REPORT FOR THE HEARING
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

v

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.

I Introduction

1. By a letter of 24 October 2016, registered at the Court as Case E-16/16 on 31 October 2016, Frostating Court of Appeal (*Frostating Lagmannsrett*) requested an Advisory Opinion in the case pending before it between Fosen-Linjen AS ("Fosen-Linjen") and AtB AS ("AtB"). By its request, the Court of Appeal referred six questions.

2. The case before the referring court concerns an appeal by Fosen-Linjen against a judgment of Sør-Trøndelag District Court (*Sør-Trøndelag tingrett*). The District Court rejected Fosen-Linjen's claims for damages, which relate to a tender procedure carried out by AtB.

II Legal background

EEA law

3. 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 EEA Agreement.

4. The Remedies Directive was amended by Directive 2007/66/EC of the European Parliament and of the European Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31 and EEA Supplement 2015 No 76, p 918) ("Directive 2007/66"). Directive 2007/66 was made part of the EEA Agreement by Joint Committee Decision No 83/2011 of 1 July 2011 (OJ 2011 L 262, p. 54, and EEA Supplement 2011 No 54, p. 68) and is also referred to at point 5 of Annex XVI (Procurement). Constitutional requirements were indicated and fulfilled in September 2012. Consequently, the decision entered into force on 1 November 2012, and the time limit for the EFTA States to implement the Directive expired on the same date.

5. The third recital in the preamble to the Remedies Directive reads as follows:

> *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;*

6. The sixth recital in the preamble to the Remedies Directive reads as follows:

> *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;*

7. The seventh recital in the preamble to the Remedies Directive reads as follows:

> *Whereas, when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place;*

8. The third subparagraph of Article 1(1) of the Remedies Directive read at the material time as follows:

> *1. ...*
>
> *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.*

9. Article 2(1)(c) of the Remedies Directive read at the material time as follows:

> *1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:*
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> *...*
>
> *(c) award damages to persons harmed by an infringement.*

10. 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) ("Directive 2004/18") was made part of 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). At the material time, it was referred to at point 2 of Annex XVI (Procurement) to the EEA Agreement. The last constitutional requirements indicated for the purpose of Article 103 of the EEA Agreement were fulfilled on 17 April 2007. In accordance with Article 3 of Joint Committee Decision No 68/2006, he decision entered into force on 18 April 2007.

11. Article 21 of Directive 2004/18 read as follows:

> *Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).*

12. Article 23 of Directive 2004/18 read as follows:

> *1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.*
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> *2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.*
>
> *3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:*
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> *(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications*

relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent';

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

5. Where a contracting authority uses the option laid down in paragraph 3 to prescribe in terms of performance or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer must prove to the satisfaction of the contracting authority and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:

— *those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,*

— *the requirements for the label are drawn up on the basis of scientific information,*

— *the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and*

— *they are accessible to all interested parties.*

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

7. 'Recognised bodies', within the meaning of this Article, are test and calibration laboratories and certification and inspection bodies which comply with applicable European standards.

Contracting authorities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words 'or equivalent'.

13. Article 35(4) of Directive 2004/18 read as follows:

4. Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 32 the contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on that agreement.

Contracting authorities shall send a notice of the result of the award of contracts based on a dynamic purchasing system within 48 days of the award of each contract. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 48 days of the end of each quarter.

In the case of public contracts for services listed in Annex II B, the contracting authorities shall indicate in the notice whether they agree to its publication. For such services contracts the Commission shall draw up the rules for establishing statistical reports on the basis of such notices and for the publication of such reports in accordance with the procedure laid down in Article 77(2).

Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

14. Annex II B to Directive 2004/18 included the following item:

Category No	Subject	CPC Reference No	CPV Reference No
19	Water transport services	72	From 61000000-5 to 61530000-9, and from 63370000-3 to 63372000-7

National law[1]

15. At the material time, the Norwegian rules for tender procedures were set out *inter alia* in the Act of 16 July 1999 No 69 on Public Procurement (*lov om offentlige anskaffelser*) ("PPA") and the Regulation of 7 April 2006 No 402 on Public Procurement (*forskrift om offentlige anskaffelser*) ("PPR").

16. Section 11 PPA provided the following:

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.

[1] Translations of national provisions are unofficial and based on those contained in the documents of the case.

17. Under Norwegian law of damages, the positive contract interest (i.e. a loss of reasonably expected profits; *lucrum cessans*) was traditionally not considered to be protected during the pre-contractual phase. However, in a judgment of 2001,[2] the Supreme Court of Norway (*Norges Høyesterett*) concluded that an aggrieved tenderer is entitled to damages on three conditions. 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.

18. In a later judgment of 2008,[3] the Supreme Court of Norway found that the threshold for liability under Norwegian law is no higher than the threshold for liability for breach of EEA law by an EEA State.

III Facts and procedure

Background

19. Fosen-Linjen is a small, local undertaking, established in 1999. The company has operated two minor ferry services for approximately 15 years. Besides Fosen-Linjen, there are a number of major ferry operators, such as Norled AS ("Norled"), and some minor local ferry operators active in Norway.

20. The public transport services in Sør-Trøndelag county are administered through AtB, which is a company furnished with the tasks of planning, promoting and procuring public transport services. The overall responsibility for public transport services in the county lies with the Sør-Trøndelag County Authority.

21. AtB does not operate the actual services but 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

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

23. The notice of the procurement procedure 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 up to two years. The tender procedure was carried out using the negotiated procedure in accordance with the

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2 Reference is made to a judgment of the Supreme Court of Norway in Rt. (Norwegian Supreme Court Reports) 2001 p. 1062.

3 Reference is made to a judgment of the Supreme Court of Norway in Rt. 2008 p. 1705.

rules laid down in the PPR Part II. The deadline for submitting tenders was 14 October 2013.

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

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

26. AtB evaluated the tenders. The award criteria evaluated concerned "price" (50 %), "environment" (25 %) and "quality" (25 %). A score on a scale from one to ten was awarded to each criterion, 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 set out in the tender specifications.

27. Under the criterion "quality" tenderers were required to submit *inter alia* a description of the tendered vessels.

28. 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 was calculated or state on what assumptions the calculations were based.

29. Following further questions relating to the documentation requirement for the environment criterion, at a tender conference in June 2013, AtB introduced a new sanction to apply during the contract period. According to the sanction, deviations of more than 10 % from the fuel oil consumption specified in the tender during the performance of the contract would trigger a charge of NOK 1 per litre. Although the question concerning the award criterion "environment" was raised a second time, no documentation requirements were introduced.

30. By letter of 17 December 2014 [sic], 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 interested party 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.

31. Following a complaint 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.

32. The standstill period was initially set to expire on 6 January 2014.

The interim measure case and the cancellation of the tender procedure

33. On 3 January 2014, Fosen-Linjen brought a case before Sør-Trøndelag District Court ("the District Court") and requested that court to stop the signature of the contract between AtB and Norled by way of an interim measure. The District Court prohibited the signature of the contract and ordered Fosen-Linjen to bring an ordinary legal action in order to resolve the dispute. After an appeal by AtB, the Court of Appeal upheld the decision of the District Court in an order of 17 March 2014.

34. In this context, AtB argued that, as regards the verification requirements, it had, "based on its own competence and experience, a good basis for ascertaining that Norled had stated a realistic fuel oil consumption". This view is no longer maintained by AtB.

35. Following the order of the Court of Appeal, AtB cancelled the tender procedure due to the errors it made. According to a letter of 30 April 2014, it decided to not appeal the order of 17 March 2014. AtB took the view that the order left the company with no other option than to cancel the tender procedure. In this regard, 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 when it failed to verify 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 defaulted on its obligation to provide guidance to Norled.

36. Subsequently AtB signed a contract with Norled for the operation of the Brekstad - Valset ferry service for 2015 and 2016 and with Boreal Transport Nord AS for 2017 and 2018. A new invitation to tender for this service was announced at the beginning of 2016 and concerned the operation of the service from 2019 to 2029. Fosen-Linjen did not submit a tender in this procedure.

