



REPORT FOR THE HEARING

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.

I Introduction

1. By a letter of 6 November 2013, registered at the Court on 8 November 2013, the State Court of the Principality of Liechtenstein (the “referring court”) requested an Advisory Opinion in a case pending before it between Casino Admiral AG (“the complainant”) and Wolfgang Egger (“the respondent”).

2. At issue in the case is whether the tender procedure for awarding a casino concession breaches EEA law and 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.

II Legal background

EEA law

3. 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.

4. 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.

5. 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”).

6. 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)”.

7. 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*¹

8. 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;

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

(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.

9. Pursuant to section 8(1) of the Gambling Act, any person wishing to operate a casino requires a concession from the Government.

10. Pursuant to the first sentence of section 8(2) of the Gambling Act, there is no right to the grant of a concession.

11. 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.

12. 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.

13. Section 14(1) and (2) of the Gambling Act reads:

Section 14 – Award of the concession

(1) The Government [of the Principality of Liechtenstein; the “Government”] 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.

14. Section 17(4) of the Casino Regulation (*Spielbankenverordnung*) of 21 December 2010, LGBI. 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.*

III Facts and procedure

15. On 1 February 2011, the Government published online a tender notice for the award of a concession to operate a casino in the Principality of Liechtenstein (the “tender notice”). The time limit for submitting bids was fixed for 16:30 hrs on 31 March 2011.

16. The tender notice referred to the tender documentation, supplied to interested parties on payment of a fee of CHF 2 000.

17. Under the heading “Criteria on which a decision will be based”, point 3.1 of the tender documentation listed 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. It stated that the criteria set out in subparagraphs (a) to (l) would be weighted differently according to their importance. Particular significance would be attached to the benefits to the Liechtenstein economy, subparagraphs (h) and (k), and to the casino’s planned location, subparagraph (l).

18. A comprehensive and precise weighting of the individual criteria specified in section 17(4)(a) to (l) of the Casino Regulation was not carried out until after the time limit for submitting bids had expired when in April 2011 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.

19. Under the heading “purpose of the evaluation form” it is stated:

The evaluation form summarises the [Office]’s evaluation of the concession bid. It provides the basis for:

(a) *any invitation to the bidder to submit improvements or additional documentation;*

(b) *the proposition of the [Office] to the Government for the grant or refusal of the concession.*

20. The subheading “Weighting of the criteria specified in section 17(4)(a) to (l) of the Casino Regulation” reads:

With a view to achieving the objectives established in section 2 of the Gambling Act, the importance attached to each criterion specified in section 17(4)(a) to (l) of the Casino Regulation differs. The importance attached to the benefits to the Liechtenstein economy (increasing the attractiveness of Liechtenstein as a tourist destination, additional benefits resulting from ancillary businesses such as restaurants and hotels, number of new jobs created, contracts for construction firms and local suppliers, tax revenues) and the suitability of the casino location from a planning law perspective (i.e. a location allowing for the concession to be exploited and payment of the gambling levy to follow in as short a time as possible) are reflected in the weighting given to these factors. The weighting is achieved by establishing the maximum number of points (“maximum points”) that can be obtained in relation to each criterion as follows:

		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

21. The other subsections of the form under the heading “Beauty contest” relate to the weighting of the individual bid documents, the assessment criteria, the

grading scheme for the individual bid documents and the satisfaction of the criteria. Under the heading “Ranking” it is established that the Office will request the Government to award the concession to the bidder whose bid has scored the greatest number of points.

22. By 31 March 2011, two bids for a concession had been received by the Office. One bid was from the complainant and the other bid was from the respondent.

23. 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, the Office ranked the two bids 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.

24. Following the completion of the evaluation procedure, on 16 November 2011, the Office requested the Government to reject the complainant’s bid and to award the concession to the respondent, that is to say, to Casino Vaduzerhof AG (a company in formation). On 31 January 2012, by decision RA 2011/2897-7117 (the “Decision”), the Government rejected the bid of the complainant and granted the concession to operate the Liechtenstein casino to Casino Vaduzerhof AG.

25. The complainant challenged the Decision by lodging a complaint with the Administrative Court (*Verwaltungsgerichtshof*). In its complaint, it argued, *inter alia*, that in many respects the evaluation criteria and the weighting attached to them were incompatible with the Gambling Act and infringed the Constitution. First, there was no legal basis for evaluating the benefit of ancillary businesses to the Liechtenstein economy. Second, the criteria concerning the benefit of the casino to the Liechtenstein economy and the location of the casino specified in section 17(4) of the Casino Regulation did not reflect the objectives of the legislation provided for in section 2 of the Gambling Act.

26. By judgment of 31 May 2012, the Administrative Court partially upheld the complaint 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.

27. On 20 July 2012, the complainant challenged this judgment before the State Court, as it disagreed with the Administrative Court’s interpretation of the obligation of transparency.

28. By judgment of 11 December 2012, the State Court upheld the appeal, holding that there had been a breach of the obligation to state reasons, and remitted the case to the Administrative Court for a new decision.

29. By its second judgment of 18 February 2013, the Administrative Court again concluded that the Decision should be set aside but rejected the second branch of the complainant’s claim, namely, that it should be granted the casino concession.

30. 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. However, that document was legally ineffective as it was not published. For that reason, there was no valid weighting of the criteria to govern the tender procedure at issue in the present case.

31. Also, the Administrative Court considered the non-publication of the evaluation form from the perspective of EEA law and concluded that a casino concession constitutes a service concession. Referring to the case-law of the Court of Justice of the European Union (“ECJ”),² the Administrative Court noted that service concessions are not covered by any of the public procurement directives and reached the conclusion that the tender procedure at issue did not satisfy the EEA requirements of transparency and equal treatment and was therefore unlawful.

