the same degree of flexibility to all tenderers. As regards the verification requirement, the Commission submits that the referring court is best placed to judge whether the verification undertaken by the contracting authority was sufficient, given that it has access to all the facts. It also argues that "effective verification" means a process by which the contracting authority is able to conclude that a tender corresponds to the requirements set out by that authority. The principle of equal treatment requires that evaluation and verification of technical data submitted by various tenderers is performed using the same methodology, so that the tenders can be compared and the contracting authority is able to choose the economically most advantageous tender.

Findings of the Court

117 It is open to the contracting authority to choose the criteria on which it will base the award of a contract, provided that the purpose of those criteria is to identify the economically most advantageous tender. Such criteria must not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (compare *EVN and Wienstrom*, cited above, paragraph 37 and case law cited).

118 The principle of equal treatment implies that tenderers must be in a position of equality both when formulating their tenders and when the contracting authority assesses those tenders. The award criteria must therefore be formulated in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same

way (compare *EVN and Wienstrom*, cited above, paragraphs 47 and 57 and case law cited).

119 The case at issue arose in the context of a negotiated procedure. It can be inferred from the request that a number of questions on the tender specification were posed, answered and made available to the tenderers before the expiry of the deadline for submitting tenders. It appears likely in these circumstances that a reasonably well-informed tenderer of normal diligence would be in a position to dispel any doubts as to the information requested by the contracting authority before submitting its tender. As the answers to the questions were furthermore made available to all tenderers, it appears as if all the tenderers involved were on an equal footing in the preparation of their respective bids. However, this is a matter for the referring court ultimately to decide.

120 As regards the contracting authority's assessment of the tenders, the principle of equal treatment entails that the award criteria must be applied objectively and uniformly to all tenderers. This principle further implies an obligation of transparency. An objective and transparent evaluation of the various tenders is conditional on the contracting authority being able to verify effectively the accuracy of the information provided by the tenderers in their bids, and whether these bids meet the award criteria (compare *EVN and Wienstrom*, cited above, paragraphs 48 to 50 and case law cited).

121 The contracting authority must, in order to be able to compare objectively the tenders submitted, determine whether the information provided is plausible, in particular, that the tenderer will be capable of providing what has been offered in his bid. The contracting authority must be in a position to verify if the bid corresponds to its requirements. It is for the national court to determine whether this was the case in the underlying tender procedure.

122 The referring court must also take account of the principle of proportionality. The need for a documentation requirement must not go beyond what is necessary to achieve the objective of verifying whether the information provided by the tenderer is plausible and corresponds to the contracting authority's requirements. Consequently, the verification requirement cannot go as far as calling for the contracting authority to determine with an accuracy that comes close to certainty whether all the information provided in the individual tenders is unequivocal.

123 A tender is to be viewed as a whole and does not consist of separate or independent parts. Therefore, the contracting authority may take into account any documentation in a tender, as long as it has requested the same documentation from all tenderers and treats all tenderers equally.

124 In view of the above, the answer to the fifth and sixth questions must be that the award criteria of a tender procedure must be formulated in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way. The contracting authority is furthermore obliged to verify whether the information submitted by the tenderer is plausible, in the sense that the respective tenderers are capable of providing what was offered in the bid, and whether that bid corresponds to the requirements set out by the contracting authority. The verification requirement must

comply with the principle of proportionality. As long as all tenderers are treated equally, the contracting authority may have regard to any information provided in the tender in order to make an effective verification of the information linked to the award criteria. It is for the referring court, having regard to the principles of equal treatment, transparency, and proportionality, to determine whether these conditions were complied with in the underlying tender procedure.

V Costs

125 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by Frostating lagmannsrett hereby gives the following Advisory Opinion:

1. **The award of damages according to Article 2(1)(c) of Directive 89/665/EEC does not depend on whether the breach of a provision of public procurement law was due to culpability and conduct deviating markedly from a justifiable course of action, or whether it occurred on basis of a material error or whether it is attributable to the existence of a material, gross and obvious error. A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of Directive 89/665/EEC, provided that the other conditions for the award of damages are met, including, in particular, the condition of a causal link.**

2. **Directive 89/665/EEC does not preclude a requirement according to which the award of damages is conditional on the aggrieved tenderer proving with clear, that is, qualified preponderance of evidence that he should have been awarded the contract had the contracting authority not committed the error, as long as the principles of equivalence and effectiveness are respected.**

3. **Directive 89/665/EEC does not preclude national law that exempts a contracting authority from liability for positive contract interest where the tender procedure, due to an error by the contracting authority, was cancelled in compliance with EEA public procurement law, even where that error was not invoked during the tender procedure and is different from the error invoked by the claimant. It is for the contracting authority to prove the existence of such an error and justify its decision to withdraw the tender procedure.**

4. **The award criteria of a tender procedure must be formulated in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way. The contracting authority is furthermore obliged to verify whether the information submitted by the tenderer is plausible, in the sense that the respective tenderers are capable of providing what was offered in the bid, and whether that bid corresponds to the requirements set out by the contracting authority. The verification requirement must comply with the principle of proportionality. As long as all tenderers are treated equally, the contracting authority may have regard to any information provided in the tender in order to make an effective verification of the information**

linked to the award criteria. It is for the referring court, having regard to the principles of equal treatment, transparency, and proportionality, to determine whether these conditions were complied with in the underlying tender procedure.

Carl Baudenbacher Per Christiansen Benedikt Bogason

Delivered in open court in Luxembourg on 31 October 2017.

Jørgen Reinholdtsen
Acting Registrar

Carl Baudenbacher
President