DECISIONS

COMMISSION DECISION

of 24 May 2011

on partial privatisation measure C 15/10 (ex NN 21/10) implemented by Greece for Mont Parnès casino

(notified under document C(2011) 3505)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2011/647/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above and having regard to their comments [1],

Whereas:

1. PROCEDURE

(1) By letter of 23 June 2002, Egnatia AE, which following a merger has since been taken over by Athinaiki Techniki and which is a member of the Casino Attikis consortium ('CA' or 'the complainant'), submitted a complaint to the European Commission about an alleged breach of EU internal market rules, concerning an allegedly non-transparent and discriminatory tender procedure followed by the Greek authorities in the sale of 49 % of the capital of Elliniko Kazino Parnithas AE ('Mont Parnès casino') to the successful bidder, the Hyatt Regency consortium ('HR' or 'the alleged beneficiary') [2].

(2) By letter of 3 October 2002 the European Commission's Internal Market Directorate-General ('DG Internal Market') transferred a copy of the file to the Competition Directorate-General ('DG Competition') for a parallel analysis of the case under EU State aid rules.

(3) By e-mail of 9 December 2002 the legal representative of the complainant provided the relevant Commission departments with additional explanations on the case.

(4) By letter of 24 January 2003 the Commission communicated the State aid complaint to the Greek authorities and invited Greece to clarify the issues it brought forward. The Greek authorities replied on 4 March 2003.

(5) On 27 January 2003 Commission staff met the legal representative of the complainant.

(6) On 12 February 2003 and 22 August 2003 the legal representative of the alleged beneficiary submitted supporting documents to the Commission services.

(7) By letters of 31 March 2003 and 16 May 2003 the complainant submitted supplementary information to DG Competition.

(8) On 10 April 2003 Commission staff met the representative of the alleged beneficiary.

(9) During the period between 15 July 2003 and 16 September 2003 the Commission had several exchanges with the complainant regarding the separate assessment of the State aid issues, and it drew the attention of the complainant to its decision-making practice according to which the disposal of a public asset in the context of a tendering procedure does not constitute State aid where the procedure has been carried out transparently and without discrimination. Consequently, the Commission informed the complainant that it would not take a position until DG Internal Market had completed its examination of the procedure for the award of the public contract.

(10) By letters of 22 January 2004 and 4 August 2004 DG Internal Market closed the investigation, considering that there was no defect in the procedure for awarding the contract. By letter of 2 June 2004 DG Competition informed the complainant that it had closed the State aid complaint pursuant to Article 20(2) of Council

[1] OJ C 233, 28.8.2010, p. 11.

[2] The successful bidder in the tender was the consortium Hyatt Regency (70 %) — Elliniki Technodomiki (30 %).

Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([3]).

(11) On 18 February 2005 the complainant brought an action for annulment of the Commission's decision to close the case before the Court of First Instance (now the General Court).

(12) By order of 26 September 2006, the Court of First Instance dismissed the action as inadmissible since it considered that the letter did not constitute an act open to challenge under Article 230 of the Treaty establishing the European Community (EC Treaty) (now Article 263 of the Treaty on the Functioning of the European Union (TFEU)) ([4]).

(13) On 18 December 2006 the complainant brought an appeal against the order of the Court of First Instance before the Court of Justice.

(14) By judgment of 17 July 2008 ([5]), the Court of Justice set aside the order; it found that the contested act did constitute an act open to challenge that was not in conformity with the Commission's obligations under the Procedural Regulation, and referred the case back to the Court of First Instance.

(15) By letter of 26 September 2008 DG Competition withdrew the closure letter of 2 June 2004 and reopened the case.

(16) By order of 29 June 2009 the Court of First Instance found that since the letter had been withdrawn there was no longer any need to issue a decision ([6]). This order of the Court of First Instance was appealed by the complainant on 7 September 2009, on the grounds that the Court should have deemed the withdrawal of the letter unlawful and should have annulled it.

(17) By e-mail of 11 September 2009 the complainant supplied further information to the Commission.

(18) On 14 October 2009 Commission staff met representatives of the complainant. After this meeting, the complainant supplied further information to the Commission in several exchanges.

(19) By letter dated 21 October 2009 the Commission requested additional information from Greece. By letter of 13 November 2009 Greece asked for more time to respond, which was granted by the Commission by e-mail of 18 November 2009. On 11 and 14 January 2010 Greece replied to the Commission.