32. Consequently, the Administrative Court set aside the Decision, holding that any new procedure to award a concession must begin with a new tender notice.

33. 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 correctly to differentiate between a service concession and a public contract. For that reason, the obligation of transparency had not been infringed. At the same time, the complainant argued that the judgment of the Administrative Court infringed its constitutional rights to the extent that the latter had refused to honour the complainant’s request to award it the casino concession.

34. Relying upon the case-law of the ECJ,³ the complainant took the view that the obligation of transparency does not require the weighting of the award criteria to be notified in advance and concluded that the Administrative Court had erred in law in failing to grant its request for an order awarding the casino concession. The complainant further requested that the Decision be suspended until final judgment was given. This latter request was granted by the President of the State Court by decision of 28 March 2013.

35. A further exchange of correspondence followed between the Administrative Court and the two parties to the proceedings. 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

² Reference is made to Joined Cases C-72/10 and C-77/10 *Costa and Cifone*, judgment of 16 February 2012, not yet reported, and Case C-532/06 *Lianakis* [2008] ECR I-251.

³ Reference is made 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.

Agreement, and the obligation of transparency derived therefrom, such as to justify a new tender procedure.

36. Since many of the ongoing arguments centred on the correct application and effect of EEA law, and in particular the scope of any transparency requirements deriving from the principles of the freedom to provide services and freedom of establishment, the State Court of the Principality of Liechtenstein decided that it was necessary to refer the following questions to the Court for an advisory opinion:

- 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?**

IV Written observations

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

- Casino Admiral AG, represented by Stefan Hassler, Advocate;
- the Government of the Kingdom 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, assisted by Philippe Vlaemminck and Robbe Verbeke, attorneys-at-law;
- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, 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, Temporary 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.

V Summary of the arguments submitted

The complainant

38. At the outset, the complainant underlines the fact that it did not request the court to set aside the tender procedure, but to award it the concession that was originally awarded to the respondent. It considers it crucial that the advisory opinion should not deal with the questions of EEA law arising simply on a general basis but address these specifically in the context of the present case.

39. As protection of the interested parties not submitting bids is one of the central issues in the case, the complainant requests the Court to address whether EEA law requires a new tender procedure to be carried out, to the extent that it is intended to award a concession, as the possibility cannot be precluded that interested parties were dissuaded from submitting a bid since the weighting of the award criteria was supposedly not made public.

40. In the complainant’s view, the judgment of the Administrative Court raises several questions, of which the most crucial is whether the weighting of the award criteria had to be provided together with the tender notice.

41. The complainant disagrees with the view taken by the Administrative Court, namely, that the obligation of transparency in EEA law requires that the weighting of the award criteria must necessarily be published together with the

tender notice. The complainant submits that only in public procurement law is publication of the weighting of the award criteria necessary,⁴ while for the award of service concessions, there is no such obligation.

42. With reference to an article on public procurement law and service concessions,⁵ the complainant points out that, for the purpose of service concession awards, it is logical that the transparency obligation does not require the weighting of the award criteria to be known in advance. As the awarding authority does not need to pay for the provision of the services, the economically most advantageous offer is not relevant. Instead, the concession holder has to obtain third-party funding. Thus, it is not important that a particular objective, such as the lowest price, is achieved; instead, the decisive question is which bidder can demonstrate the best possible satisfaction of all the criteria incorporating the objectives of the Gambling Act. However, it is not necessary that the award criteria are weighted differently; it is also possible that the award criteria are all given an equal weighting.

43. 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 can be found in the Gambling Act.⁶ The Gambling Act provides the parameters for the exercise of discretion by the national authorities when awarding a concession. Those requirements also govern the interpretation of section 17(4) of the Casino Regulation which reflects the objectives of the Gambling Act. The complainant submits further that if the Gambling Act has three equally important objectives, this equal ranking itself constituted a weighting.

44. The complainant submits that the criteria specified in subparagraphs (k) and (l) of section 17(4) do not fall within the objectives of the Gambling Act as they cannot be found in section 2(1) of the latter. However, even though there may be doubts whether the Gambling Act provided a sufficient legal basis in that regard, these two criteria did not affect the tender notice itself as they did not impact substantively on the production of a concession bid but only on the ranking at the award stage.

45. As regards the evaluation form, the complainant stresses that it is an internal document produced by the Office. Although the complainant agrees with the Administrative Court that the evaluation form is unlawful, it takes the view that this document could simply have been ignored and the tenders submitted examined without it. Since no tenderer knew that such an evaluation form had

⁴ Reference is made to *Commission v Ireland*, cited above.

⁵ Reference is made to the online journal *Publicus, Der Online-Spiegel für das Öffentliche Recht, Vergaberecht, Dienstleistungskonzessionen*, volume 2012.5, *Die Dienstleistungskonzession – Der Königsweg für Rettungsdienst-Vergaben?*, <http://www.publicus-boorberg.de/sixcms/detail.php?template=pub_artikel&id=boorberg01.c.259150.de>.

⁶ Reference is made to section 14(2) in conjunction with section 2 of the Gambling Act.

been drafted, this document is not relevant for determining whether the tender procedure was unlawful.

46. In answering the question whether the tender procedure was lawful, the complainant urges the Court to examine whether the procedural principles of EEA law require publication of the precise weighting of the award criteria, to what extent this weighting has to be set out and whether the weighting laid down in the Gambling Act and the Casino Regulation, providing for an equal ranking of the award criteria, is sufficient.

47. In relation to this question, the complainant points out that, at the time of the 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.

48. According to the complainant, the Court is asked to consider how the judgment of the ECJ in *Commission v Ireland*⁷ is to be interpreted in relation to the Liechtenstein service concession award procedures and how the Commission interpretative Communication on concessions⁸ has to be understood and to assess whether it can be deduced therefrom that the weighting of the award criteria has to be published at the same time as the tender notice.