The proceedings before the District Court and before the Court of Appeal

37. On 27 February 2014, Fosen-Linjen filed a lawsuit against AtB. By default judgment, the District Court set aside the award of the contract to Norled and awarded Fosen-Linjen NOK 5 million in damages. By an order of 20 November 2014, the Court of Appeal annulled the default judgment and reinstated AtB. The case was referred back to the District Court. Following a submission of 4 March 2015, Fosen-Linjen's claim for damages for the positive contract interest was included in the case. As AtB had cancelled the tender procedure and Fosen-Linjen had not contested this decision, the case was now limited to the claim for damages.

38. By judgment of 2 October 2015, the District Court found in favour of AtB and rejected the claims for damages with regard to both the negative (*damnum emergens*) and the positive (*lucrum cessans*) contract interest.

39. As regards the award criterion "environment", the District Court found the following parameters to be particularly important for the purposes of calculating fuel oil consumption:

- Hull resistance, which depends, in particular on vessel displacement (the water mass/volume displaced by the vessel, which in turn has to do with factors such as weight and choice of materials) hull design and speed of service;

- Propulsive efficiency, that is the choice of propulsion/propeller system;

- Specific oil consumption, which depends on, for example, the engine type chosen and, if applicable, the possibility of running the engine at the most efficient levels; ref. the hybrid solution;

- Electrical and mechanical transmission loss;

- The hotel load, that is the energy required for auxiliary systems like ventilation, cooling, heating, pumps etc.;

- Ship resistance during transit (that is weather and wind resistance during crossing).

40. The District Court held that, under EEA law, there is a requirement that award criteria should be linked to a requirement for 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, and 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.

41. In an *obiter dictum*, the District Court also concluded that the tenders did not contain information allowing effective verification of the fuel consumption stated by the tenderers in their tender.

42. Fosen-Linjen brought an appeal against the District Court's judgment before the referring Court of Appeal on 30 October 2015.

43. 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*[4] and *Strabag*[5] with the ECJ's judgment in *Combinatie*.[6] It also states

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4 Reference is made to the judgment in *Commission* v *Portugal*, C-275/03, EU:C:2004:632.

5 Reference is made to the judgment in *Strabag and Others*, C-314/09, EU:C:2010:567.

6 Reference is made to the judgment in *Combinatie Spijker and Others*, C-568/08, EU:C:2010:751.

that the parties disagree as to the documentation requirements and the notion of effective verification of information implied by the ECJ's judgment in *Wienstrom*.[7]

IV Questions

44. The following questions have been referred 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**
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> > **(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?**
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> **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?**
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> **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**

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[7] Reference is made to the judgment in *EVN and Wienstrom*, C-448/01, EU:C:2003:651.

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?

V Written observations

45. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

— Fosen-Linjen, represented by Anders Thue, advokat;

— AtB, represented by Goud Helge Homme Fjellheim, advokat;

— the Norwegian Government, represented by Helge Røstum, advocate at the Attorney General (Civil Affairs), Carsten Anker, Senior Adviser, Ministry of Foreign Affairs, and Dag Sørlie Lund, Senior Adviser, 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.

VI Summary of the arguments submitted and answers proposed

Fosen-Linjen

46. As a preliminary remark, Fosen-Linjen contends that the principles of equal treatment and transparency are expressly set out in Article 2 of Directive 2004/18 and had already been recognised previously by the ECJ.[8] The principle of equal treatment implies an obligation of transparency.[9] These principles are moreover fundamental principles under the EEA Agreement and must be complied with whenever public contracts are concluded.[10] The principle of effectiveness – another fundamental principle of EEA law – is contained in Article 1(1) of the Remedies Directive.

47. In this regard, Fosen-Linjen contends that the *Simmenthal*[11] approach to effectiveness is more suitable in the case at hand than the approach taken in *Rewe*.[12] It observes that the ECJ has applied the *Simmenthal* approach to effectiveness in the field of Community public procurement law.[13]

48. Turning to the questions referred, Fosen-Linjen argues that the Court should examine the questions referred in light of the general context and aim of the judicial remedy of damages.[14] In the case at issue, the only possible remedy for Fosen-Linjen was to claim damages from AtB.

49. With regard to the first and second questions, which Fosen-Linjen addresses together, it argues that, although, at first glance, *Strabag* and *Combinatie* may be difficult to reconcile, it is no surprise that the ECJ did not carry out a review under the effectiveness angle in the latter case, as it simply had no reason to do so.

50. Citing the views of academic authors in support,[15] Fosen-Linjen submits that the criteria of State liability cannot be applied to damages claims in tender

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8 Reference is made to the judgment in *Commission* v *Denmark*, C-243/89, EU:C:1993:257, paragraph 33.

9 Reference is made to the judgment in *Wienstrom*, cited above, paragraph 49.

10 Reference is made to Section 1.1 of the European Commission's Interpretive Communication of 23 June 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2).

11 Reference is made to the judgment in *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 22 and 23.

12 Reference is made to the judgment in *Rewe Zentralfinanz*, 33/76, EU:C:1976:188, paragraph 5.

13 Reference is made to the judgment in *Commission* v *Portugal*, C-70/06, EU:C:2008:3, paragraph 42.

14 Reference is made to the judgment in *Strabag*, cited above, paragraph 34.

15 Reference is made to Steen Treumer, "Basis and Conditions for a Damages Claim for Breach of the EU Public Procurement Rules", in Fairgrieve and Lichère (eds), *Public Procurement Law – Damages as an Effective Remedy* (2011), pp. 122 to 124; Carina Risvig Gamer, *Grundlæggende udbudsretten* (2016), p. 829; Jakobsen, Poulsen and Kalsmose-Hjelmborg, *EU udbudsretten* (3rd ed., 2016), p. 664; and Hanna Schebesta, *Damages in EU Public Procurement Law* (2016), pp. 70 to 71.

cases within the Remedies Directive. That approach could even render the damages provisions in the Remedies Directive superfluous. What is more, neglecting the public procurement context and applying the criteria of State liability would in fact run contrary to the aim of the Remedies Directive, which is to strengthen existing mechanisms.[16] The conclusion is that the doctrine of State liability cannot apply alone, disregarding the principles set out in the Remedies Directive. Accordingly, a "sufficiently serious breach" of law cannot be required as a condition for the award of damages.

51. However, Fosen-Linjen submits that, even if the notion of State liability were to apply under the Remedies Directive, it must be construed in line with the principle of effectiveness. The Court should follow the approach adopted by the ECJ in *Strabag*. This would be fully compliant with the ECJ's approach in *Combinatie* and the application of State liability. The ECJ expressly recognised in that case that the principle of effectiveness limits procedural autonomy.[17]

52. In this regard, Fosen-Linjen argues that any breach of EEA public procurement law already provides sufficient ground for damages. A requirement of national law, according to which the contracting authority's error causing the infringement of EEA law must be material, gross or obvious for damages to be awarded, is precluded by the Remedies Directive and the principle of effectiveness.

53. Furthermore, Fosen-Linjen contends that the contracting authority cannot exonerate itself from potential liability by referring to a discretionary margin if there is no or limited discretion at play.[18] This is also in line with *Strabag*.[19]

54. Consequently, Fosen-Linjen considers a breach of a national rule transposing EEA law in the field of public procurement, under which a contracting authority is not free to exercise any discretion, to constitute in itself a sufficiently serious breach that gives a right to damages under the Remedies Directive if the other conditions for claiming damages are also fulfilled.

55. Turning to the third question, Fosen-Linjen argues that the Court should follow the approach set out by the ECJ in *Strabag* and *Commission* v *Portugal*.[20] The notion that the burden of proof in respect of an injury's causation cannot be too strict is also supported by the Opinion of Advocate General Cruz Villalón in

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16 Reference is made to the judgment in *Universale-Bau and Others*, C-470/99, EU:C:2002:746.

