**SPM4423**

**Model answers**

**10 April 2013**

**Question 1**

1. SF operates SA which has a runway of more than 2.100 metres. Mid 2002 it applied for a permit to construct an additional terminal. This permit was issued and the terminal was built in 2003/2004. In 2004 SF wanted to expand the airport. This expansion was aimed at creating buildings, car parks, aircraft standing areas, hangars and the alteration of taxiways, but **not** at an extension (or any change) of the runway. LS requested the competent authorities to conduct an EIA on both the construction of the terminal and the expansion plans. The competent authorities rejected that request because the threshold to conduct an EIA, namely an increase in the number of aircraft movements of at least 20.000 per year, was not exceeded. LS appealed this decision. The Umweltsenat quashed that decision and ruled that Dir. 85/337/EEC should be applied directly because the transposition into Austrian legislation was imperfect. This ruling was also appealed. The dispute is whether the requirements of the Austrian law violates Directive 85/337/EEC.
2. Par. 25: it rules at final instance and it is not an acte clair or éclairé.
3. Par. 28: probably. Works to change the infrastructure of an existing airport, without extension of the runway, are *likely* to be covered by point 13 of Annex II of Dir. 85/337/EEC, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself. So when it comes down to an alteration of the airport, it falls within the scope of the Directive. That does not mean that an EIA is mandatory. Annex II 🡪 MS decide on a case-by-case basis or on the basis of certain criteria.
4. Austrian law sets a threshold for conducting an EIA of more than 20.000 aircraft movements per year (26). Projects that are likely to have significant effects on the environment by virtue of their nature, size or location, have to be made subject to an EIA (29). A MS is not allowed to establish a threshold at such a level that an entire class of projects would be exempted in advance from the requirement of an EIA, unless it is clear that those projects are not likely to have significant effect (31). When establishing such thresholds, regard must be had to the criteria of Annex III, including densely populated areas (32). The Austrian law excludes categorically changes to a small or medium-sized airport to be subjected to an EIA, although those changes might very well have a significant effect on the environment (34). Furthermore, this threshold only focuses on a quantitative aspect without taking into account all the other criteria mentioned in Annex III (35). In order to assess the effects properly, it can be necessary to look at the cumulative effect of the projects that are (chronologically) connected (37).

**Question 2**

1. Framework:
   1. Cross border aspect: yes, measure is also applicable to non-nationals that want to live in Flanders and not only to Belgian nationals.
   2. What freedom: persons (citizens and workers), establishment (self-employed).
   3. Restriction: yes, it is more difficult to get a house or plot in those municipalities.
   4. Justification: none of the Treaty grounds is applicable. But measure without distinction, so rule of reason can be applied. Urban and spatial planning is accepted by the ECJ in the Konle ruling. National court has to verify whether this is really the reason behind the Decree. If it is keeping these municipalities Flemish, it cannot be justified because then it would be (in fact) discriminating.
   5. Suitable, necessary and proportional: probably not. In order to achieve social and economic coherence, less restrictive measures can be taken, e.g. neighborhood events, municipal activities etc. Attracting less wealthy persons can also be achieved by intervening in prices, subsidies etc.

🡺 in violation with EU-law.

1. She can bring proceeding before a national (Belgian) court in order to have the Decree annulled. The national court can ask preliminary questions on the interpretation of EU law on this point.
2. She can, on behalf of the Commission, send a letter of formal notice to the NL. The NL can react on that. If ms. Zilverpeer is not satisfied with the answer, she can send a reasoned opinion. The NL can, again, react on that. If ms. Zilverpeer is still not satisfied, proceedings can be brought before the ECJ.

**Question 3**

1. No. It is a decision to grant a subsidy. This is not a public works, services or supplies contract in the meaning of the procurement directives. **Note**: the network will be owned by GiFi, not by the government.
2. Altmark-criteria: clear description of a SGEI that is entrusted to GiFi by means of the government decision (yes); compensation calculated on the basis of objective parameters, adopted and published in advance (no); no overcompensation (no, overcompensation is possible); procurement or benchmark (yes) 🡺 not fulfilled, so advantage.

State resources: yes, from the government

Undertaking: yes, GiFi performs economic activities

Selective: yes, only GiFi

Distortion of competition: yes, highly competitive market (7 candidates)

Effect on trade between MS: yes, the competition position of GiFi is strengthened so it can attract more customers.

* Yes, a state aid measure

1. SGEI-Decision applicable? No, because of parameters (not set in advance) and risk of overcompensation. The government has to notify the contribution to the Commission and has to wait for its approval before it can grant the contribution.
2. In a restricted procedure, at least five candidates have to be invited. Here, only four are invited.
3. No. GiFi is not a contracting entity in the meaning of Dir. 2004/18/EC. It is not a government or a body governed by public law. So it does not have any obligations under the procurement directives (or even the Treaty principles).