49. Even if the Court concludes that EEA law requires the weighting of the award criteria to be published together with the tender notice and that the weighting to be found in the Gambling Act and the Casino Regulation does not meet the requirements of the obligation of transparency, the complainant contends that a new concession award procedure with a new tender notice is not justified since this flaw only taints the weighting procedure.

50. The complainant considers the concession award procedure to consist of two parts. The first part focuses on whether the tenders submitted satisfy all the concession requirements. Only when more than one tender submitted satisfies those criteria is the second part of the procedure launched and a weighting of the award criteria necessary.

51. In its view, the flaw in relation to the weighting of the award criteria only taints the second part of the concession award procedure, while the first part is left untouched. As the correct outcome of the first part of the procedure has to be that only the complainant's bid meets the necessary requirements, there is no need for any weighting of the award criteria. The complainant asserts that the fact that both parts of the assessment are to be found in one procedure does not mean that a flaw in the second part of the procedure affects the first part of the procedure.

⁷ Reference is made to *Commission v Ireland*, cited above.

⁸ Reference is made to Commission Interpretative Communication on concessions under Community Law (OJ 2000 C 121, p. 2), point 3.1.2 – fourth and fifth paragraphs.

52. In this regard, the complainant emphasises that a flaw in the weighting of the award criteria can only lead to a re-opening of the second part of the procedure, and this can only be done on the condition that more than one tender submitted fulfils the concession requirements.

53. The complainant urges the Court to assess whether an alleged failure to publish the weighting of the award criteria can result in a requirement to repeat the tender procedure even in the situation where the award criteria are not applied as, in fact, there is only one suitable bidder. Moreover, the complainant doubts whether an infringement of EEA law should lead to a repetition of the concession award procedure. According to the complainant, a repetition is only justified when there is a serious infringement and it is not possible to bring about a lawful award of the concession without resorting to a repetition of the procedure.

54. The complainant contends that, in public procurement law, the setting aside of a tender procedure is a remedy of last resort, implying that the awarding authority must first exhaust all legal possibilities available to it with a view to reaching a lawful decision. The interest of the complainant lies in a lawful, substantive assessment of the tender it submitted. According to the complainant, a repetition of the tender procedure would entail the same consequences for it as setting the tender procedure aside. Consequently, in its view, the conditions that need to be satisfied in order to set aside a tender procedure have to exist in the present case.

55. The complainant points out that, under national law, a serious flaw in the tender procedure should lead to the conclusion that the tender procedure is void, not to the conclusion that the tender procedure must be set aside.

56. In this connection, the complainant requests the Court to indicate which serious flaws in the tender procedure should lead to the repetition of the concession award procedure. Taking account of the disadvantages resulting from a repetition, the complainant asserts that it would be reasonable and proportionate to permit as grounds resulting in the mandatory repetition of the tender procedure only such grounds as would also result, by analogy with procurement law,⁹ in the setting aside of the tender procedure.

57. In this regard, the complainant observes that, in public procurement law, a tender procedure may be set aside where no suitable service provider has submitted an offer. According to the complainant, repetition of the tender procedure is not the appropriate solution to correct supposed flaws in the procedure. The complainant argues that there may be other ways to bring about a lawful concession award decision, for example, the award procedure could be repeated if flawed criteria relate only to that part of the process. With that

⁹ Having reference to a judgment of the German Federal Court of Justice (*Bundesgerichtshof*) (X ZR 150/99), the complainant considers it appropriate to apply this part of public procurement law by analogy.

solution in mind, the complainant asserts that only its bid meets the concession requirements.

The Government of the Kingdom of Belgium

Preliminary remarks

58. As a preliminary remark, the Belgian Government stresses that since the service concession in question is a casino concession, the case law of the ECJ on gambling activities has to be taken into account.

59. The Belgian Government refers to *Schindler*¹⁰ in which the ECJ stated that the operating of games of chance is an economic activity of a special nature, considering the societal risks linked to this type of activity. In *Stanleybet*,¹¹ the ECJ noted that the common market and competition rules do not – and should not – apply to games of chance. The Belgian Government notes that the special nature of gambling is also the reason why it is excluded from certain European Union secondary legislation, such as the Services Directive.¹²

60. The Belgian Government contends that national authorities have been granted a margin of discretion with respect to regulating gambling activities.¹³ However, any restrictions to the freedom of establishment or the freedom to provide services should be justified by overriding reasons of public interest. These restrictions should be applied in a non-discriminatory manner and the standards of proportionality have also to be met.¹⁴

61. According to the Belgian Government, a sufficiently strict interpretation of the applicable rules stemming from the fundamental principles of EEA law is crucial.

First, second and third questions

62. The Belgian Government proposes to answer the first three questions jointly, as they all concern the question of how the obligation of transparency

¹⁰ Reference is made to Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, paragraph 60.

¹¹ Reference is made to Joined Cases C-186/11 and C-209/11 *Stanleybet International and Others*, judgment of 24 January 2013, not yet reported, paragraph 45, and Case C-203/08 *Sporting Exchange Ltd, trading as 'Betfair'* [2010] ECR I-4695, paragraph 58.

¹² Reference is made to Article 2(2)(h) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376, p. 36.

¹³ Reference is made to Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß* [2010] ECR I-8069, paragraph 76, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* [2007] ECR I-1891, paragraph 47, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 57.

¹⁴ Reference is made to *Markus Stoß*, cited above, paragraph 77, and *Liga Portuguesa*, cited above, paragraph 59.

under EEA law should be translated to tender procedures for services concessions.

63. First, the Belgian Government points out that service concession contracts are not governed by any public procurement directive and, therefore, no regard should be had to the *Lianakis* judgment¹⁵ as the legal provision¹⁶ that was crucial to that judgment does not apply to service concessions.