17 Reference is made to the judgment in *Combinatie*, cited above, paragraph 92.

18 Reference is made to Case E-2/12 *HOB-vín ehf.* [2013] EFTA Ct. Rep. 818, paragraphs 129 and 130.

19 Reference is made to the judgment in *Strabag*, cited above, paragraph 41. Reference is also made to Wolfgang Wurmnest and Christian Heinze, "General Principles of Tort Law in the Jurisprudence of the European Court of Justice", in Schulze (ed.), *Compensation of Private Losses – the Evolution of Torts in Business Law* (2011), p. 64.

20 Reference is made to the judgments in *Strabag*, cited above, and *Commission* v *Portugal*, C-275/03, cited above.

Combinatie.[21] The Remedies Directive and the principle of effectiveness preclude a national rule according to which an award of damages to remedy an infringement of a national rule transposing EEA law in the field of public procurement is conditional on the tenderer being able to prove with clear, or qualified preponderance that it should have been awarded the contract if the contracting authority had not made the error.

56. As regards the fourth question, Fosen-Linjen argues that factual causality is decisive. Case law supports the view that the contracting authority cannot exonerate itself from damages liability by invoking a lack of causality resulting from other errors not invoked during the tender procedure.[22] Applications cannot be dismissed on the basis of errors invoked by the contracting authority at a later stage which were not invoked during the tender procedure. Also with regard to State liability, factual causality is decisive for a causal link between the error and the loss.[23] Applied to the case at hand, what is decisive is whether Fosen-Linjen would have been awarded the contract, had AtB not committed the error, and Norled's tender would have been rejected. To test the requirement of a causal link against all potential hypothetical circumstances in law and in fact would be contrary to the need for effective remedies under the Remedies Directive and the principle of effectiveness.

57. However, even if other errors were to be relevant in the assessment of causal link, Fosen-Linjen argues, in the alternative, that it would be for the contracting authority to prove such errors. A national rule whereby the burden of proof is on the tenderer to establish the non-existence of other errors of that kind put forward by the contracting authority after the tender procedure would constitute an excessive burden on the tenderer. In the field of procurement law, 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.

58. According to Fosen-Linjen, this is illustrated by the case at issue. AtB claims that its own award criterion "environment" was illegal and, hence, an award to Fosen-Linjen based upon this procedure also would have been illegal. Accordingly, the possibility of damages must be ruled out. However, in contrast, AtB had no difficulties in awarding the second lot of the same tender, based also on the same award criteria, to Fosen-Linjen. In addition, a reversal of the burden of proof is a concept alien to EEA public procurement law.[24]

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21 Reference is made to the Opinion of Advocate General Cruz Villalón in *Combinatie*, C-568/08, EU:C:2010:515, point 34.

22 Reference is made to the judgment in *Gesellschaft für Abfallentsorgungs-Technik (GAT)*, C-315/01, EU:C:2003:360, paragraph 56.

23 Reference is made to the Opinion of Advocate General Léger in *Köbler*, C-224/01, EU:C:2003:207, point 151.

24 Reference is made, by analogy, to the judgment in *Commission* v *Greece*, C-394/02, EU:C:2005:336, paragraph 33.

59. With regard to the fifth and sixth questions, Fosen-Linjen submits that the extent of the documentation requirement was addressed by the ECJ in *Wienstrom*.[25] In that case, the ECJ based its findings on the fundamental principles of equal treatment and transparency.[26] The parties are agreed that it must be possible for the contracting authority to effectively verify the information contained in the tenders. Nevertheless, the principles emphasised in *Wienstrom* do not impose on the contracting authority anything more than an obligation to ensure that the documentation required in the tender will allow the contracting authority to check whether the information provided seems reasonable. The contracting authority must then check the reliability of the information against the documents received. The verification requirement must be proportional to the procurement at hand.

60. According to Fosen-Linjen, its position is supported by the Opinion of Advocate General Mischo in *Wienstrom*.[27] Advocate General Mischo recognised that it was not easy for the contracting authority to determine the source of the electricity supplied; however, there were various means of doing so.[28] In the light of Advocate General Mischo's opinion, *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.

61. The principle of equal treatment and transparency cannot require 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 that documentation.

62. In the case at issue, Fosen-Linjen contends that, under the award criterion of "quality", AtB requested *inter alia* a description of the vessels. That information may be considered when verifying the fuel consumption level offered under the award criterion "environment". Furthermore, there was no confusion as to the information AtB was to take into account in its evaluation under the environment criterion. Further, it is also relevant that the level of fuel consumption offered was to be included in the contract as a legally binding commitment on the supplier.

63. Finally, Fosen-Linjen submits that, as means of verification may differ, the verification requirement under EEA law must also respect the principle of proportionality. EEA law does not require contracting authorities to opt for one particular means of documentation insofar as there are other relevant, reasonable

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25 Reference is made to the judgment in *Wienstrom*, cited above.

26 Ibid., paragraph 47 to 51

27 Reference is made to the Opinion of Advocate General Mischo in *Wienstrom*, C-448/01, EU:C:2003:121, points 39 to 44.

28 Ibid., point 48.

and reliable means of checking the accuracy of the information provided by the tenderers.

64. Fosen-Linjen proposes that the Court should answer the questions referred as follows:

1. *Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, and the principle of effectiveness and effective remedies under EEA law, preclude national rules which make damages for infringements of national rules transposing EEA law in the field of public procurement conditional on either*

   (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. *Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, and the principle of effectiveness and effective remedies under EEA law, must be interpreted to mean that any breach by a contracting authority of a national rule transposing EEA law in the field of procurement provision under which the contracting authority is not free to exercise discretion shall in itself be sufficient for damages provided there is an economic loss and causality between the breach and the economic loss.*

3. *Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, and the principle of effectiveness and effective remedies under EEA law, preclude national rules on awarding damages, where the award of damages is conditional on the tenderer that brings the case and claims compensation being able to prove with clear, that is qualified preponderance of evidence, that it should have been awarded the contract had the contracting authority not committed the error invoked as a basis for that claim.*

4. *Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, and the principle of effectiveness and effective remedies under EEA law, preclude national rules whereby a claim for damages is dismissed or rejected on the ground that the contracting authority invokes other alleged errors made by the contracting authority, which were in fact not invoked by it during the tender procedure, and thus that the award was in any event unlawful and that the harm which the*

tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

5. *The principle of equal treatment under EEA law requires the contracting authority to request documentation in a tender for contracts within the scope of Directive 2004/18 which makes it possible for it to effectively verify the accuracy of the information from the tenderers. The principle of equal treatment is fulfilled insofar as the documentation required enables the contracting authority to actually check the reliability of the information from tenderers within reasonable limits, taking into account that documentation and verification requirements must comply with the principle of proportionality. The principle of equal treatment is fulfilled if the contracting authority is able to check that a certain figure provided by the tenderers is reliable within a reasonable margin of uncertainty, for example plus/minus 20 %.*

6. *When the contracting authority is to verify information by a tenderer in connection with an award criterion, the requirement for documentation and effective verification of the information under the principle of equal treatment may be met by having regard to all relevant documentation requested in the tender documents.*

AtB

65. As a preliminary remark, AtB contends that the contract in the main proceedings is an "Annex II B contract". Accordingly, Directive 2004/18 only applies in part to it. The reason is that Annex II B services were not considered to have sufficient cross-border interest.[29] An Annex II B service contract is subject to the principle of equal treatment and transparency, derived from Articles 49 and 56 TFEU, if the contract in question has a certain cross-border interest.[30] The ECJ's case law shows that this does not mean that the provisions of Directive 2004/18 apply by analogy. The case law indicates, however, that the principles of equal treatment and transparency lead to certain obligations on the contracting authority.[31]

66. In the case at issue, AtB doubts whether the contract at issue has a cross-border interest. There are no examples of a foreign supplier bidding for a contract to operate ferry services in Norway. Therefore, the issues at stake in the main proceedings are addressed only in the event that the Court of Appeal finds that the contract at issue has a certain cross-border interest.

