

European Court of Justice to decide on the applicability of Community procurement law on casino licenses

After the Austrian regional court of Linz's reference for preliminary ruling regarding the monopoly on casinos other proceedings regarding the licensing procedure for casinos have just recently been referred to the European Court of Justice (ECJ) for preliminary ruling, this time from Greece (Case C-145/08 – „Club Hotel Loutraki“). The reference for preliminary ruling by the Symvoulío tis Epikrateias involves the question whether Community procurement law (here Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts – Procurement Directive) is applicable to the licensing of casinos and the exploitation of such a license.

The questions for preliminary ruling referred by the Greek court sound technical at first, but have considerable practical repercussions. If the Directive relating to the coordination of procedures for the award of public service contracts (Procurement Directive) is applicable, the licenses in question would be subject to an EU-wide tender procedure before being awarded. The ECJ's decision could challenge the current licensing system for casinos in several Member States, particularly in Germany and Austria.

The first two questions referred by the Greek court relate to the award and the procurement of a casino license. The court wants to know, whether the relevant directives are applicable to such a licensing contract:

- Does a contract by which the contracting authority

entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino's licence, and which contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates, constitute a concession, not governed by Directive 92/50/EEC?

- If the first question referred for a preliminary ruling is answered in the negative: does a legal action which is brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services subject to Annex I B to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209), and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive), fall within the field of application of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395), or is its application precluded inasmuch as, in accordance with Article 9 of Directive 92/50/EEC, only Articles 14 and 16 of the latter apply to the procedure for the award of the abovementioned contract for the supply of services?

Two further questions relate to the procedural situation (filing for remedy, the affected undertakings' right to set out their views).

Should the ECJ affirm the applicability of the Procurement

Directive, the strict rules of Community procurement law would have to be observed.

In particular, the Procurement Directive provides for the grounds, on which a tenderer may be excluded and for the assessment of the tenderer's financial and economic capacity. A third category of provisions is in relation to the tenderer's technical capacity. The second referred question explicitly bears upon the principle of equal treatment of participants to a tender.