(20) By judgment of 6 May 2010 the Court of Justice responded to a request for a preliminary ruling under Article 234 EC (now Article 267 TFEU) from the Simvoulio tis Epikreatias ('Council of State'), in particular concerning the application of the EU public procurement rules to the tendering procedure in question. The Court of Justice concluded, inter alia, that, taken as a whole, a contract such as the one to be awarded following the tender in question did not fall within the scope of the Directives on public contracts ([7]). In addition, the Court noted that this conclusion did not preclude the fact that such a contract must observe the basic rules and general principles of the Treaty, in particular those on freedom of establishment and free movement of capital.

(21) By letter of 6 July 2010 the Commission informed Greece that it had decided to open the procedure laid down in Article 108(2) TFEU in respect of the measure (the 'opening decision').

(22) The Commission's decision to open the procedure was published in the *Official Journal of the European Union* ([8]). The Commission invited interested parties to submit their comments on the measure.

(23) Following the opening of the procedure, the Commission received comments from two interested parties, namely the representatives of the alleged beneficiary (Athens Resort Casino Holdings ([9]), on behalf of HR) ([10]) and from representatives of the complainant (Club Hotel Casino Loutraki, on behalf of CA) ([11]). By letter of 6 August 2010, Greece submitted its comments. The comments of both interested parties were sent by letter of 29 October 2010 to Greece, which reacted by letter of 25 November 2010.

([3]) OJ L 83, 27.3.1999, p. 1.
([4]) Case T-94/05 *Athinaiki Techniki AE* v *Commission* [2006] ECR II-73.
([5]) Case C-521/06 *Athinaiki Techniki AE* v *Commission* [2008] ECR I-5829.
([6]) Case T-94/05 *Athinaiki Techniki AE* v *Commission* (OJ C 233, 26.9.2009, p. 14).
([7]) Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* (OJ C 179, 3.7.2010, p. 2). The Court observed that the contract had as its main object the acquisition of 49 % of the capital of Mont Parnès casino and as ancillary object, indivisibly linked with that main object, the supply of services and the performance of works.
([8]) See footnote 1.
([9]) The company constituted under private law Athens Resort Casino AE which, as licence-holder, currently operates Mont Parnès casino, was set up in 2003 by the eventual successful bidder in the tender (Hyatt Regency — Elliniki Technodomiki). 70 % of Athens Resort Casino is owned by Regency Entertainment Psychagogiki kai Touristiki AE (formerly Hyatt Regency Xenodocheiaki kai Touristiki Thessaloniki AE) and the remaining 30 % by Ellaktor AE (formerly Elliniki Technodomiki AE).
([10]) By letter of 4 August 2010.
([11]) By e-mail from their legal representative of 29 September 2010.

(24) On 16 December 2010 ([12]), the Court of Justice ruled that the General Court (formerly the Court of First Instance) had been wrong in determining that there was no case to answer in the original challenge to the Commission's 'administrative closure' of the case.

2. DESCRIPTION OF THE MEASURE

(25) In October 2001 the Greek authorities initiated a procedure for the award of a public contract with a view to disposing of 49 % of the capital of Mont Parnès casino ([13]). There were two competing applicants, namely 'Kazino Attikis' (Casino Attikis or CA) and the consortium named Hyatt Regency — Elliniki Technodomiki (the Hyatt Regency consortium or HR), both of which were selected to participate in the second stage of the tendering procedure ([14]), under the terms of the relevant national provisions. Following proceedings which it is alleged were invalid, the contract was awarded to HR. The following paragraphs 26 to 29 describe the events leading to this award, according to the information available to the Commission.

(26) According to the applicable national provisions, the winning candidate would be declared through bidding (ascending price auction), the initial sale price having been set at EUR 80 million. The Tender Committee would unseal the envelopes submitted by the candidates, containing each candidate's financial bid, and would announce each bid in turn. The candidate having tendered the lower bid would be entitled to submit their new bid, enclosed in a sealed envelope, in the next round. Such a new bid would have to be at least equal to the initially higher bid increased by 1 % ([15]). This subsequent bidding would carry on indefinitely in separate rounds, until one of the bidders withdrew, in which case the last bidder would be declared the provisional highest bidder. The minutes naming the provisional highest bidder would be submitted by the Tender Committee to the Board of Directors of the Hellenic Tourism Development Authority (ETA).