64. Since no specific rules apply to service concessions, the concession-awarding public authority is bound by the fundamental rules of EEA law, in particular by the principles of equal treatment and of non-discrimination on the ground of nationality and the consequent obligation of transparency.

65. On the main obligation of transparency in general, the Belgian Government notes that the main consequence of this obligation is that a concession to operate games cannot be given without any competitive procedure in advance. The call for tenders itself, however, does not fall under the obligation of transparency. According to the Belgian Government, 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.¹⁷

66. The restrictions which can be imposed on the freedom to provide services in the framework of gambling activities cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EEA law, in particular those relating to the fundamental freedoms.¹⁸ The Belgian Government emphasises that compliance with the principle of equal treatment and with the consequent obligation of transparency necessarily means that the objective criteria enabling the Member States' competent authorities' discretion to be circumscribed must be sufficiently advertised.¹⁹

67. As regards the obligation of transparency with respect to supplementing, specifying and weighting existing criteria, the Belgian Government argues that, although the Directive does not apply to the case at hand, the fundamental principles of the EEA law must still be respected.

68. According to the Belgian Government, the considerations expressed by the ECJ with regard to public service contracts can be applied by analogy to service concessions due to the similarity between them.

¹⁵ Reference is made to *Lianakis*, cited above.

¹⁶ Reference is made to Article 36(2) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209, p. 1.

¹⁷ Reference is made to Case C-64/08 *Ernst Engelmann* [2010] ECR I-8219, paragraph 50.

¹⁸ *Ibid.*, paragraph 54 and case law cited.

¹⁹ Reference is made to *Sporting Exchange*, cited above, paragraph 51.

69. Referring to *Commission v Ireland*,²⁰ 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 criteria used by the contracting authority is to be determined in advance and notified to potential tenderers when they are invited to submit their bids.

70. The Belgian Government observes further that the ECJ has held that it is not contrary to European Union law to attach a weighting to already defined award criteria, provided that this does not alter these 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.²¹

71. The Belgian Government concludes that any specification, supplementation or weighting added to existing criteria may not be of a substantial nature²² in as much as this would have allowed for the admission of different tenderers or for the acceptance of different offers.

72. The Government of the Kingdom of Belgium proposes that the Court should answer the first, second and third questions as follows:

EU law does not 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 which it had set out; and there is no general obligation to give prior notice of the relative weighting that will be given to the award criteria when awarding a service concession, provided that the weighting or supplemental criteria are not construed after the bids have been reviewed.

The general requirements under European law with respect to the obligation of transparency should be understood to comprise that Member States must install a predetermined set of substantial rules, equally accessible to all interested parties in the EEA and sufficiently advertised, laid down in accordance with national law, in which the general criteria for the award of the service concession in question are described and which create a framework for obtaining an objective and impartial award decision by the competent authorities. Although further detailing of criteria and/or weighting can be done without prior publication, no substantial amendments to these criteria can be implemented and no rules can be created or decisions taken in the course of the award procedure that could potentially affect the award decision in a way that one candidate could be favoured over another.

²⁰ Reference is made to *Commission v Ireland*, cited above, paragraphs 42 and 43.

²¹ Reference is made to Case C-331/04 *ATI EAC and Others* [2005] ECR I-10109, paragraph 32.

²² Reference is made to Case C-91/08 *Wall* [2010] ECR I-2815.

Fourth question

73. The Belgian Government indicates that it is for the referring court to make an assessment of the facts, taking into account all the facts of the case, in accordance with EEA law as clarified by the Court.

74. According to the Belgian Government, it appears that in the case at hand, the requirements of EEA law were satisfied. Should the referring court reach an opposite conclusion, it is for that court to determine in accordance with national law what should be done to remedy this breach of law; in that regard, commencing a new tender procedure is not necessarily the only appropriate solution.

75. The Government of the Kingdom of Belgium proposes that the Court should answer the fourth question as follows:

Assessment of whether the requirement[s] of European law, including those with respect to the obligation of transparency, are satisfied must be done by the national court.

Fifth question

76. The Belgian Government emphasises first that there is no EEA rule applicable which imposes a specific consequence for a breach of the obligation of transparency as laid down in EEA law. It is apparent, however, that all necessary measures would have to be taken to restore the transparency of the procedure.

77. According to the Belgian Government, a contract which has been entered into in breach of the transparency obligation does not necessarily need to be terminated by the national authorities.²³ Similarly, a tenderer whose offer was not accepted in a procedure in breach of the transparency obligation should not necessarily be able to obtain an order from the national court putting an end to that breach.

78. The Belgian Government contends that national authorities and competent courts should implement the correct remedy in accordance with national law.²⁴ This remedy should comply with the principles of effectiveness and equivalence.

79. The Belgian Government stresses that the correct remedy does not necessarily have to be a new tender procedure. A new procedure only has added value if it can be anticipated that additional bidders would participate. It proposes as a solution to reweigh the criteria while leaving out the unlawfully added weightings.

²³ Reference is made to *Wall*, cited above, paragraph 65.

²⁴ Reference is made to *Wall*, cited above, paragraph 63.

80. Finally, the Belgian Government observes that the finding of a failure by a Member State to fulfil its obligations is not related to a finding as to the damage flowing therefrom.²⁵

81. The Government of the Kingdom of Belgium proposes that the Court should answer the fifth question as follows:

If the national court would find that the tender procedure is indeed not compliant with European law, all necessary measures would have to be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure. This might extend to a new award procedure but it is not necessarily the only possible remedy.

The Government of the Principality of Liechtenstein

Preliminary remarks

82. As a preliminary remark, the Liechtenstein Government observes that the parties to the main proceedings and the referring court agree that the main proceedings concern the award of a service concession which may be of interest to an undertaking located in an EEA State other than Liechtenstein.