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29 Reference is made to the judgment in *Strong Segurança*, C-95/10, EU:C:2011:161, paragraph 35.

30 Reference is made to the judgment in C-507/03, *Commission* v *Ireland*, EU:C:2007:676, paragraph 29.

31 Reference is made to the judgments in *Strong Segurança*, cited above; *Commission* v *Ireland*, C-507/03, cited above; and *Commission* v *Ireland*, C-226/09, EU:C:2010:697.

67. Furthermore, AtB maintains that EEA law does not lay down any general scheme of substantive or procedural law governing remedies for its enforcement. Accordingly, the starting point is national procedural autonomy.

68. As regards more specifically public procurement, AtB submits that the EU legislative bodies have laid down minimum requirements. According to Article 2(1)(c) of the Remedies Directive, the national review body must have the power to award damages to persons harmed by an infringement. The Remedies Directive does not establish a system for the recognition of damages and, thus, the conditions for the award of damages depend on national law. Even though the Remedies Directive was subject to revision in 2007, the EU legislative bodies did not find it desirable or necessary to adopt new provisions concerning the award of damages.

69. In Norway, the conditions for awarding damages have been primarily developed through case law. In this regard, the conditions for awarding damages for loss of profit differ substantially from the conditions for awarding damages for the cost of bidding. This distinction is fundamental not only in Norway but also in most European countries.

70. Turning to the first question, AtB maintains that none of the alternatives mentioned fully correspond to the basis of liability applying in Norwegian law for infringement of EEA public procurement law. Accordingly, the questions are hypothetical. The question the Court of Appeal must address is whether the Remedies Directive requires damages to be awarded for the loss of profit on the basis of strict liability or whether such damages may only be awarded when the contracting authority committed a sufficiently serious breach. Consequently, the Court should rephrase the first question.

71. As regards the interpretation of Article 2(1)(c) of the Remedies Directive, AtB submits that of the case law[32] interpreting this provision the judgment in *Combinatie*[33] encompasses the most thorough considerations. In that judgment, the ECJ found that Article 2(1)(c) of the Remedies Directive gives expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law.[34] This corresponds to the General Court's approach with regard to the liability of EU institutions.[35]

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32 Reference is made to the judgments in *Commission* v *Portugal*, C-275/03, cited above; *Strabag*, cited above; and *Combinatie*, cited above.

33 *Combinatie*, cited above.

34 Ibid., paragraph 87.

35 Reference is made to the judgment in *Agriconsulting Europe* v *Commission*, T-570/13, EU:T:2016:40, paragraph 32.

72. Against this background, AtB understands *Strabag*[36] as developing the approach taken in *Brasserie du Pêcheur*,[37] to the effect that national law cannot depend upon a condition based on any concept of fault going beyond that of a "sufficiently serious breach" of Community law. Furthermore, the conclusion in *Strabag* attaches great weight to the principle of effectiveness.[38]

73. In this regard, AtB takes the view that, in assessing whether a national review procedure is sufficiently effective, it must be viewed on the basis of the combined effect of the remedies available.[39] Not all remedies must be equally effective. On the contrary, the second recital in the preamble to the Remedies Directive gives weight to the view that the pre-contractual remedies are the most important remedies. This is also supported by case law.[40] Furthermore, this position is further strengthened by the fact that the Commission did not consider it desirable and necessary to amend the Remedies Directive such as to impose requirements concerning the conditions under which an awarding authority may be held liable under national law for infringements of EU procurement law.[41]

74. AtB contends that, according to case law, EU institutions cannot be made liable for an aggrieved tenderer's loss of profit.[42] It considers it difficult to find a reason why national contracting authorities should be strictly liable for the positive contract interest in the case of a breach of the procurement rules, whereas EU institutions never become liable.

75. In addition, AtB points out that, also under EEA procurement law, the contracting authorities are not obliged to enter into a contract with the tenderer selected as the winner of the award procedure. The contracting authority is free to cancel the award procedure at any time, provided that the principles of transparency and equal treatment are complied with.[43]

76. AtB argues that the judgment in *Strabag* cannot be read as establishing strict liability for the loss of profit; at most it can be read as establishing strict liability for bid costs. This conclusion is also strengthened by the fact that *Strabag*

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36 Reference is made to the judgment in *Strabag*, cited above, paragraph 45.

37 Reference is to the judgment in *Brasserie du Pêcheur*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 79.

38 Reference is made to the judgment in *Strabag*, cited above, paragraph 45.

39 Reference is made to the judgment in *Bulicke*, C-246/09, EU:C:2010:418, paragraph 35.

40 Reference is made to the Opinion of Advocate General Mischo in *Alcatel*, C-81/98, EU:C:1999:295, points 38 and 39; and the judgment in the same case (EU:C:1999:534) paragraphs 37 and 38.

41 Reference is made to the European Commission's Impact assessment report – Remedies in the field of public procurement, Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts (COM(2006) 195).

42 Reference is made to the judgment in *Agriconsulting*, cited above, paragraphs 91, 95 and 96.

43 Reference is made to the judgment in *Croce Amica One Italia*, C-440/13, EU:C:2014:2435, paragraphs 31 and 36.

concerned a provision governing damages for costs incurred (i.e. the "negative contract interest").[44]

77. AtB maintains that strict liability for loss of profit would be considerably more burdensome while adding no more deterrent effect than liability based on a sufficiently serious error. Only factors the contracting authority can influence will have a deterrent effect. In many cases, it can be unclear what course of action EEA procurement law dictates because the facts are complicated or because the provision of procurement law is unclear. However, the contracting authority must make a choice. Whichever choice is made at least one tenderer will be displeased. The consequences of a strict liability rule in such cases is that the contracting authority would be liable to pay the positive contract interest twice. This would even be contrary to the fundamental considerations underlying the procurement directives, which aim at ensuring the most efficient use of public funds.[45]

78. Moreover, according to AtB, the principle of equivalence does not present difficulties, as the condition that the error must be sufficiently serious is the basis for liability both for breaches of EEA and Norwegian public procurement law.

79. With regard to the principle of effectiveness, AtB submits that regard must be had to the combined effects of the remedies available under national law. In view of the remedies available under Norwegian law, there are no indications that these render practically impossible or excessively difficult the exercise of rights conferred by EEA procurement law.

80. In this context, AtB points out that the Commission has concluded that the Remedies Directive generally meets its objectives in term of effectiveness.[46] As claims for damages for loss of profit succeed much more frequently in Norway than in most other European countries,[47] the damages remedy must be considered sufficiently effective in Norway. In this regard, AtB makes reference to the

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44 Reference is made to the judgment in *Strabag*, cited above, paragraph 7.

45 Reference is made to Recital 2 in the preamble to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

46 Reference is made to the Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning Review Procedures in the Area of Public Procurement (COM(2017) 28 final).

47 Reference is made to two judgments given by the Supreme Court of Norway in Rt. 2001 p. 1062 and in Rt. 2007 p. 983.

conditions for awarding damages in other European countries.[48] In addition, it contends that the causal link required under Norwegian law to award damages for bid costs is one of the most liberal in Europe.

81. As regards the second question, AtB states that this question appears hypothetical. Fosen-Linjen has not invoked any breach of either Article 23 or Article 35(4) of Directive 2004/18. Furthermore, the second question is nothing more than a rewording of the first. Accordingly, it refers to its observations on the first question.

82. In AtB's submission, the obligations, if any, that the principles of equal treatment and transparency place on a contracting authority when making a decision in an award procedure come down often to nothing more than a qualified guess. 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.

