



## JUDGMENT OF THE COURT

29 August 2014\*

*(Freedom of establishment – Freedom to provide services – Obligation of transparency – Principles of equivalence and effectiveness)*

In Case E-24/13,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice from the State Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*) in the case of

**Casino Admiral AG**

and

**Wolfgang Egger**

concerning the interpretation of Articles 31 and 36 of the EEA Agreement and the obligation of transparency derived therefrom in the context of a procedure for awarding a casino concession,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Casino Admiral AG (“the complainant”), represented by Stefan Hassler, Advocate;

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\* Language of the request: German.

- the Government of Belgium, represented by Liesbet Van den Broeck and Marie Jacobs, Attachés within the Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agents, and Philippe Vlaemminck and Robbe Verbeke, Attorneys-at-law;
- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Frédérique Lambrecht, Senior Legal Officer, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Catherine Howdle, Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Adrián Tokár, Hélène Tserepa-Lacombe and Nicola Yerrell, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the complainant, represented by Stefan Hassler, Advocate; Wolfgang Egger (“the respondent”), represented by Thomas Nigg, Advocate; the Belgian Government, represented by Robbe Verbeke, Attorney-at-law; the Liechtenstein Government, represented by Dr Andrea Entner-Koch; ESA, represented by Catherine Howdle; and the Commission, represented by Nicola Yerrell, at the hearing on 5 June 2014,

gives the following

## **Judgment**

### **I Legal background**

*EEA law*

1 Article 31(1) of the EEA Agreement reads:

*Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*

*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*

2 Article 36(1) of the EEA Agreement reads:

*Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

3 Article 65(1) of the EEA Agreement provides that “Annex XVI contains specific provisions and arrangements concerning procurement”. Point 1 of this Annex contains a reference to Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) (“the Directive”).

4 Recital 2 in the preamble to the Directive states:

*The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. [...]*

5 Article 17 of the Directive expressly provides that “[w]ithout prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4)”.

6 Article 1(4) of the Directive defines a service concession as “a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment”.

#### *National law*

7 Section 2 of the Gambling Act (*Geldspielgesetz*) of 30 June 2010, LGBl. 2010 No 235, (“the Gambling Act”), reads:

#### *Section 2 – Purpose*

*(1) The purpose of this Act is:*

*(a) to ensure that gambling activities take place under safe, orderly and transparent conditions;*

*(b) to prevent money laundering, organised crime and the financing of terrorism on the part of gambling operators, their customers or third parties connected with gambling activities;*

*(c) to avoid socially harmful consequences of gambling.*

*(2) Within the scope of the objectives set out in subsection (1), the present Act seeks to generate income for the State and to support non-commercial and charitable projects and activities.*

- 8 Pursuant to section 8(1) of the Gambling Act, any person wishing to operate a casino requires a concession from the Government.
- 9 Pursuant to the first sentence of section 8(2) of the Gambling Act, there is no right to the grant of a concession.
- 10 Pursuant to section 9 of the Gambling Act, a casino concession may only be granted if the requirements set out in that section are satisfied.
- 11 Pursuant to the second sentence of section 13(1) of the Gambling Act, if only one concession is to be granted, a prior tender procedure must be carried out. Section 13(2) of the Gambling Act provides that the Office for Economic Affairs (*Amt für Volkswirtschaft*) (“the Office”) must examine the bid and, where necessary, request the applicant to improve its bid or to provide additional documents within a set time limit.
- 12 Section 14(1) and (2) of the Gambling Act reads:

*Section 14 – Award of the concession*

*(1) The Government [of the Principality of Liechtenstein] shall decide on the award of the concession.*

*(2) If the number of bids submitted is greater than the number of concessions specified by the Government, it shall reach a decision on the basis of the quality of the bids submitted, having regard to the most effective implementation of the objectives of the present Act.*