83. Nor is it disputed, the Liechtenstein Government continues, that the award of service concessions is not subject to any clear rules of secondary legislation. Only the general principles of equal treatment and non-discrimination as well as the obligation of transparency guide such awards.

84. Taking the view that the award at issue, a service concession, and the rules which apply to it are undisputed, according to the Liechtenstein Government, the crucial question is the precise content of the obligations of transparency and non-discrimination arising from the EEA Agreement.

First question

85. The Liechtenstein Government observes that the ECJ has held²⁶ that public authorities, when awarding service concessions, are bound to comply with the fundamental rules of the Treaties and that they are bound in particular by Articles 43 and 49 EC (now Articles 49 and 56 TFEU), the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency.

²⁵ Reference is made to *Commission v Ireland*, cited above, paragraph 64, and Case C-263/96 *Commission v Belgium* [1997] ECR I-7453, paragraph 30.

²⁶ Reference is made to *Sporting Exchange*, cited above, paragraph 39, and to *Engelmann*, cited above, paragraph 49 and case law cited.

86. It follows that EEA law requires that the procedure for awarding casino concessions is governed by the principles of equal treatment of tenderers and non-discrimination on grounds of nationality. Resulting from those principles is the equally applicable obligation of transparency.

87. Consequently, the Liechtenstein Government contends, the two abovementioned principles imply that all potential tenderers have to be afforded equality of opportunity in formulating the terms of their application, and they have to be subject to the same conditions.²⁷

88. According to the Liechtenstein Government, the principles of equal treatment and non-discrimination have been complied with as the interested parties had a genuine opportunity to manifest their interest in obtaining the concession and were placed on an equal footing during the procedure.

89. The obligation of transparency entails that 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.²⁸ According to the Liechtenstein Government, this obligation was met because the notice was formulated clearly and precisely, the notice was published on the internet and the tender documentation supplied made it possible for the parties to form a detailed idea of the concession.

90. The Government of the Principality of Liechtenstein proposes that the Court should answer the first question as follows:

The general requirements of EEA law and European law regarding the procedure for awarding casino concessions entail firstly that all potential tenderers be afforded equality of opportunity and accordingly be subject to the same conditions, and secondly that the concession granting authority has to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the market to be opened up to competition and the impartiality of the award procedures to be reviewed. It is for the referring court to rule on the question whether these principles and the obligation of transparency flowing from these principles were complied with in the case in the main proceedings.

Second question

91. The Liechtenstein Government emphasises that the tender documentation, which was available to parties upon request, stated that “The criteria set out in points (a) to (l) will be weighted differently according to their importance. Particular significance will be attached to the benefits to the Liechtenstein economy, points (h) and (k), and the casino’s planned location, point (l).”

²⁷ Reference is made to *Costa and Cifone*, cited above, paragraph 57.

²⁸ Reference is made to *Sporting Exchange*, cited above, paragraphs 40 and 41, and *Engelmann*, cited above, paragraph 50.

92. According to the Liechtenstein Government, the non-published evaluation form itself, which was established later, did not introduce anything new in relation to the criteria; it merely established the comprehensive and precise weighting of the individual criteria. On the basis of the information available to the parties, the tenderers could have reasonably expected this weighting.

93. The Liechtenstein Government contends that potential tenderers had access to the appropriate information prior to the closing date for the submission of tenders, and thus the principles of equal treatment and non-discrimination and the consequent obligation of transparency were satisfied.

94. The Government of the Principality of Liechtenstein proposes that the Court should answer the second question as follows:

EEA law or European law requires that a concession-awarding authority, at the time at which it published its tender notice and tender documentation, grants potential tenderers access to appropriate information concerning the concession at issue prior to the closing date for the submission of tenders, so that they have a real opportunity of expressing their interest in obtaining that concession and so that the exercise of the awarding authority's discretion is circumscribed. It is for the referring court to evaluate the appropriateness of the detailed arrangements of the tender notice and tender documentation to the particularities of the service concession in question.

Third question

95. The Liechtenstein Government submits that neither the principles of equal treatment and non-discrimination nor the obligation of transparency were infringed by the fact that the precise weighting of the award criteria was not published. There is no obligation to give prior notice of the relative weighting, as the concession award in the main proceedings falls outside the scope of the directives on the different categories of public contracts.

96. The Liechtenstein Government considers that this follows from the judgment of the ECJ in *Commission v Ireland*.²⁹ According to the Liechtenstein Government, this judgment implies that it cannot be legitimately argued that the concession-awarding authority is under an obligation to determine in advance the relative weighting of criteria and to notify this weighting to potential tenderers when they are invited to submit their bids.

97. Since there is no obligation to determine and notify the relative weighting of the criteria in advance, the Liechtenstein Government holds that there is in essence no need for the Court to provide guidance on the requirements that EEA

²⁹ Reference is made to *Commission v Ireland*, cited above, paragraph 43.

law imposes as regards the substance of the information regarding the relative weighting that must be provided in the prior notice.

98. The Government of the Principality of Liechtenstein proposes that the Court should answer the third question as follows:

There is no general obligation under EEA law to give prior notice of the relative weighting that will be given to the award criteria when awarding a concession such as that in question in the main proceedings.

Fourth question

99. Having regard to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), the Liechtenstein Government submits that it is solely for the referring court, before which the dispute has been brought, to assume responsibility for the subsequent judicial decision and thus to rule on the question whether the requirements of EEA law were satisfied in the case at hand.

100. The Liechtenstein Government points out that the role of the Court is confined to providing the referring court with an interpretation on EEA law which will be useful for the decision which the referring court has to take in the dispute before it.³⁰

101. The Government of the Principality of Liechtenstein proposes that the Court should answer the fourth question as follows:

It is solely for the referring court, before which the dispute has been brought, to rule on the question whether the requirements of EEA law and European law were satisfied in the case at hand.