83. On the third question, AtB submits 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 in a claim for damages for loss of profit and for bid costs under Norwegian law appears to be considerably lower than in many other European countries[49] and under the case law of the General Court.[50]

84. As regards the fourth question, AtB submits that this question appears hypothetical. In its view, the question to be answered by the Court of Appeal in the main proceedings is whether damages for loss of profit can be awarded where the termination of the award procedure was lawful even if AtB was not obliged to terminate the award procedure, but rightfully chose to do so. The answer thereto must be "no". Where the award procedure is lawfully terminated, there is no causal

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48 Reference is made to two Swedish judgments: (RH 2010:48 (*Plastikkirugmålet*) and judgment of the Svea Hovrätt of 15 February 2011 (*Tolkmålet*)); and a judgment of the Danish Complaints Board for Public Procurement of 15 September 2016. Reference is also made to Dacian Dragos, Boganda Neamtu and Raluca Velisc, "Remedies in Public Procurement in Romania", in Treumer and Lichère (eds), *Enforcement of the EU Public Procurement Rules* (2011); Anne Rubach-Larsen, "Damages under German Law for Infringement of EU Procurement Law", *Public Procurement Law Review* (2006) no. 4, p. 187; Martin Burgi, "Damages and EC Procurement Law: German Perspectives", in Fairgrieve and Lichère (eds), *Public Procurement Law: Damages as an Effective Remedy* (2011), p. 28; Hanna Schebesta, *Damages in EU Public Procurement Law*, cited above, chapter 7.2.1.5; María Fuentes, "The Spanish Approach to the Remedy of Damages in the Field of European Public Procurement", *European Procurement & Public Private Partnership Review* (2016) no 1, pp. 49 to 52; and Sue Arrowsmith, *The Law of Public and Utilities Procurement* (2nd ed. 2005), p. 1383.

49 Reference is made to Hanna Schebesta, *Damages in EU Public Procurement Law*, cited above, chapter 5.4.1.1; Martin Burgi, "Damages and EC Procurement Law: German Perspectives", cited above, p. 35; Vera Eirò and Esperança Mealha, "Damages under Public Procurement, the Portuguese Case", in Fairgrieve and Lichère (eds), *Public Procurement Law: Damages as an Effective Remedy* (2011), and María Fuentes, "The Spanish Approach to the Remedy of Damages in the Field of European Public Procurement", cited above.

50 Reference is made to the judgment in *Agriconsulting*, cited above.

link between alleged errors and the loss of profit. This is also in accordance with the principle of freedom of contract and how the issue is resolved in the rest of Europe.

85. Furthermore, in AtB's view, the fourth question would only be relevant if the Court of Appeal were to find that AtB could only cancel the procedure where it was obliged to do so, and where none of the errors addressed in the letter informing tenderers of the cancellation resulted in such an obligation.

86. In this connection, AtB contends that the Remedies Directive does not regulate the causal link requirement. However, even if the Remedies Directive did govern that requirement, it cannot impose an obligation to award damages for loss of profit connected to a contract that could not have been lawfully awarded to the aggrieved tenderer.[51]

87. According to AtB, to compensate an aggrieved tenderer for the loss of profit connected to a contract that he is not awarded and that he never should have been awarded would be contrary to the main objective of Directive 2004/18 which is to increase the efficiency of public spending. Moreover, this would amount to unjust enrichment of the aggrieved tenderer. In addition, had the award procedure not been cancelled in such a case, the other tenderers would have been entitled to file a petition for an interim measure seeking the cancellation of the tender procedure on the basis of the error not mentioned in the letter to the tenderers. The judgment in *GAT*,[52] on which Fosen-Linjen relies, is not relevant when deciding whether the Remedies Directive imposes any requirements concerning the condition of a causal link under national law.

88. Finally, AtB explains that it is not willing to compensate Fosen-Linjen's bid costs because Fosen-Linjen chose to submit a tender even though it knew that the award criterion "environment" was not accompanied by a documentation requirement. The ECJ has held that this is a relevant factor when deciding whether a claim for damages should succeed.[53]

89. Turning to the issue of effective verification, AtB submits that, according to the ECJ's case law,[54] the lack of documentation made the award criterion "environment" unlawful. In that connection, the ECJ has held that a tender procedure must be cancelled if the contracting authority has included an unlawful award criterion in the procurement documents.[55]

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51 Reference is made to the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, point 85.

52 Reference is made to the judgment in *GAT*, cited above.

53 Reference is made to the judgment in *Brasserie du Pêcheur*, , cited above, paragraph 84.

54 Reference is made to the judgment in *Wienstrom*, cited above, paragraph 52.

55 Ibid., paragraphs 89 to 95.

90. As regards more specifically the fifth question, AtB maintains that this question is hypothetical. None of the tenders contained the information necessary to calculate the fuel oil consumption of the vessels presented. In addition, both Fosen-Linjen and Norled based their offers on vessels not yet built.

91. As regards the sixth question, AtB considers this question, too, to be hypothetical and unrelated to the facts of the main proceedings. The question appears to be based on the assumption that the unlawful award criterion has had no impact on the award procedure. 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 the award procedure.[56]

92. AtB does not proposes specific answers to the Court.

The Norwegian Government

93. As a preliminary remark concerning the first three questions, the Norwegian Government maintains that Article 2(1)(c) of the Remedies Directive does not set out specific requirements concerning the conditions under which the contracting authority may be held liable. Consequently, recourse must be had to the conditions established under the principle of State liability for damage caused by breach of EEA law.

94. The Norwegian Government maintains that this conclusion is supported by the ECJ's judgment in *Combinatie*.[57] It follows from this judgment that, as long as the three customary conditions for State liability are complied with, it is for the legal order of each EEA State to determine the specific criteria, provided that those conditions are in compliance with the principles of equivalence and effectiveness.

95. With regard to the ECJ's judgments in *Strabag* and *Commission* v *Portugal*, the Norwegian Government argues that the ECJ did not state that Article 2(1)(c) of the Remedies Directive lays down a principle of strict liability, nor did it explicitly state that specific requirements concerning the conditions for liability could be derived from that provision.

96. The Norwegian Government contends that the approach taken in *Strabag* is difficult to reconcile with the approach taken in *Combinatie*. *Combinatie*, however, is consistent with the approach taken by the General Court for breach of the rules on public contracts by Community institutions, which are considered to be adequately effective.

97. Furthermore, the case law of the General Court on liability for Community institutions for a breach of the rules on public contracts is relevant when determining the conditions for holding contracting authorities in EEA States

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56 Reference is made to the judgment in *Evropaïki Dynamiki*, T-50/05, EU:T:2010:101, paragraph 61.

57 Reference is made to the judgment in *Combinatie*, cited above, paragraph 85 to 87.

responsible for a breach of EEA law on public contracts.[58] The General Court has consistently held that liability for Community institution for a breach of the rules on award of public contract requires that there is a "sufficiently serious breach".[59] There is no reason for applying a different standard of liability for EEA States with regard to a breach of EEA law on public contracts.

98. As regards the specific conditions for State liability, the Norwegian Government refers to *Sveinbjörnsdóttir*, *Karlsson* and *Nguyen*.[60] The Court defined what is encompassed by the condition of a "sufficiently serious breach"[61] in *Karlsson*. A "sufficiently serious breach" of EEA law is, according to the ECJ's approach in *Combinatie*, the relevant condition that should be applied when determining liability in the field of public procurement law.

99. Turning more specifically to the second question, the Norwegian Government argues that the question appears to be of no relevance to the case at issue, as the present case does not concern a breach of any specific provision of EEA law.

100. Notwithstanding this fact, the Norwegian Government comments on the question. It argues that the Court and the ECJ have held that a lack of discretion may imply that a breach is a "sufficiently serious breach".[62] However, in particular, with regard to provisions of EEA law on public contracts, where the authorities are obliged to adopt numerous decisions within a short time-limit, this alone cannot be sufficient. In these circumstances, the misinterpretation of a provision of EEA law on public contracts cannot be regarded in itself a "sufficiently serious" breach such as to trigger liability.