- 13 Section 17(4) of the Casino Regulation (*Spielbankenverordnung*) of 21 December 2010, LGBl. 2010 No 439, (“the Casino Regulation”), reads:

*(4) If more than one bidder satisfying the requirements for the concession applies at the same time, the [Office] shall rank those bidders to reflect best possible satisfaction of the following criteria:*

*(a) independence of the management in external dealings;*

*(b) transparency and control of gambling activities and movements of funds;*

*(c) professional expertise;*

- (d) *quality of the security scheme;*
- (e) *quality of the scheme for discharging the duty of care;*
- (f) *quality of the scheme for managing social consequences;*
- (g) *quality and plausibility of the business plan;*
- (h) *reliability and conclusions of the report on the benefits of the casino for the Liechtenstein economy;*
- (i) *functioning and evocative force accorded to the internal organisation and the quality management system;*
- (k) *benefits to the Liechtenstein economy resulting from ancillary businesses;*
- (l) *suitability of the casino location from a planning law perspective.*

## **II Facts and procedure before the national court**

- 14 On 1 February 2011 the Government of Liechtenstein (“the Government”) published online a tender for the award of a concession to operate a casino in the Principality of Liechtenstein (“the tender notice”). Two bids were received before the deadline of 31 March 2011; one from the complainant and the other from the respondent.
- 15 Under point 3.1 of the tender documentation, supplied to interested parties, reference was made to the requirements for a concession specified in section 9 of the Gambling Act and the award criteria specified in section 17(4)(a) to (l) of the Casino Regulation. Moreover, it was stated that the criteria set out in the latter section would be weighted differently, with particular significance attached to the benefits to the Liechtenstein economy, subparagraphs (h) and (k), and to the casino’s planned location, subparagraph (l).
- 16 In April 2011, after the time limit for submitting bids had expired, an evaluation form was established. This was prepared by the Office and formally noted by the Government by decision of 19 April 2011. The evaluation form was not published. It provided detailed weighting of the criteria specified in section 17(4)(a) to (l) of the Casino Regulation, referring to the different significance of each criterion. Special reference was made to “[t]he importance attached to the benefits to the Liechtenstein economy [...] and the suitability of the casino location from a planning law perspective”. The evaluation form included the following table stating the maximum number of points that could be obtained in relation to each criterion. Furthermore, it was stated that the Office was to request the Government to award the concession to the bidder whose bid scored the greatest number of points.

		Max. points:
(a)	<i>Independence of the management in external dealings;</i>	100
(b)	<i>Transparency and control of gambling activities and movement of funds;</i>	180
(c)	<i>Professional expertise;</i>	110

(d)	<i>Quality of the security scheme;</i>	240
(e)	<i>Quality of the scheme for discharging the duty of care;</i>	225
(f)	<i>Quality of the scheme for managing social consequences;</i>	230
(g)	<i>Quality and plausibility of the business plan;</i>	370
(h + k)	<i>Reliability and conclusions of the report on the benefits of the casino and ancillary businesses for the Liechtenstein economy;</i>	430
(i)	<i>Functioning and reliability of the internal organisation and the quality management system;</i>	150
(l)	<i>Suitability of the casino location from a planning law perspective;</i>	370
	<i>Total</i>	2 405