Fifth question

102. At the outset, the Liechtenstein Government points out that the question referred is framed in a manner which makes it impossible for the Court to answer it. Having regard to the division of jurisdiction between the national courts and the Court as established by Article 34 SCA, only questions 5(a) and (b) should be answered by the Court.

103. As regards the specific legal consequences that follow in the case of procedural errors and the conditions under which procedural errors can be cured, the Liechtenstein Government refers to the statement made by the European

³⁰ Reference is made to Case E-2/95 *Eilert Eidesund v Stavanger Catering A/S* [1995–96] EFTA Ct. Rep. 3, paragraph 14, and Case E-1/95 *Ulf Samuelsson v Svenska staten* [1994–95] EFTA Ct. Rep. 145, paragraph 13, and Case E-10/04 *Paolo Piazza v Paul Schurte AG* [2005] EFTA Ct. Rep. 76, paragraph 21.

Commission in its Working Paper³¹ that “services concessions ... are not covered by the rules providing for legal remedies in the area of public procurement. Therefore aggrieved tenderers do not benefit from important judicial protection afforded by the Remedies Directive.” Thus, it is for the domestic legal system of each EEA State to lay down detailed procedural rules to ensure the protection of the rights which individuals derive from EEA law. However, these national procedural rules have to comply with the principles of equivalence and effectiveness.

104. The Liechtenstein Government adds that it is for the referring court to establish whether a legal remedy complies with the principles of equivalence and effectiveness. In determining whether these two principles are satisfied, the referring court will have to examine the role of the remedy in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. The referring court will also have to take into account the basic principles of the domestic judicial system such as the rights of defence, the principle of legal certainty and the proper conduct of procedure.³²

105. The Liechtenstein Government takes the view that the Liechtenstein procedural rules and legal remedies comply with the principles of equivalence and effectiveness. Pursuant to section 87(2) of the Gambling Act, a complaint may be lodged with the Administrative Court challenging an ordinance or decision of the Government. This complaint procedure is governed by the General Public Administration Act of 21 April 1922 (the “General Public Administration Act”) which provides, *inter alia*, that the Administrative Court is accorded full judicial authority. Subsequently, a decision of the Administrative Court may be challenged by lodging a complaint with the State Court. The Liechtenstein Government observes in this regard that the General Public Administration Act applies both to rights which derive from national law and to those which derive from EEA law.

106. The Government of the Principality of Liechtenstein proposes that the Court should answer the fifth question as follows:

It is for the referring court to determine whether, in the case at hand, the requirements were met to set aside the whole tender and concession award procedure. It is furthermore for the referring Court to ascertain whether national procedural rules and legal remedies to ensure the protection of the rights which individuals derive from EEA law are not less favourable than those pursuant to which the national legal order

³¹ Reference is made to Commission Staff Working Paper, Executive Summary on the Impact Assessment SEC(2011) 1589 final – accompanying the document Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, COM(2011) 897 final, p. 4.

³² Reference is made to Case C-246/09 *Susanne Bulicke v Deutsche Büro Service GmbH* [2010] ECR I-7003, paragraphs 29 and 35, and Case E-11/12 *Koch, Hummel and Müller v Swiss Life (Liechtenstein) AG* [2013] EFTA Ct. Rep. 272, paragraphs 124 and 125 and case law cited.

protects similar rights under purely domestic legislation and whether such rules do not render it in practice impossible or excessively difficult to exercise the rights conferred by EEA law.

The EFTA Surveillance Authority

Preliminary remarks

107. ESA submits that the questions referred seek an answer to two key issues. The first issue is what the obligation of transparency entails exactly in the context of a tender process for a concession to operate a casino. The second issue is what remedies and/or courses of action for national courts are permitted (or precluded) by the obligation of transparency.

First question

108. As regards the first question, ESA states that, while the Court has not ruled upon identical or similar cases to the one at hand, the ECJ has ruled upon three cases which concern procurement procedures falling either outside the scope of the European Union directives on public procurement, or falling within the simplified procedural rules applying to procurement within the scope of Annex II B to the Directive. The principle of homogeneity obliges the Court to interpret the principle of transparency in the same manner as the ECJ has interpreted it.

109. ESA contends that it follows from *Wall*³³ that national authorities must comply with two requirements when advertising and concluding a concession. The national authorities must ensure, first, that the tender is advertised in such a way that the concession can be opened up to competition and, second, that the tender is advertised in a manner which allows the impartiality of the award procedures to be reviewed.

110. In order to allow for the impartiality of the award procedure to be reviewed, ESA contends that the 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 was the case.

111. Relying on *Commission v Ireland*,³⁴ ESA contends that limitations exist on the substantive meaning of the obligation of transparency. In its view, the ECJ ruling implies that the obligation of transparency does not require the precise procedural requirements of the public procurement directives to be applied

³³ Reference is made to *Wall*, cited above, paragraph 36.

³⁴ Reference is made to *Commission v Ireland*, cited above.

outside the scope of those directives.³⁵ Consequently, this limits the possibility to use *Lianakis*³⁶ by analogy.

112. ESA argues that *Costa and Cifone*³⁷ indicates that the ECJ has raised the standard which national authorities should meet in order to fulfil the obligation of transparency. ESA refers to paragraphs 73 and 74 of that judgment:

(73) ... the purpose underlying the principle of transparency, which is a corollary of the principle of equality, 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.

(74) 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.

113. Furthermore, ESA stresses that in cases where the requirement of transparency is not met, the relevant tender procedure will constitute a prima facie discrimination and/or a difference in treatment, leading to a restriction on the freedom of establishment and freedom to provide services set out in Articles 31 and 36 EEA.

114. According to ESA, EEA law permits the national authorities - including the national courts - to go beyond the minimum transparency requirements. Indeed, the more transparency there is to be found in the procedure, the less chance there is of discriminatory behaviour or the possibility of bias. A higher degree of transparency also brings the advantages of improving legal certainty and increasing participation and competitiveness.