101. According to the Norwegian Government, the better approach would be to consider the degree of clarity and precision of the provision infringed in determining whether there has been a "sufficiently serious breach". This seems to be the approach taken by the Court in *HOB-vín*.[63]

102. As regards Questions 1(a) and 1(b), the Norwegian Government maintains that the condition of a "sufficiently serious breach" does not preclude the existence of subjective factors in the conditions for liability under national law; what matters

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58 Reference is made to *Brasserie du Pêcheur*, cited above, paragraph 42.

59 Reference is made to the judgments in *Renco SpA*, T-4/01, EU:T:2003:37, paragraph 60; *AFCon*, T-160/03, EU:T:2005:107, paragraph 93; and *Agriconsulting*, cited above, paragraph 34.

60 Reference is made to Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 62 to 69; Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 38; and Case E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224, paragraphs 30 to 36.

61 Reference is made to *Karlsson*, cited above, paragraph 38.

62 Reference is made to *HOB-vín*, cited above, paragraph 130, and to the judgment in *Larsy*, C-118/00, EU:C:2001:368, paragraph 38.

63 Reference is made to *HOB-vín*, cited above, paragraph 131.

is whether a condition for liability containing subjective factors goes beyond that of a sufficiently serious breach.[64]

103. Furthermore, the Norwegian Government contends that the national law in this regard complies with the conditions of a "sufficiently serious breach". The national condition of a "sufficiently serious error" for the award of damages for the positive contract interest does not set a higher threshold for establishing liability than the condition of a "sufficiently serious breach" under EEA law. The same is true with regard to the conditions for the award of damages for the negative contract interest. The soft or relaxed form of culpa required under national law for this latter head of damages is a less restrictive condition than the condition of a "sufficiently serious breach".

104. Turning to the third question, the Norwegian Government maintains that, under the principle of State liability, the requirement for causation is that there must be a "direct causal link" between the breach of an EEA law rule and the damage incurred.[65] What constitutes a "direct causal link" is a matter that falls under the procedural autonomy of the EEA States.[66]

105. According to the Norwegian Government, the General Court has consistently held that for an aggrieved tenderer to be awarded damages for the 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.[67] Moreover, 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.[68] 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 which requires the tenderer to prove that he would have been awarded the contract with a level of probability that comes close to certainty.[69]

106. As regards the principles of equivalence and effectiveness, the Norwegian Government maintains that the national rules do not discriminate between damages claims based on the EEA law of public contracts and claims based on the national law of public contracts, nor do they render it practically impossible or excessively difficult for an individual to enforce his rights.

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64 Reference is made to the Opinion of Advocate General Léger in *Köbler*, cited above, point 139.

65 Reference is made to *Karlsson*, cited above, paragraph 47.

66 Ibid. Reference is also made to the judgment in *Danfoss A/S and Sauer-Danfoss ApS* v *Skatteministeriet*, C-94/10, EU:C:2011:674, paragraphs 33 to 38.

67 Reference is made to the judgment in *Agriconsulting*, cited above, paragraphs 92 and 98.

68 Reference is made to the judgment in *Brasserie du Pêcheur*, cited above, paragraph 42.

69 Reference is made to the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above.

107. Turning to the fifth question, the Norwegian Government queries whether the detailed sub-questions are, in fact, hypothetical and thus need not be answered by the Court.[70]

108. Nevertheless, as regards the essence of Question 5, the Norwegian Government submits that the principle of equal treatment requires that an award criterion, in order to be lawful, 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.[71] However, the principle of equal treatment cannot be the basis for imposing a particular strict and specific requirement. Imposing too strict requirements would render it difficult to apply certain award criteria and could have the effect even of limiting innovation. 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.

109. As regards the sixth question, the Norwegian Government has doubts whether this question is relevant.[72] It submits nonetheless 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.

110. As regards the fourth question, the Norwegian Government maintains that the Remedies Directive and EEA law do not preclude a contracting authority from exonerating itself from a claim for damages for the positive contract interest by invoking arguments for cancellation other than the argument mentioned in the cancellation decision. Awarding damages for the positive contract interest presupposes that the tenderer would have been entitled to be awarded the contract. The claimant cannot be entitled to damages for the positive contract interest where the conclusion of that contract would be unlawful under EEA law on public contracts. This argument is further supported by case law, which provides that national courts may take steps to ensure that the protection of rights guaranteed by Community law does not entail unjust enrichment of those who enjoy them.[73] The judgment in *GAT* is not relevant in relation to the matters raised in the fourth question.

111. Finally, the Norwegian Government maintains that neither the Remedies Directive nor the principle of effectiveness precludes a rule whereby a tenderer

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70 Reference is made to Case E-1/16 *Synnøve Finden*, judgment of 15 December 2016, not yet reported, paragraph 28.

71 Reference is made to the judgment in *Wienstrom*, cited above.

72 Reference is made to *Synnøve Finden*, cited above, paragraph 28.

73 Reference is made to the judgment in *Manfredi*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 94.

which brings a claim for damages for the positive contract interest has to prove that it would have been lawful to conclude the contract with him.

112. The Norwegian Government proposes that the Court should answer the questions referred as follows:

Questions 1 and 2:

Article 2(1)(c) of Directive 89/665 does not set out any specific conditions on the basis of which damage for infringement of EEA law on public contracts must be determined, but is a specific expression of the principle of State liability for loss and damage caused to individuals as result of breach of EEA law.

Therefore, individuals harmed by a breach of EEA law on public contracts have a right to damages where the three customary conditions for State liability are met. Once those conditions have been complied with, it is for the national law to determine the criteria on the basis of which the damage arising from a breach of EEA law on public contracts must be determined and estimated provided the principles of equivalence and effectiveness are complied with.

It is, in principle, for the national court to determine whether the conditions in national law for the award of damages comply with the conditions for State liability for beach of EEA law.

Question 3:

Directive 89/665 and EEA law on public contracts do not preclude a rule whereby an aggrieved tenderer that brings a claim for damages for the positive interest has to prove with a clear probability that he would have been awarded the contract had the tendering procedure been conducted lawfully and the contracting authority not committed a breach of EEA law on public contracts.

Question 4:

Directive 89/665 and EEA law on public contracts do not preclude a contracting authority from freeing itself from a claim for damages for the positive interest by invoking arguments in support of its original decision to cancel the tender procedure other than the one explicitly mentioned when it made that decision during the tender procedure.

Directive 89/665 and EEA law on public contracts do not preclude a rule whereby the claimant has to prove the non-existence of other infringements of EEA law, so that the award and conclusion of the contract with the claimant would have been lawful.

Question 5:

> *The principle of equal treatment requires that an award criterion, in order to be lawful, must be accompanied by documentation from the tenderer so to enable the contracting authority to verify with a reasonable degree of reliability that the information provided by a tenderer under an award criterion is correct and accurate.*

Question 6:

> *The principle of equal treatment does not preclude that the requirement to provide documentation under an award criterion in order to verify with a reasonable degree of reliability that the information given under an award criterion is correct and accurate can be met by having regard to information given elsewhere in tender.*

ESA

113. As a preliminary remark, ESA submits that the rules for public contracts entail a high level of harmonisation of national public procurement regimes and require all contracting authorities to treat economic operators equally and without discrimination. The post-contractual remedy of damages is set out in Article 2(1)(c) of the Remedies Directive. There are no further provisions in the Directive and the sixth recital in the preamble to the Directive states merely that it is necessary to ensure that "adequate procedures exist in all the Member States to permit … compensation of persons harmed by an infringement". In the absence of further provisions on damages, it is, in principle, for the legal order of each State to determine the criteria for the award of damages arising from an infringement of EEA public procurement rules.[74] The procedural autonomy of the States is, in this regard, only limited by the principles of equivalence and effectiveness.

114. As regards the case law on Article 2(1)(c) of the Remedies Directive, ESA finds the ECJ's judgments in *Combinatie* and *Strabag* difficult to reconcile, as the approaches taken in these two judgments differ substantially. The Court should, however, follow the approach taken in *Combinatie*. Consequently, Article 2(1)(c) of the Remedies Directive is considered an expression of the principle of State liability.