(27) During the first round, the two candidates submitted their bids at the same time, in sealed envelopes, on 31 May 2002, at the headquarters of ETA. CA's bid was EUR 91 183 652, whereas the HR's bid was EUR 80 075 000. However, the envelope of the latter contained, apart from its bid, a statement disputing the lawfulness of the participation by the CA consortium in the tendering procedure. CA objected to this statement, claiming that the formulation of reservations rendered HR's financial bid inadmissible. CA's objection was rejected by the Objections Committee, which considered that HR's statement did not affect the validity of its bid.

(28) In the second round, HR submitted in a sealed envelope its bid of EUR 92 105 888, again accompanied by the same written statement. After the completion of the second round, the legal representative of CA submitted an envelope with the financial bid for the third round, and also submitted a separate statement to the Board of Directors of ETA on violation of the terms of the tender with regard to the validity requirements of the tender. The Tender Committee rejected this submission on the grounds that it would be admissible only if submitted in the form of an objection, falling within the competence of the Objections Committee. The legal representative of CA then asked the Committee for a 5-minute extension in order to decide upon their next actions. The extension was granted and they removed from the Committee's table both the written statement and the bid envelope. When they returned within the 5 minutes, they stated that they did not intend to submit an objection and they submitted their bid. Subsequently, HR submitted an objection and requested that the third round of bids be deemed inadmissible on the grounds that CA had submitted a bid which they had withdrawn and then re-submitted. HR's objection was accepted by the Objections Committee and CA's bid ([16]) was excluded from the procedure.

(29) After excluding CA's third-round bid, the Tender Committee forwarded ([17]) to the Board of Directors of ETA a copy of the minutes of its eighth meeting, at which it had named HR first provisional highest bidder (with a bid of EUR 92 105 888) and CA second provisional highest bidder. The Tender Committee appears not to have unsealed the third round bid of CA and did not return the sealed envelope to the latter, but delivered it to ETA to be kept in its safe ([18]). The Board of Directors of ETA convened an extraordinary general meeting. Thereafter, on 5 June 2002, the Managing Director of ETA and the legal representative of Kantor Capital, economic adviser in charge of the proceedings, were authorised to ask HR to improve its bid. HR subsequently raised the proposed amount to EUR 110 million. On 12 June 2002, CA submitted to the Board of Directors of ETA a letter containing a bid of EUR 162 million, but it was subsequently rejected because it was made after

([12]) Case C-362/09 P *Athinaiki Techniki AE* v *Commission* (OJ C 55, 19.2.2011, p. 12).
([13]) 'Elliniko Kazino Parnithas AE — Invitation to tender for privatisation — October 2001' (the original invitation to tender).
([14]) Supplementary invitation to stage 2 of the tender (April 2002).
([15]) As was clarified after the opening decision, which referred to a percentage of 10 %.
([16]) CA states that its bid was EUR 107 million.
([17]) Under cover of letter ref. 38/3.6.2002.
([18]) According to the information provided by the Greek authorities, the sealed envelope is still in the ETA safe, in order to protect the right of CA to exhaust all national and European legal remedies.

the tender procedure had closed. Finally, the HR bid was improved still further, rising to the sum of EUR 120 million ([19]).

3. DECISION TO OPEN THE FORMAL INVESTIGATION

(30) The Commission opened the formal investigation because it was not able to allay its doubts as to whether the stake of 49 % in the capital of Mont Parnès casino was sold by the Greek State to the highest bidder in a sale procedure that met the requirements of openness, transparency and non-discrimination. In particular, the Commission was not sure whether or not during the sale procedure there was any preferential treatment unlawfully granted to the buyer and consequently whether a market price was or was not paid. The Commission considered that the exclusion of CA from the tender, and of CA's bid of EUR 162 million made after the tender procedure, might be evidence of a sale below value and therefore of the existence of aid in the form of foregone State resources.

4. COMMENTS FROM GREECE

(31) By letter of 6 August 2010 Greece submitted its observations. Greece contests the existence of State aid on the grounds that the tender procedure for the sale of its stake in the capital of Mont Parnès casino was run in accordance with the applicable legislation, and that the 49 % stake in the casino was sold at market price.

(32) The Greek authorities first of all emphasise that the selection of the participants in the tender and the whole tendering procedure was entirely lawful and conducted in accordance with the rules on invitations to tender ([20]), which are governed by the legislation in force, and that those invitations to tender had been accepted by both candidates in the tender without reservation.