115. As regards the first question, ESA concludes that Articles 31 and 36 EEA require a sufficient level of advertising such that the concession can be opened up to competition and the impartiality of the award procedure can be reviewed. Furthermore, ESA concludes that the conditions and rules of the award procedure must be clear, precise and unequivocal to make it possible for all reasonably

³⁵ Ibid, paragraph 43.

³⁶ Reference is made to *Lianakis*, cited above.

³⁷ Reference is made to *Costa and Cifone*, cited above.

informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way.

Second question

116. As regards the second question, ESA notes that it concerns the transparency of process. According to ESA, EEA law does not specifically require that an authority seeking to award a concession must 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 the act and the regulation. However, the national authority must comply with the general requirements of transparency and ESA emphasises that a higher level of transparency than strictly necessary is desirable. It is for the national courts to ascertain whether the requirements of transparency have been met.

Third question

117. As regards the third question, ESA notes that it concerns the degree of detail to which the rules relating to the tender must be known in advance to all actual or potential participants.

118. According to ESA, the circumstances in *Commission v Ireland*³⁸ are very similar to those in the case at hand as in that case only a list of unweighted criteria was published in the contract tender notice; the weightings were established after the deadline for submissions and, following an initial review of the tenders submitted, the criteria were altered.

119. ESA explains that, in *Commission v Ireland*,³⁹ Article 53 of the Directive⁴⁰ did not apply since the contract at issue was excluded from its scope. Thus, the ECJ assessed the case on the basis of the requirements imposed by the obligation of transparency.

120. According to ESA, it can be inferred from *Commission v Ireland*⁴¹ that the specific procedural requirements set out in Article 53 of the Directive cannot be imposed upon national authorities in situations such as those in the main proceedings.⁴² ESA underlines, however, that it would be desirable if the higher standards of Article 53 of the Directive are reflected in the procedures followed.

121. Likewise, ESA infers from *Commission v Ireland*⁴³ that the obligation of transparency does not *prima facie* preclude circumstances in which a detailed

³⁸ Reference is made to *Commission v Ireland*, cited above.

³⁹ Reference is made to *Commission v Ireland*, cited above.

⁴⁰ Article 53 of the Directive is headed “Contract award criteria”.

⁴¹ Reference is made to *Commission v Ireland*, cited above.

⁴² In reaching this conclusion, ESA refers to *Commission v Ireland*, cited above, paragraphs 43 to 48.

⁴³ Reference is made to *Commission v Ireland*, cited above.

weighting of the evaluation criteria for the award of a concession is not set out to bidders until after the deadline for submissions.⁴⁴

122. ESA stresses, however, that the judgment of the ECJ in *Costa and Cifone*⁴⁵ cannot be disregarded as this ruling further develops the transparency obligation. According to ESA, this judgment leaves little discretion to the national authorities in terms of when to decide the weightings. Therefore, in its view, the national court will have to consider whether the level of detail in the criteria published in section 17(4) of the Casino Regulation was sufficiently clear, precise and unequivocal and whether it ensured that all potential tenderers were treated in the same way and protected from arbitrariness and/or discrimination.

123. In relation to the third question, ESA concludes that, in the context of the relevant tender procedure, there is no specific obligation to give prior notice of the relative weighting that will be given to the award criteria when awarding the concession. The contracting authorities are not *prima facie* precluded from determining the specific weightings of the criteria established in the tender notice at a later date, including where the competition has been closed, as long as the bids have not been opened.

124. However, the national authorities must ensure that there is a degree of advertising sufficient to allow the concession to be opened up to competition and the impartiality of the award procedures to be reviewed. In choosing not to give prior notice of the relative weighting, the national authorities must nonetheless ensure that the conditions and detailed rules of the award procedure are 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. ESA asserts that, in particular, 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.

125. The EFTA Surveillance Authority proposes that the Court should answer the first, second and third questions as follows:

It follows from Articles 31 and 36 of the EEA Agreement, the principle of equal treatment, the obligation of transparency and the principle of legal certainty that the conditions and detailed rules of a tender procedure for a service concession such as that at issue in the main proceedings must be drawn up in a clear, precise and unequivocal manner.

While there is no specific procedural obligation to give prior notice of the relative weighting that will be given to the award criteria when awarding the concession it must nonetheless be possible for all reasonably informed

⁴⁴ In reaching this conclusion, ESA refers to *Commission v Ireland*, cited above, paragraphs 43 to 48.

⁴⁵ Reference is made to *Costa and Cifone*, cited above.

tenderers exercising ordinary care to understand their exact significance and interpret them in the same way.

Fourth question

126. ESA submits that it is for the national court to decide on issues of law and fact arising within the national sphere. Nevertheless, ESA has reservations as to whether the generalities of the weighting which were set out in the tender documentation were precise enough and allowed for the actual or potential tenderers to understand the “exact significance” of each of the evaluation criteria.

127. In that regard, ESA observes that the tender notice stressed that subparagraphs (h), (k) and (l) would be given particular significance, while in the actual weighting subparagraphs (h) and (k) were added together and given a combined value equal to the combined value of some other subparagraphs not mentioned as having particular significance. Also, ESA notes that the value given to subparagraph (l) was equal to the value given to subparagraph (g); however, the tender notice did not mention that subparagraph (g) had a particular significance.

128. ESA observes further that the evaluation form which set out the fully weighted criteria was non-binding and non-published. Moreover, from the request for an advisory opinion, it cannot be deduced 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.

129. The EFTA Surveillance Authority proposes that the Court should answer the fourth question as follows:

It is for the referring court to verify whether the award procedure at issue in the main proceedings has met these conditions.