- 17 With assistance from experts, the Office examined whether the requirements for a concession specified in section 9 of the Gambling Act were satisfied and, in a subsequent step, it ranked the two bids received in accordance with the criteria set out in section 17(4) of the Casino Regulation and the weighting provided for in the abovementioned evaluation form. On 31 January 2012, by decision RA 2011/2897-7117 (“the Decision”), the Government, in accordance with the Office’s request of 16 November 2011, rejected the complainant’s bid and awarded the concession to the respondent.
- 18 The complainant challenged the Government’s decision, bringing an action before the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*). It argued, *inter alia*, that the evaluation criteria and the weighting attached to them were incompatible with the Gambling Act and infringed the Constitution.
- 19 By judgment of 31 May 2012, the Administrative Court upheld the complaint in part and set aside the Decision. It found that the weighting of the award criteria had been unlawful and that a new tender notice needed to be published. The complainant disagreed with the Court’s interpretation of the obligation of transparency and, on 20 July 2012, challenged this judgment before the State Court. By judgment of 11 December 2012, the State Court upheld the appeal, stating that there had been a breach of the obligation to give reasons, and remitted the case to the Administrative Court for a new decision.
- 20 By its second judgment of 18 February 2013, the Administrative Court again concluded that the Decision should be set aside but rejected the complainant’s claim that it should be granted the casino concession, holding that any new procedure to award a concession must begin with a new tender notice.
- 21 In this judgment, the Administrative Court concluded that the first and only document to set out a materially adequate explanation of the weighting of the

award criteria was the evaluation form and not the original tender notice. As that document had not been published, it was legally ineffective. Thus, there was no valid weighting of the criteria to govern the tender procedure. From the perspective of EEA law, the Administrative Court found that a casino concession constitutes a service concession and that such concessions are not covered by any of the directives on public procurement. All the same, the Administrative Court concluded that the tender procedure at issue did not satisfy the EEA law requirements of transparency and equal treatment and was therefore unlawful.

- 22 On 21 March 2013, the complainant lodged a further complaint with the State Court, alleging that, in its judgment of 18 February 2013, the Administrative Court had failed to correctly differentiate between a service concession and a public contract. For that reason, the obligation of transparency had not been infringed. Referring to Case C-226/09 *Commission v Ireland* [2010] ECR I-11807 and to the Opinion of Advocate General Alber in Case C-470/99 *Universale-Bau* [2002] ECR I-11617, the complainant took the view that the obligation of transparency does not require the weighting of the award criteria to be notified in advance. Thus, the Administrative Court had erred in law and infringed the complainant's constitutional rights by failing to grant its request to be awarded the casino concession. The complainant's further request, that the Decision be suspended until final judgment was given, was granted by the President of the State Court by decision of 28 March 2013.
- 23 The State Court observed that there is no case law of the EEA courts which provides a manifestly unambiguous answer to the question whether the tender procedure for the casino concession infringed EEA law requirements, in particular Articles 31 and 36 of the EEA Agreement, and the obligation of transparency derived therefrom, such as to justify a new tender procedure.
- 24 Consequently, in a request registered at the Court on 8 November 2013, the State Court referred the following questions:
  1. *What are the general requirements of EEA law and European law (in particular Articles 43 and 49 EC and the obligation of transparency derived therefrom) regarding the procedure for awarding casino concessions?*
  2. *Does EEA law or European law require that an authority seeking to award a concession states at the time at which it publishes its tender notice how it intends to supplement and specify in greater detail the requirements set out in the act and the regulation?*
  3. *In particular, in the context of the relevant tender procedure, is there a general obligation to give prior notice of the relative weighting that will be given to the award criteria when awarding the concession? If that question is answered in the affirmative, what requirements do EEA law and European law impose as regards the substance of the information that must be provided in that prior notice?*

4. *In the case at hand, were the requirements of EEA law and European law satisfied?*
5. *If the EFTA Court finds that the tender procedure did not comply with the requirements of EEA law and European law:*
  - a. *Do EEA law and European law establish specific legal consequences in the case of procedural errors of that kind?*
  - b. *Can procedural errors of that kind be cured? If so, under what conditions?*
  - c. *In the case at hand, were the requirements met to set aside the whole tender and concession award procedure?*

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

### **III The first, second and third questions**

26 In light of the information submitted in the State Court's request and the jurisdiction of the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), the first question must be understood as asking what requirements can be derived from Articles 31 and 36 of the EEA Agreement when awarding a casino concession such as that at issue in the main proceedings. By its second question, the State Court asks whether there is a requirement to specify, at the time when a tender notice is published, how the requirements laid down in applicable legislation will be supplemented. By its third question, the State Court asks whether there is a general obligation to give prior notice of the relative weighting that will be given to the award criteria and, if so, what information a notice of that kind is required to contain. The Court finds it appropriate to assess these three questions together.