(33) The Greek authorities also explain that the statement by HR, contained in the envelope of HR's financial bid in both the first and second rounds of the bidding procedure, did not affect the validity of its financial bids, but concerned only the participation per se of CA in the tender procedure, and thus HR's financial bids were quite rightly deemed lawful by the Objections Committee.

(34) The Greek authorities further argue in more detail that the bid submitted by CA in the third round of the tendering procedure, which the complainant claims was EUR 107 million, was excluded because the envelope had been removed from sight of the Tender Committee. In these circumstances, the Committee could not be sure that the bid had not been changed. In any case, the re-submission of the bid would mean a second submission in the same round, which was against the rules.

(35) The Greek authorities explain that the second-round bid made by HR of EUR 92 105 888, up from the initial bid of EUR 91 183 652 made by CA in the first round, was in line with the tender rules, since according to the terms of the invitations to tender, each new bid had to be increased by 1 %, not 10 % as was assumed in the Commission's opening decision. Therefore, the rules of the tender were respected in this regard.

(36) The Greek authorities also argue that CA's last bid of EUR 162 million — the amount which the CA claimed it was prepared to pay — is invalid, because it was made after and outside the tender procedure. To accept this bid would have meant breaching the principle of legality, given that the purpose of a public bidding procedure is not only to serve the financial interest of the State, but also to serve the broader public interest, i.e. to secure the highest possible price while observing the principle of legality (i.e. the rules of law laid down in the rules on invitations to tender and tender dossiers and other applicable legislation).

(37) The Greek authorities further explain that they did not simply cancel the tender and start a new one because to do so would have meant re-running the whole procedure for the fourth time in 8 years, which would have damaged Greece's international reputation, with no certainty that a re-running of the tender procedure would have secured a price of EUR 162 million. In this respect, Greece even questions the credibility of the EUR 162 million bid, since CA was aware that its acceptance would only have triggered the cancellation of the procedure and the launch of a new one.

([19]) According to information received after the opening of the bids, see footnote 24 below.

([20]) The initial invitation and the supplementary invitation for stage 2.

(38) Furthermore, the Greek authorities confirm ([21]) that the price finally paid (EUR 120 million) was reasonable as it was 25,5 % higher than the expert valuation of EUR 95,4 million that had been made prior to the tendering procedure by the independent appraiser and kept sealed until the end of the procedure. They state that this valuation — even though not necessary because of the tendering procedure — was requested to safeguard Greece's interests even further ([22]).

(39) As regards the assertions by the complainant that the original terms of the invitations to tender were improved by the subsequent Law No 3139/2003 confirming the privatisation, the Greek authorities explain that the notices of invitation to tender were not amended either by Law 3139/2003 or in any other way. According to Greece, that Law simply regulates various authorisations linked to the investment and to the running of the casino, and includes measures for the protection of workers after the privatisation. HR was not relieved by that Law of the obligation to invest EUR 44 million in Mont Parnès casino, and the contractual clause in the contract on the return to HR of 70 % of the price in the event of an operating licence being granted to another casino before 2012 was already an explicit provision of the invitations to tender.

(40) The Greek authorities therefore observe that the sale price represents the market value of the 49 % stake in the capital of Mont Parnès casino.

(41) To reinforce their claim that no irregularities occurred in the tender procedure, the Greek authorities point to several rulings by national courts which analysed the lawfulness of the tender procedure under national law. To date, the national courts have found no irregularities in the tender and have therefore rejected the various applications made by CA on the subject ([23]). Among the findings of the national courts, confirming the correctness of the tender, the Greek authorities refer more particularly to the following:

(a) *Litigation before the civil courts:*

(42) In its judgement 8118/2002 ([24]), the Athens Court of First Instance rejected an application made by CA and ruled that:

— The Tender Committee and the Objections Committee rightly held that HR's first- and second-round bids were in conformity with the invitations to tender. HR's statement attached to its bids had not affected the unconditional nature of its bids,

— CA submitted a bid at 15.30, i.e. at the beginning of the third round, as laid down by the Tender Committee at the end of the second round. The bid was taken back by CA's representative, of his own will and motion, even though the chairman of the Tender Committee tried to deter him from doing so. If the chairman of the Tender Committee had explicitly warned CA's representative about taking back the bid, this would have resulted in discriminatory treatment in favour of CA and against HR.