Fifth question

130. ESA recognises that the fifth question concerns whether a proper interpretation of EEA law would preclude the decision taken by the Administrative Court to annul the decision and order the restarting of the procedure *ab initio*.

131. ESA contends that, as the specific provisions of the public procurement directives do not apply, the general rules of EEA law apply. These general rules do not specify a particular remedy for an infringement of the obligation of transparency, thus it is for the domestic system of the EEA States to regulate, in compliance with the principles of equivalence and effectiveness, the legal procedures which are necessary to safeguard rights deriving from EEA law.

132. Once a breach has been established, ESA submits that there can be more than one appropriate solution to ensure that the adverse effects do not subsist throughout the performance of the contract.

133. ESA stresses that the obligation of transparency is 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 across borders from submitting tenders. The remedies considered by the national court should reflect the public interest objective.

134. In this regard, ESA contends that the substitution of one tenderer for another, as requested by the complainant in the case at hand, is not *prima facie* sufficient to solve the underlying problem which is a lack of transparency. In ESA's view, re-opening of the tender procedure appears, *prima facie*, the most appropriate solution if there is a serious breach of the transparency obligation. Should the national court decide on a different remedy, it will have to determine whether the principles of equivalence and effectiveness are met.

135. ESA acknowledges, however, that the re-opening of the award procedure can 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 who participated in the initial tender procedure, the question of state liability may arise.

136. The EFTA Surveillance Authority proposes that the Court should answer the fifth question as follows:

It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from the obligation of transparency and the principle of legal certainty in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of these rights practically impossible or excessively difficult.

The European Commission

Preliminary remarks

137. As a preliminary remark, the Commission notes that the Directive does not apply, as it excludes 'service concessions' as defined in Article 1(4) from its scope. According to the Commission, the key factors for determining whether a concession is a service concession is whether the consideration for the provision of services consists in the right to operate the activity in question and whether the service provider assumes the risk of the operating service. The Commission considers these conditions to be met.

First, second and third questions

138. The Commission interprets the first three questions as seeking to establish which general principles of EEA law should apply to the procedure for granting a casino concession, with particular emphasis on the obligation of transparency and its practical application.

139. Notwithstanding the fact that service concessions fall outside the scope of the Directive, in the Commission's view, they remain subject to the fundamental rules of freedom of establishment and freedom to provide services, and in particular to the key principle of non-discrimination on grounds of nationality. To enable the contracting parties to verify that this principle is met, there is an obligation of transparency.

140. According to the Commission, 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.⁴⁶

141. The Commission continues by stating that, as regards the application of the transparency obligation in practice, adequate information should be given at the outset, so that interested parties can assess whether they want to express an interest or not,⁴⁷ as this is the only way in which the procedure can be "opened up" in compliance with the principle of equal treatment. Second, the Commission argues that, in order to circumscribe the exercise of the national authorities' discretion, the award criteria must be based on objective, non-discriminatory criteria which are known in advance.⁴⁸ Throughout the procedure, the bids have to be assessed on the same terms and under the same conditions. Third, the Commission adds that, for service concessions falling outside the scope of the Directive, there is no specific requirement to publish details of the relative weighting to be given to the award criteria for service concessions.⁴⁹

142. In the Commission's view, there remain two important conditions that must be satisfied. The first is that a decision on the relative weighting of award criteria 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. The second is that weighting of the award criteria must be fixed prior to the opening of the bids.⁵⁰

⁴⁶ Reference is made to Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 62, and *Engelmann*, cited above, paragraph 50.

⁴⁷ Reference is made to Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 21.

⁴⁸ Reference is made to *Costa and Cifone*, cited above, paragraph 56.

⁴⁹ Reference is made to *Commission v Ireland*, cited above, paragraph 43, and *ATI EAC and Others*, cited above, paragraph 24.

⁵⁰ Reference is made to *Commission v Ireland*, cited above, paragraphs 48 and 49.

143. The European Commission proposes that the Court should answer the first, second and third questions as follows:

A procedure such as the one in issue in the present proceedings for the award of a casino concession must comply with the general requirements of Articles 31 and 36 [of the] EEA [Agreement] and the principle of non-discrimination, and in particular the obligation of transparency derived therefrom.

This obligation of transparency must be interpreted as requiring the criteria for awarding the concession to be objective and non-discriminatory and known in advance, but does not impose a specific obligation on the awarding authority to give prior notice of the relative weighting it intends to apply to those criteria. If details of this relative weighting are nevertheless provided, the principles of non-discrimination and transparency imply that this cannot subsequently be changed in such a way that it could have had a material effect on the preparation of the bids, or so as to amount to an alteration of the original criteria.

Fourth question

144. The Commission contends that it is for the national court to assess on the basis of the facts before it whether the requirements of EEA law were satisfied in the present proceedings. It appears to the Commission undisputed that all relevant criteria were set out in section 17(4)(a) to (l) of the Casino Regulation and reproduced in the tender notice of 1 February 2011. Some details of the relative weighting to be given to those criteria were also published in the tender notice, and it would appear that this was reflected in the more detailed points system set out in the subsequent evaluation form. In this context, however, the Commission stresses that the two important conditions, namely, that a decision on the relative weighting of award criteria 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 and that weighting of the award criteria must be fixed prior to the opening of the bids, have also to be examined.

145. The European Commission proposes that the Court should answer the fourth question as follows:

It is for the national court to assess on the basis of all the facts before it whether the obligation of transparency was complied with.

Fifth question

146. With regard to the fifth question, the Commission considers that it is for the national legal order to lay down detailed procedural rules to ensure the protection of the rights of economic operators under EEA law, provided that those rules are

not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the right conferred by EEA law (the principle of effectiveness).

147. The European Commission proposes that the Court should answer the fifth question as follows:

Remedies under national law for a breach of the above-mentioned obligations must comply with the principles of equivalence and effectiveness.

Páll Hreinsson
Judge-Rapporteur