115. ESA submits that the conditions of State liability laid down by the Court are identical to those laid down by the ECJ. However, differences in the legal orders might justify differences in the application of the principles. In particular, the Court has already held that the application of the principles of State liability in the EU and the EEA legal orders "may not necessarily be in all respects

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[74] Reference is made to the judgments in *Combinatie*, cited above, paragraph 90, and *Strabag*, cited above, paragraph 33.

coextensive"[75]. In the present case, the legal context in the two legal orders is similar. There is therefore no justification for a different application of the principle in the EEA in the present case.

116. Turning to the first and second questions, ESA submits that a national rule limiting the right to damages to infringements committed with culpa is clearly precluded by Article 2(1)(c) of the Remedies Directive. This follows from the second condition for State liability, as well as the ECJ's judgment in *Strabag*.

117. Furthermore, ESA submits that the second condition for State liability requires the State's breach to be sufficiently serious. In this regard, national courts "must take into account all the factors that characterise the situation before it" such as "the clarity and precision of the rules infringed; the measure of discretion left by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable".[76] States cannot limit the scope of State liability by adopting additional conditions or tests. Accordingly, the test described in the second part of Question 1(a) is incompatible with the second condition for State liability.

118. As regards Question 1(b), ESA submits that the notion of culpa does not play a role in the case law on State liability. Nevertheless, it is relevant whether the infringement was intentional or involuntary and whether any error of law was excusable. In other words, the second condition for State liability depends on many of the same factors which determine whether an act is culpable under national law. However, this does not imply that the categorisation under national law ought to play a role in the assessment under EEA law.

119. As regards Question 1(c), ESA submits that requiring the error committed to be substantial, manifest and grave would amount to adding another condition for State liability, for which there is no basis in case law. The test laid down in the case law focuses on the extent of the discretion of the authorities, whereas a condition of substantial error focuses on fault by the contracting authorities. These tests may therefore lead to different results. In particular, the conclusion of the Supreme Court of Norway[77] may, as a description of the result of the law, be correct; but it is incorrect as a description of the law. EU law does not require there to be a manifest and grave error for State liability to arise, but instead requires there to be a manifest and grave disregard of the limits of the State's discretion.

120. In addressing the second question, ESA submits that, as a matter of principle, the infringement of a rule that affords to the State no discretion in its implementation will be enough to establish a sufficiently serious breach of EEA

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75 Reference is made to *Karlsson*, cited above, paragraph 30.

76 Ibid., paragraph 38.

77 Reference is made to a judgment of the Supreme Court of Norway (Rt. 2008 p. 1705, paragraph 56) based on *Brasserie du Pêcheur*, cited above, paragraphs 55 and 56.

law. However, that rule must be clear and unequivocal.[78] This is in line with *Karlsson*.[79] For a breach of a rule to be considered sufficiently serious, it is not enough that the rule infringed confers no discretion on the State. The condition of a sufficiently serious breach requires other factors of the situation to be taken into account as well, in particular the clarity of the infringed rule.

121. As regards the third question, ESA takes the view that this question is limited to claims for damages for the positive contract interest, since in case of claims for damages concerning the negative contract interest no qualified standard of probability applies under Norwegian law.

122. ESA maintains that it is for the legal order of each State to determine the rules on causality, subject to the principles of equivalence and effectiveness. The request does not seem to raise any particular issues as regards the principle of equivalence.

123. With regard to the principle of effectiveness, ESA maintains that a breach of EEA public procurement law will only cause the tenderer a loss of profits if that tenderer had a right to be awarded the contract in the first place.

124. ESA contends that there is no obligation on a contracting authority to conclude a tender procedure[80] even though a decision to withdraw an invitation to tender must comply with EEA law.[81] The State may enact legislation allowing the cancellation of a tender procedure on grounds of, *inter alia*, expediency or where the contracting authority considers that there was an insufficient degree of competition in the tender procedure. This implies that tenderers do not have a legitimate expectation that the tender procedure will be concluded when they submit their tenders. Accordingly, where a tender procedure is lawfully cancelled, tenderers can claim neither a right to be awarded the contract nor damages for the loss of profits.

125. ESA submits that a right to be awarded the contract with a corresponding claim for damages for the positive contract interest will potentially only exist where there are exceptional circumstances or the tender procedure has been completed and the contract has been unlawfully awarded to another tenderer.

126. In the present case, the tender procedure was cancelled and the request from the national court indicates that there are no exceptional circumstances that give rise to a claim for damages for the positive contract interest under EEA law. The third question referred is, accordingly, hypothetical and inadmissible.

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78 Reference is made to *HOB-vín*, cited above, paragraphs 133 to 136, and *Karlsson*, cited above.

79 Reference is made to *Karlsson*, cited above, paragraph 51.

80 Reference is made to the judgments in *Croce Amica*, cited above, paragraph 30, and *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI)*, C-92/00, EU:C:2002:379, paragraph 41.

81 Reference is made to the judgment in *Croce Amica*, cited above, paragraph 33.

127. If, however, the Court nevertheless concludes that a tenderer can have a right to damages for the loss of profits under certain circumstances, ESA submits, that the national court must examine whether the national rule described in the question complies with the principle of effectiveness.

128. In this regard, ESA submits that where a claimant must prove that it should have been awarded the contract, it needs to establish that its tender was better than those of its competitors. However, this is an area in which the contracting authority has a broad discretion. If State liability is construed too strictly, the risk of legal actions claiming damages for lost profits may hinder the exercise of that discretion.[82] Accordingly, a national rule whereby a claim for damages for lost profits is subject to a qualified standard of liability, such as that described in the question, would therefore not necessarily be in conflict with the principle of effectiveness.

129. Furthermore, ESA contends that, where a claimant can obtain damages for the negative contract interest, exercise of the right to damages for breaches of EEA public procurement law is arguably not excessively difficult.

130. ESA submits that the fourth question is limited to claims for damages for the loss of profits, as the circumstances described in the fourth question would be an ineffective defence to a claim for the negative contract interest.

131. ESA maintains that the contracting authority has not only a right, but also a duty, to withdraw an invitation to tender if a decision relating to one of the award criteria is unlawful and therefore annulled by the review body.[83] Awarding damages for the loss of profits under a contract that would have been concluded in breach of EEA public procurement law would provide an incentive to contracting authorities to proceed with the conclusion of a contract, in order to avoid liability for lost profits, instead of ensuring compliance with EEA public procurement law by cancelling the tender procedure. It could thus undermine the effectiveness of EEA law.

132. Accordingly, ESA submits that there is no direct causality between the breach of EEA law and any lost profits, where the contract could not have been lawfully concluded. It is of no importance whether the error was invoked earlier in the process. The loss suffered in such a case would constitute the costs incurred in preparing the bid.

133. 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 causality and that the request does not raise any particular issues as regards the principle of equivalence or effectiveness.

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82 Reference is made, by comparison, to the judgment in *Brasserie du Pêcheur*, cited above, paragraph 45.

83 Reference is made to the judgment in *Wienstrom*, cited above, paragraphs 94 and 95.

134. Turning to the fifth question, ESA submits that EEA public procurement law does not contain a general obligation to verify the information relating to award criteria. Nevertheless, the contracting authorities must at all times comply with the principle of equal treatment. That principle precludes the authority from arbitrarily verifying information submitted by one of the tenderers only. It may also imply that the contracting authority must verify information, which is unclear or dubious, so as to ensure that the tenderers are treated equally.

135. Finally, with regard to the sixth question, ESA submits that from the perspective of EEA public procurement law, a tender is a single item, and does not consist of separate independent parts. The contracting authority may therefore base a verification of information on documentation provided elsewhere in the tender. However, the contracting authority must comply, at all times, with the principle of equal treatment. It cannot arbitrarily treat another tenderer differently by refusing to do the same when verifying information submitted by that other tenderer.