— CA's second bid in the third round was rightly considered inadmissible by the Objections Committee. Each bidder could tender only one bid in each round. Moreover, if CA's second bid in the third round had been deemed admissible, this would have resulted in a violation of the principle of transparency. CA's representative took back CA's first sealed envelope, left the venue where the tender was taking place and on his return presented a sealed envelope, which could not be verified as being the same as the first envelope ([25]).

([21]) Also with reference to a financial report of August 2002 made by Kantor (financial expert), sent by the Greek authorities after the opening decision.

([22]) The Greek authorities sent a copy of that valuation to the Commission after the opening decision.

([23]) The Greek authorities referred to the following national court decisions: judgment 8118/2002 of the single-member First Instance Court of Athens; judgment 3350/2002 of the multi-member First Instance Court of Athens; judgment 1649/2007 of the Areios Pagos (Supreme Civil Court); judgment 8101/2009 of the multi-member First Instance Court of Athens; judgment 754/2002 of the Committee for Suspensions of the Council of State; judgment 3243/2004 of Council of State (Chamber D); judgment 606/2008 of Council of State (Plenary Session); order 437/2007 of the Council of Court of Appeals Judges of Athens; judgment 1531/2008 of the Areios Pagos; order 800/2009 of the Council of Court of Appeals Judges of Athens; extracts of judgment 466/2011 of the Appeal Court of Athens (three-member chamber for felonies).

([24]) Judgment 8118/2002 of the First Instance Court of Athens, rejecting an application made by CA, where CA argued essentially that the declaration of HR as provisional highest bidder was the result of the unlawful decisions of the Tender Committee and the Objections Committee, whereby HR's first- and second-round bids were deemed admissible and, on the other hand, CA's third-round bid inadmissible.

([25]) The Commission notes that another case is currently still pending before national civil courts, concerning an action by the members of CA against ETA and HR, seeking a declaration of inapplicability of the contract signed between ETA and HR, and also damages of approximately EUR 50 million. The case is currently on the case list of the Athens Court of Appeals — appeal against judgement 8101/2009 of the Court of First Instance, heard on 7 April 2011; the case is still pending; once delivered, this judgment may be further contested before the Areios Pagos (Supreme Civil Court). The Commission observes that, as presented, this case does not appear to affect the findings of judgment 8118/2002 of the First Instance Court of Athens; so far, this pending case appears to have discussed mainly procedural issues (e.g. administrative or civil jurisdiction, legal standing of the applicants).

(b) *Litigation before the administrative courts*

(43) According to the Greek authorities, a case is currently before the Council of State (Supreme Administrative Court) concerning another application made by CA alleging the unlawfulness of the tender procedure ([26]). The final judgment is currently pending; however the Greek authorities observe that the Judge Rapporteur has proposed that CA's application should be dismissed as inadmissible on grounds of jurisdiction and unfounded on grounds of substance ([27]).

(c) *Criminal litigation*

(44) Following an action filed in 2002 by CA against members of the Tender Committee, the Objections Committee, ETA, the evaluation consultant (American Appraisal Hellas Ltd) and the financial advisor (Kantor), concerning their behaviour during the tender procedure, the Council of Court of Appeals Judges, to which the case was forwarded for adjudication, issued an acquitting order ([28]) and found, more particularly, that:

— Neither the first nor the second decision of the Objections Committee were unlawful and no adequate evidence was found of any misconduct on the part of its members. The members of the Objections Committee, by overruling CA's objection in the first and second round and accepting on the other hand HR's objection in the third round, did not infringe the terms of the invitations to tender and did not treat the two bidders differently.

— The decisions of the Tender Committee were not unlawful and the members of the Tender Committee did not treat the two bidders differently; furthermore the Tender Committee was obliged, according to the terms of the invitations to tender, to adhere to the findings of the Objections Committee.

— ETA's representative did not infringe the relevant national provisions by asking the first provisional highest bidder (HR) to increase its financial bid; ETA's representative was not authorised to enter into negotiations and did not have the power to cancel or call off the bidding procedure.

(45) The above acquitting order was further challenged before the national courts ([29]) and very recently the Appeal Court of Athens delivered a judgment acquitting all the persons charged (judgment 466/2011). The full text of this judgment is not yet available.

(46) In conclusion, in consideration of all the above observations, the Greek authorities maintain that the measure under assessment does not involve State aid within the meaning of Article 107 TFEU.