#### *Observations submitted to the Court*

27 Referring to *Commission v Ireland*, cited above, the complainant submits that even if the obligation of transparency in EEA law requires in public procurement law that the weighting of the award criteria must necessarily be published together with the tender notice, such an obligation does not extend to the award of a service concession. The complainant points out that this is logical as the economically most advantageous offer is not relevant since the awarding authority does not need to pay for the provision of the services.

28 The complainant contends that even if the transparency obligation does require that the weighting of the award criteria must be published, this obligation has not been breached since the weighting criteria can be found in the Gambling Act and



parts of the Casino Regulation which lay down the relevant objectives. Where a distinction is not made between these objectives, they should be considered to be equally important and thus have equal ranking.

- 29 In line with the Administrative Court's findings, the complainant submits that the evaluation form is unlawful. However, in its view, that should not lead to the tender procedure itself being found unlawful. The evaluation form is an internal document produced by the Office that no tenderer knew to exist. It could simply have been ignored and the tenders submitted examined without it.
- 30 With regard to the question whether the tender procedure itself was lawful, the complainant submits that, at the time of publication of the tender notice, neither European Union directives nor the case law of the European Union courts required the publication of the weighting of the award criteria.
- 31 At the oral hearing the complainant suggested that the transparency obligation does not entail a strict requirement. Some degree of publicity is sufficient, which, in its view, was secured by the online publication of the tender procedure and the award criteria, where reference was made to the Gambling Act and the Casino Regulation. The transparency obligation was further secured in that a bidder had the possibility to submit to the Office any questions relating to unclear aspects in the tender documents. Much use was made of this possibility as 27 questions were posed and the answers to them made available to all bidders.
- 32 In its oral submissions the respondent stated that the awarding of the casino concession was lawful and that the requirements laid down in the Gambling Act and Casino Regulation had been met.
- 33 The Belgian Government notes that service concessions are not regulated by any public procurement directive or other specific rules. Thus, the concession awarding authority is bound by the fundamental rules of EEA law, in particular the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency. The main requirement of the latter obligation is that a competitive procedure must take place before a concession to operate games is awarded. However, the call for tenders itself does not fall under the obligation of transparency. It suffices to have a degree of publicity sufficient to open the service concession up to competition and to allow the impartiality of the award procedures to be reviewed.
- 34 The Belgian Government argues that compliance with the principle of equal treatment and the consequent obligation of transparency necessarily means that objective criteria – enabling the discretion of the competent authorities of the EEA State concerned to be circumscribed – must be sufficiently advertised. Referring to *Commission v Ireland*, cited above, the Belgian Government contends that, when public procurement directives do not apply, it cannot be legitimately argued that the scope of the principle of equal treatment and the consequent obligation of transparency extends to requiring that the relative weighting of the criteria used by the contracting authority must be determined in

advance and notified to potential tenderers when they are invited to submit their bids. At the oral hearing, the Belgian Government further emphasized that attaching weighting to a tender procedure is not allowed once the bids have been opened.