136. ESA proposes that the Court should answer the questions referred as follows:

> *1. Article 2(1)(c) of 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 must be interpreted to imply that any person having or having had an interest in obtaining a particular contract who has suffered loss or damage as a result of a breach of EEA public procurement law is entitled to damage where the rule of law infringed is intended to confer rights on individuals, the breach by the contracting authority is sufficiently serious and there is a direct causal link between the breach and the damage sustained. In the absence of any provisions of EEA law in that area, it is for the internal legal order of each State, once those conditions have been complied with, to determine the criteria for the award of damages, provided the principles of equivalence and effectiveness are complied with.*
>
> *2. Article 2(1)(c) of Directive 89/665/EEC must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law conditional on*
>
> *i. that infringement being culpable;*
>
> *ii. a requirement that the conduct of the contracting authority has deviated markedly from a reasonable standard;*
>
> *iii. the existence of a substantial error by the contracting authority, where the notion of culpability as defined in national law is part of a more comprehensive overall assessment; and*

iv. the contracting authority have committed a substantial, manifest and grave error.

3. Article 2(1)(c) of Directive 89/665/EEC must be interpreted to mean that a breach of an EEA procurement law provision does not constitute a sufficiently serious breach for the mere reason that the contracting authority is not free to exercise any discretion under that provision. To determine whether a breach is sufficiently serious, the national court must determine whether the State has manifestly and gravely disregarded the limits of discretion.

4. Article 2(1)(c) of Directive 89/665/EEC must be interpreted to mean that in its defence against a claim for damages for the loss of profits, a contracting authority can rely on the fact 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 claimant, and thereby avoid liability, even where that error was not in fact invoked during the tender procedure. A national rule whereby the supplier that brings the action has the burden of proof for the non-existence of such an error is not precluded by Article 1(1) or Article 2(1)(c) of Directive 89/665/EEC, provided that it complies with the principles of equivalence and effectiveness.

5. The principle of equal treatment requires that the award criteria must be formulated in a way, or be accompanied by requirements, which permit the accuracy of the information contained in the tenders to be effectively verified.

6. When verifying information submitted by a tenderer in line with the principle of equal treatment of tenderers, a contracting authority may have regard to any documentation provided in tender.

The Commission

137. The Commission considers it appropriate to address the first and second questions together. Both questions concern the liability of a contracting authority for damages due to a violation of EEA law provisions on public procurement.

138. The Commission submits that a simple breach of a sufficiently clear rule of EU law, which does not leave discretion to the contracting authority, should be considered a sufficiently serious breach of EU law for the purposes of the general case law of the ECJ on State liability for breaches of EU law.[84]

139. The Commission maintains that the rules in the field of public procurement have been subject to extensive harmonisation since the 1970s and as early as the

[84] Reference is made to the judgment in *Brasserie du Pêcheur*, cited above, paragraphs 55 to 57.

1990s the ECJ ruled that many of the rules established by EU public procurement directives were sufficiently clear and precise to produce direct effect.[85]

140. In this regard, the Commission submits that contracting authorities are obliged to establish award criteria and formulate them in a clear and precise manner. They are then obliged during the procedure to apply the criteria that they themselves established. By establishing award criteria and publishing them at the start of the public procurement procedure the contracting authority is limiting its own discretion.[86]

141. In the Commission's view, although the ECJ stated in *Strabag* that the Remedies Directive leaves certain matters to the procedural autonomy of Member States, at the same time it derived important conclusions from the general context and aim of the judicial remedy of damages. In *Strabag*, the ECJ held that the Remedies Directive aims to guarantee "judicial remedies which are effective and as rapid as possible against decisions taken by contracting authorities in infringement of the law on public contracts".[87]

142. The Commission infers from *Strabag* that every decision of a contracting authority infringing public procurement law must be amenable to review and remedies, including damages. Remedies are not limited to cases where the contracting authority is at fault or where the breach of public procurement law is particularly serious.

143. The Commission argues that, as far as damages are concerned, the ECJ has emphasised that damage claims must not be made subject to more stringent requirements than other types of remedies, as damages claims often constitute the sole remedy available to an applicant.

144. Turning to the third question, the Commission indicates that it understands the third question as relating to the positive contract interest. The standard of proof is largely unregulated by EU public procurement law. Although Article 2(7) of Directive 92/13 sets out certain criteria in this regard, this provision is of little relevance. First, it relates to the negative contract interest whereas the third question relates to the positive contract interest. Second, Directive 92/13 is not applicable to the case at issue and the suggestion by Advocate General Cruz Villalón[88] to use that directive in interpreting the Remedies Directive was not followed by the ECJ.[89] Accordingly, the Commission submits that the standard of

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85 Reference is made to the judgment in *Tögel*, C-76/97, EU:C:1998:432, paragraph 47.

86 Reference is made to the judgment in *Cartiera dell'adda*, C-42/13, EU:C:2014:2345, paragraphs 42 to 44.

87 Reference is made to the judgment in *Strabag*, cited above, paragraph 43.

88 Reference is made to the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, point 97.

89 Reference is made to the judgment in *Combinatie*, cited above, paragraph 89.

proof is a question left to the procedural autonomy of the Member States, which are bound by the principles of effectiveness and equivalence.

145. As regards the fourth question, the Commission refers to the ECJ's judgment in *GAT*,[90] which dealt with a similar issue. However, unlike the situation in *GAT*, in the present case, the contracting authority eventually cancelled the tender procedure and reopened 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 as a result of that decision.

146. The Commission contends that the fifth and sixth questions are closely linked and accordingly analyses them together. In its view, when answering those questions, regard must be had to the fact that the procedure concerned was a negotiated procedure. Given that contacts between the contracting authority and the tenderer leading to adaptations of the tender are a standard feature of a negotiated procedure, relying on information provided elsewhere in the tender does not appear to be problematic as long as the contracting authority accords the same degree of flexibility to all tenderers.

147. As regards the verification requirement, the Commission submits that neither *Wienstrom* nor the new public procurement directives define the method by which verification is to be carried out. The referring court is best placed to judge whether the verification undertaken by the contracting authority in the main case was sufficient, given that it has access to all the facts.

148. The Commission 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 the contracting authority. When verification concerns a technical aspect of the tender, the contracting authority should follow appropriate practice to verify such technical details. Such practice may be defined by legislation, public or private technical standards, or even industry practice. 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.

149. The Commission proposes that the Court should answer the questions referred as follows:

> *Directive 89/665/EEC is to be interpreted in the sense that award of damages must be available in every case, where an infringement of public procurement rules can be established. Award of damages cannot be limited*

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90 Reference is made to the judgment in *GAT*, cited above.

to cases where the contracting authority is at fault or the breach of public procurement rules is particularly serious.

A simple breach of a sufficiently clear rule of EU law that does not leave discretion to a contracting authority should be considered as a sufficiently serious breach of EU law. Such rules of EU law can arise out of the case-law of the Court of Justice; secondary EU law; or even, in the context of public procurement, from a contract notice established by the contracting authority.

In the absence of detailed EU law, standard of proof in an action for damages is a question left to the procedural autonomy of the Member States, which are bound by the principles of effectiveness and equivalence.

Directive 89/665/EEC is to be interpreted as meaning that the fact that a contracting authority cancelled a tender procedure after the award decision does not preclude a damages action linked to the illegality of that award decision.

The principle of equal treatment is to be interpreted in the sense that a contracting authority is obliged to verify a tender to the extent necessary to come to the conclusion that a tender corresponds to the requirements set out by the contracting authority. When verification concerns technical aspects of a tender, the contracting authority should follow appropriate practice as defined by legislation, public or private technical standards, or by industry practice. The principle of equal treatment requires that evaluation and verification of technical data submitted by various tenderers be 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.

The principle of equal treatment is to be interpreted in the sense that a contracting authority is allowed to rely on information provided elsewhere in the tender as long as it treats all tenderers equally.

Carl Baudenbacher

Judge-Rapporteur