5. COMMENTS FROM INTERESTED PARTIES

(47) By letter of 4 August 2010, representatives of the alleged beneficiary (i.e. Athens Resort Casino Holdings on behalf of HR) intervened in the Commission proceedings as an interested party. The alleged beneficiary submitted the same comments as Greece, which are summarised in the Section 4.

(48) In addition, the alleged beneficiary states that the price actually paid for the stake in the casino was EUR 120 million, EUR 10 million higher than previously understood ([30]). It was also therefore even further above the professional valuation of EUR 95,4 million that had been made (but not made known) before the tendering procedure was launched.

([26]) This pending case concerns an application by CA for annulment of the act of the Inter-ministerial Committee on Privatisation by which the tender was awarded to HR. It alleges that the Tender had been initiated by ETA without legal authorisation; the decisions of the committees of the tender procedure, whereby HR's first- and second-round bids were deemed admissible and CA's third-round bid inadmissible, were unlawful; the tender was unlawfully awarded; ETA unlawfully negotiated the terms of the contract with HR; the principle of fair treatment of the bidders had been violated to the detriment of CA; the contract between ETA and HR should have been audited before being signed by the Court of Auditors; the contract between ETA and HR was not ratified by law. The application for annulment was heard on 22 November 2010. The judgment is pending; once delivered, this judgement cannot be subject to any other national judicial review.

([27]) The Commission notes that another administrative case has been dealt with by the Council of State concerning an application by the members of CA for the annulment of an order by the National Radio and Television Council (ESR), on the basis of which the signing of the contract between ETA and HR was permitted (alleging incompatibility/ineligibility criteria under national law). The plenary session of the Council of State delivered judgment 606/2008 and referred the case to the Court of Justice of the EU for a preliminary ruling. The main issue Court of Justice dealt with was whether the contract in question (contract between ETA and HR) fell within the scope of EC Directives on public procurement. The Court found that the contract fell outside the scope of the EC Directives (Joined Cases C-145/08 and C-149/08, see footnote 10). The case was recently heard again before the plenary of the Council of State (11 March 2011); the judgment is pending; once delivered, this judgment cannot be subject to any other national judicial review.

([28]) Order 437/2007 of the Council of Court of Appeals Judges of Athens.

([29]) Further appeal by the Public Prosecutor of the Areios Pagos (25/2007); partially accepted by the Areios Pagos (judgment 1531/2008) and case referred back to the Council of Court of Appeals Judges. The Council of Court of Appeals Judges referred the case to the Appeal Court of Athens (order 800/2009). The Appeal Court of Athens recently delivered a judgment acquitting all the persons charged (judgment 466/2011).

([30]) As confirmed e.g. by a financial report of August 2002 by Kantor (financial expert), sent by the Greek authorities after the decision to open proceedings, see footnote 24 above.

(49) The alleged beneficiary further argues that ETA was not only not obliged, but also had no right to call on the provisional second highest bidder, because that would have meant beginning new rounds of bidding, in breach of the terms of the invitations to tender. It further claims that the bid of EUR 162 million by CA outside the tendering procedure was at no risk of being taken seriously, and was submitted only to trigger the cancellation of the tender procedure. It confirms that it would certainly have contested any decision to accept this bid, risking the cancellation of the entire procedure. In this respect, it also points to the opinion of the Legal Council of State, which confirmed that the CA bid could not be taken into account or be accepted ([31]).

(50) The alleged beneficiary also calls into question the supposition made by the Commission in the opening decision, regarding distortion of competition and effect on trade, that gambling is a worldwide business and the companies in this field exercise an economic activity in an international market. The alleged beneficiary claims that Mont Parnès is not active internationally but operates only locally and is therefore not in competition with casinos abroad.

(51) By letter of 29 September 2010, Club Hotel Casino Loutraki AE (on behalf of CA) ([32]) intervened in the Commission proceedings as an interested party. In that letter it argues that, as regards the quantification of the alleged aid, account should also have been taken of the difference between the bids and the impact of the ratifying law on the obligations of the purchaser under the terms of the public tender procedure.

6. ASSESSMENT OF THE MEASURE

6.1. The existence of State aid in the disposal of shares by trade sale

(52) Article 107(1) TFEU states that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the internal market, in so far as it affects trade between Member States.