- 35 Referring to Case C-331/04 *ATI EAC and Others* [2005] ECR I-10109, the Belgian Government submits further that it is not contrary to European law to attach a weighting to already defined award criteria, provided that this does not alter those criteria, does not contain elements which would have affected the preparation of the tenders and was not done on the basis of matters likely to give rise to discrimination against one of the tenderers. Any such specification, supplementation or weighting added to existing criteria may not be of substantial nature in as much as this would have allowed for the admission of different tenderers or for the acceptance of different offers.
- 36 The Liechtenstein Government submits that public authorities are required, when awarding service concessions, to comply with the fundamental rules of EEA law such as the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency. In light of those principles, all potential tenderers have to be afforded equal opportunity in formulating the terms of their application and they must be subject to the same conditions. There should be a degree of publicity which is sufficient to enable the market to be opened up to competition and the impartiality of the award procedures to be reviewed. According to Liechtenstein, that requirement is met when a tender notice is published on the internet and the tender documentation supplied makes it possible to form a detailed idea of the concession.
- 37 The Liechtenstein Government contends further that the directives on the different categories of public contracts do not apply to the award of a service concession. Referring to *Commission v Ireland*, cited above, it submits that there is neither an obligation to determine in advance the relative weighting of criteria for the award of a service concession nor to notify such weighting to potential tenderers when they are invited to submit their bids.
- 38 According to ESA, it follows from Case C-91/08 *Wall* [2010] ECR I-2815 that national authorities must comply with two requirements when advertising and concluding a service concession. These are that the tender is advertised in such a way that, first, the concession can be opened up to competition and, second, the impartiality of the award procedure can be reviewed. For that purpose, national authorities should ensure that the evaluation criteria used in a tender award process do not create a situation of discrimination or partiality and that they are not determined in a manner which precludes a national court from reviewing whether this is the case.
- 39 In ESA's view, the ruling in *Commission v Ireland*, cited above, implies that the obligation of transparency does not require the precise procedural requirements of public procurement directives to be applied outside the scope of those directives. All the same, the standard that national authorities should meet in

order to fulfil the obligation of transparency itself appears to have been raised in Joined Cases C-72/10 and C-77/10 *Costa and Cifone*, judgment of 16 February 2012, published electronically.

- 40 ESA is of the view that Articles 31 and 36 EEA require a sufficient level of advertising so that the concession can be opened up to competition and the impartiality of the award procedure can be reviewed. The conditions and rules of the award procedure must be clear, precise and unequivocal to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way.
- 41 ESA does not consider it the case that EEA law specifically requires an authority seeking to award a concession to state at the time at which it publishes its tender notice how it intends to supplement and specify in greater detail the requirements set out in relevant legal acts. Specific weighting of the criteria established in the tender notice can be determined at a later date as long as the bids have not been opened. The national authority must, however, comply with the general requirements of transparency. If a relative weighting is set out in the public tender notice (or may be inferred from consistent practice) then this relative weighting must not change when the exact weighting is specified by the tender authority.
- 42 The Commission notes that service concessions fall outside the scope of the Directive. All the same, they remain subject to the fundamental principles of freedom of establishment and freedom to provide services, and in particular to the key principle of non-discrimination on grounds of nationality. An obligation of transparency allows for verifying that this principle is observed.
- 43 Referring to Cases C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 and C-64/08 *Engelmann* [2010] ECR I-8219, the Commission submits that, in order to comply with the transparency obligation, it is essential that the contracting authority provides a “degree of advertising sufficient to enable the services market to be opened up to competition” and for the impartiality of the award procedure to be reviewed.
- 44 In order to open up the procedure in compliance with the principle of equal treatment, the Commission submits that adequate information should be given at the outset so that the interested parties can assess whether they want to express an interest or not. To circumscribe the exercise of national authorities’ discretion, the award criteria must be based on objective, non-discriminatory criteria which are known in advance. This ensures the equal position of parties when formulating a bid and that any bids are subsequently assessed on the same terms and under the same conditions.
- 45 The Commission also notes that there is no specific requirement to publish details of the relative weighting to be given to the award criteria for a service concession falling outside the scope of the Directive. Nevertheless, the relative weighting of award criteria must be fixed prior to the opening of bids and it

cannot contain information which could have had a significant effect on the preparation of the bid itself, nor which effectively amounts to an alteration of the original criteria.

- 46 At the oral hearing, the Commission stated that it does not share ESA's view that *Costa and Cifone*, cited above, has raised the standard to be met with respect to the general obligation of transparency. In that case, the Court of Justice of the European Union refers to longstanding general principles and, given the difference in factual situation between the two cases, it cannot be seen as revisiting *Commission v Ireland*, cited above, of which no mention is made in the relevant part of the judgment. In further support of this view, the Commission referred to Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1) which has not yet been made part of EEA law. Articles 33, 41 and Annex V require the award criteria to be included in the concession notice but Article 41(3) requires the criteria to be listed only in descending order of importance. Thus, the Union legislative bodies have not chosen a requirement of relative weighting, which can be contrasted with Article 53(2) of Directive 2004/18/EC, and it cannot be argued that a relative weighting requirement would apply nonetheless on the basis of the general principles of non-discrimination on grounds of nationality and transparency.

#### *Findings of the Court*

- 47 At the outset, it is noted that the consideration for the provision of services under the contract at issue in the main proceedings consists solely in the right to exploit the service of casino operation. Thus, the contract amounts to a service concession, as defined in Article 1(4) of the Directive. Accordingly, it falls outside the Directive's scope as provided for in Article 17 of the Directive.
- 48 The Court recalls that all games of chance (gambling and betting) provided in return for money constitute economic activities falling within the scope of EEA fundamental freedoms (see Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 39 and case law cited). Moreover, national legislation, such as that at issue in the main proceedings, that makes the exercise of an economic activity subject to the grant of a concession constitutes an obstacle to the freedoms guaranteed by Articles 31 and 36 EEA.
- 49 Such restrictions may, however, be justified on the basis of the express derogations as provided for in Article 33 EEA, or by overriding reasons in the public interest. Moral, religious and cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order.
- 50 The EEA States are free to set the objectives of their policy on gaming and, where appropriate, to define in detail the level of protection sought, provided that

they comply with the requirements under the case law of the Court with regard to their proportionality (see *Ladbroke's*, cited above, paragraph 42 and case law cited).

- 51 Thus, although service concession contracts are not, as EEA law now stands, governed by any of the directives by which the field of public procurement is regulated the public authorities concluding them are bound to comply with the fundamental rules of the EEA Agreement in general, including the freedom to provide services and, in particular, the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency. The latter obligation applies where the service concession in question may be of interest to an undertaking located in an EEA State other than that in which the concession is awarded (see, for comparison, Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraphs 39 and 40 and case law cited).
- 52 Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the bid process for the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed (compare, to that effect, *Costa and Cifone*, cited above, paragraph 55 and case law cited).
- 53 The award of a service concession must therefore be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion.
- 54 In the absence of transparency, an undertaking located in an EEA State other than the concession awarding EEA State has no real opportunity of expressing its interest in obtaining that concession. The transparency requirements are, in particular, such as to ensure that an undertaking located in the territory of an EEA State other than Liechtenstein can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession (compare Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 18 and 21).
- 55 The purpose underlying the principle of transparency is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure.

- 56 The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings.
- 57 According to the case-file, the tender documentation, supplied to interested parties, included a reference to the requirements for the granting of a concession under section 9 of the Gambling Act and the award criteria specified in section 17(4)(a) to (l) of the Casino Regulation. Moreover, it was stated at the outset that the criteria set out in section 17(4) of the Casino Regulation would be weighted differently, with particular significance attached to criteria set out in subparagraphs (h) and (k) of section 17(4), which relate to the benefits to the Liechtenstein economy, and in subparagraph (l) of the same provision, which concerns the casino's planned location. However, the relative weighting for each of the award criteria was neither stated in the publication notice nor the tender documentation.
- 58 The Court notes that while the requirement to state the relative weighting for each of the award criteria at the stage of publication of a contract notice, provided for in Article 53(2) of the Directive, does extend the obligation of transparency with regard to public service contracts, the same cannot legitimately be argued with regard to service concessions in the absence of specific provisions to that effect (see for comparison, *Commission v Ireland*, cited above, paragraph 43). Whereas Articles 31 and 36 EEA do not preclude the publication of the relative weighting of criteria or making such weighting known to interested operators prior to the submission of bids, the considerations set out in paragraphs 55 and 56 do not entail that a general obligation exists in that respect.
- 59 Nevertheless, by attributing weightings such as those at issue in the main proceedings, in which the terms on which tenders submitted are to be evaluated are set out, the contracting authority must ensure the impartiality of the process and the equality of those interested in acquiring a concession for a service. There is an obligation on the contracting authority to interpret the award criteria in the same way and the weighting of the award criteria should be fixed before the envelopes containing the tenders submitted are opened. Moreover, the weighting attributed should not alter the criteria for the award of a contract set out in the tender documents or the contract notice, nor should it contain elements which, if they had been known at the time the tenders were prepared, could have significantly affected their preparation. Finally, the weighting should not be adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (compare *Commission v Ireland*, cited above, paragraphs 46, 48 and 49).
- 60 In light of the preceding findings, the answer to the first three questions must be that, in the absence of specific provisions, national authorities remain bound by fundamental rules of EEA law when awarding service concessions. This does not preclude the national authority from attaching relative weighting to the award criteria but there remains a duty to comply with the obligation of transparency. This obligation entails that the relative weighting cannot alter the original award

criteria, be of a nature that could have significantly affected the preparation of tenders or be likely to give rise to discrimination against one of the tenderers.

#### **IV The fourth and fifth questions**

- 61 The fourth and fifth questions seek to establish whether the requirements of EEA law regarding the tender procedure were satisfied and what consequences follow if those requirements were not satisfied. Namely, the national court wishes to know whether procedural errors of that kind can be cured and if requirements for setting aside the whole tender and concession award procedure are met. The Court finds it appropriate to assess these questions together.

##### *Observations submitted to the Court*

- 62 The complainant argues that there was a flaw in the weighting of the award criteria. All the same, as this flaw did not affect the whole tender procedure it could only lead to a re-opening of the affected part and only on the condition that more than one tender fulfils the concession requirements. The complainant asserts that only its bid met the necessary requirements and that, as a result, the conditions for repetition are not met.
- 63 The Belgian and Liechtenstein Governments, ESA and the Commission all contend that it is for the referring court to assess the facts of the case before it and rule whether the requirements of EEA law are met. The Belgian Government submits that if a tender procedure is found not to be compliant with EEA law then all necessary measures have to be taken, in accordance with the national legal system, to restore transparency. The Liechtenstein Government, ESA and the Commission all refer to the role of the national legal system in ensuring remedies for the protection of rights derived from EEA law and that such remedies comply with the principles of equivalence and effectiveness.
- 64 ESA observes further that the evaluation form which set out the fully weighted criteria was non-binding and unpublished. Moreover, it cannot be deduced from the State Court's request whether the evaluation form was adopted before or after the tenders submitted had been opened. In ESA's view, the transparency obligation precludes the adoption of this form if the tenders had already been opened.
- 65 ESA contends that if a breach has been established, there can be more than one appropriate solution to ensure that the adverse effects do not subsist throughout the performance of the contract.
- 66 ESA considers the obligation of transparency as intended to fulfil the public interest objective of ensuring good administration in the award of concessions, so that awards can be made in a way that is non-arbitrary and non-discriminatory. A lack of transparency might discourage potential participants including those who are participating on a cross-border basis from submitting tenders. The remedies considered by the national court should reflect the public interest objective.

- 67 In that regard, ESA contends that the substitution of one tenderer for another, as requested by the complainant in the case at hand, does not appear the most appropriate solution. In ESA's view, re-opening of the tender procedure appears more appropriate for breaches of the principle of transparency relating to (i) the weightings attributed to the award criteria and (ii) the time at which the award criteria were determined in detail. Should the national court decide on a different remedy, it will have to ensure that the principles of equivalence and effectiveness are satisfied.
- 68 ESA acknowledges, however, that the re-opening of the award procedure may involve certain difficulties, for example, when the bids have been made public or when there is an increased level of market participation. If there are no safeguards for the parties which participated in the initial tender procedure, the question of State liability may arise.

*Findings of the Court*

- 69 In the absence of EEA rules on remedies in the field of service concession contracts, it is for the domestic legal system of each EEA State to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law. However, such rules must, first, be no less favourable than those governing similar domestic actions (principle of equivalence). Second, they must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness) (see, for comparison, Case E-11/12 *Koch and Others* [2013] EFTA Ct. Rep. 272, paragraph 121 and case law cited).
- 70 It follows that the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 31 and 36 EEA and the consequent obligation of transparency do not necessarily require, in the case of a breach of that obligation in connection with the award of a service concession, the national authorities to terminate a contract or the national courts to set aside the award decision.
- 71 However, in the case at hand, when assessing the available remedies intended to avoid that effects contrary to Articles 31 and 36 EEA subsist, the national court must ensure that the public interest objective of good administration is adequately reflected in the award of concessions, so that awards can be made in a manner that is neither arbitrary nor discriminatory.
- 72 It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from the obligation of transparency in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult.



- 73 In order to establish whether the principle of equivalence has been complied with in the main proceedings, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the relevant field of national law, to consider the purpose, cause of action and the essential characteristics of allegedly similar domestic actions. Moreover, every case in which the question arises as to whether a national provision is less favourable than those concerning similar domestic actions must be analysed by the national court by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies (see, for comparison, *Koch and Others*, cited above, paragraphs 124 and 125).
- 74 If the State Court finds that there is a sufficiently serious breach of the obligation of transparency with respect to the weightings of the award criteria, a re-opening of the tender procedure appears to be a more appropriate course of action than the substitution of one tenderer for another. The stage of the tender procedure at which it should be re-opened, e.g. *ab initio* or at the point at which the bids were received, depends on the nature of the flaw in the process. This is a matter to be determined by the State Court.
- 75 In light of the preceding considerations, the answer to the fourth and fifth questions must be that the obligation of transparency does not necessarily require the national authorities to terminate a contract or the national courts to set aside an award decision in every case of a breach of that obligation in connection with the award of a service concession. However, the national court must consider, when assessing in the circumstances of the case at hand the available remedies to ensure that effects contrary to Articles 31 and 36 EEA do not subsist, that the public interest objective of good administration is adequately reflected in the award of concessions, so that awards can be made in a way that is non-arbitrary and non-discriminatory. In the absence of EEA rules on remedies it is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from the obligation of transparency in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult.

## V Costs

- 76 The costs incurred by the complainant, the respondent, the Governments of Belgium and Liechtenstein, ESA and the Commission, which have all submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the State Court, any decision on the costs of the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the State Court of the Principality of Liechtenstein hereby gives the following Advisory Opinion:

**1. In the absence of specific provisions, national authorities remain bound by fundamental rules of EEA law when awarding service concessions. This does not preclude the national authority from attaching relative weighting to the award criteria but there remains a duty to comply with the obligation of transparency. This obligation entails that the relative weighting cannot alter the original award criteria, be of a nature that could have significantly affected the preparation of tenders or be likely to give rise to discrimination against one of the tenderers.**

**2. The obligation of transparency does not necessarily require the national authorities to terminate a contract or the national courts to set aside an award decision in every case of breach of that obligation in connection with the award of a service concession. However, the national court must consider, when assessing in the circumstances of the case at hand the available remedies to ensure that the effects contrary to Articles 31 and 36 EEA do not subsist, that the public interest objective of good administration is adequately reflected in the award of concessions, so that awards can be made in a way that is neither arbitrary nor discriminatory. In the absence of EEA rules on remedies it is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 29 August 2014.

Philipp Speitler  
Acting Registrar

Carl Baudenbacher  
President