(53) In accordance with the settled case law of the Court of Justice of the EU ([33]) and Commission rules and practice on State aid in the context of privatisations ([34]), when a Member State purchases or sells shares of undertakings, no advantage is present if the Member State's behaviour is consistent with that of a private market economy investor.

(54) In particular, when the sale of shares takes place on the stock exchange, it is generally assumed to be on market conditions and not to involve any advantage. However, when the disposal is carried out through a trade sale, it can be assumed that no advantage is involved if the following conditions are fulfilled: first, the shareholding is sold by a competitive tender that is open to all comers, transparent and non-discriminatory; second, no conditions are attached which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price; third, the shareholding is sold to the highest bidder; and fourth, bidders must be given enough time and information to carry out a proper valuation of the assets at the basis of their bid.

(55) In other words, when the privatisation is carried out by trade sale, the benchmark for assessing whether a transaction concerning State assets involves an advantage is whether a market economy operator placed in a similar situation would have behaved in the same way, i.e. would have sold the company at the same price. Non-economic considerations, such as for example industrial policy reasons, employment considerations or regional development objectives, which would not be entertained by a market economy operator, cannot be taken into account as reasons for accepting a lower price and, on the contrary, point to the existence of an advantage. This principle has been repeatedly explained by the Commission and consistently confirmed by the Court ([35]).

(56) Therefore, if any of the above requirements are not met, the Commission considers that the public sale must be examined for possible aid implications and, thus, must be notified. By respecting these requirements, it is

([31]) Opinion 422/2002/EC of the Legal Council of State sitting in plenary session.

([32]) Club Hotel Loutraki was a member of CA and took part in the tender procedure.

([33]) See for example Court of First Instance in Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-03871; Court of First Instance in Joined Cases T-228/99 and T-233/99 *WestLB* v *Commission* [2003] ECR II-00435; Court of First Instance in Case T-366/00 *Scott SA* v *Commission* [2007] ECR II-01763; Court of Justice in Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035; Court of First Instance in Case T-358/94 *Air France* v *Commission* [1996] ECR II-02109.

([34]) Twenty-third Report on Competition Policy, 1993, p. 255.

([35]) See footnote 33.

possible to ensure that the State obtains the highest price, i.e. the market price for its assets and therefore that no advantage is involved.

6.2. **The sale of the 49 % stake in the capital of Mont Parnès casino**

(57) When opening the proceedings under Article 108(2) TFEU, the Commission had doubts whether the sale of Mont Parnès casino was conducted within an open, transparent and non-discriminatory tender procedure. According to the information available at that stage, the Commission considered that there were significant difficulties in determining whether any preferential treatment was unlawfully granted and also whether a market price was or was not paid. The Commission was concerned that irregularities in the tendering procedure might have resulted in State aid.

(58) The Commission then carried out an assessment of the relevant facts within the framework of the formal investigation. This assessment is based on the body of evidence available in respect of the measure.

(59) During the various stages of the procedure, the Commission has received information about the many legal actions at national level that vindicate the original tendering procedure. The Commission notes that, to date, the various court rulings at national level do not appear to support the observations made by the complainant about irregularities and unequal treatment in the tender procedure (see also paragraphs 41 to 46 above). The national courts rather appear to have so far confirmed the lawfulness and the non-discriminatory nature of the tender procedure, based on national rules.

(60) Although the Commission's assessment is not dependent on the findings of national courts, it may take such findings into consideration as one factor in its analysis. The Commission however notes that the present assessment is not in any way intended to interpret national law, which is solely the competence of the Member State.

(61) In this context, the Commission considers that the lawfulness of the tender procedure under national law, as described and justified through the extensive in-depth examination performed by the various national courts so far, constitutes a significant indication of the correctness and the non-discriminatory nature of the tender procedure. This apparent validation of the tender under national rules can be taken into account by the Commission, among other factors, in its assessment under EU State aid rules that the bidding procedure was open, unconditional and non-discriminatory.

(62) As regards the question raised in the opening decision that one of the bids seemed to breach the rule in the invitation to tender concerning the minimum increase over the previous bid, the Commission notes that this issue has been resolved, since the required increase was 1 % and not 10 % as the Commission had been given to understand. Therefore the Commission considers that the rules of the tender procedure were complied with in this regard.

(63) As regards the alleged different treatment of the various objections made during the tender procedure, the Commission also notes that the Greek authorities have given an acceptable explanation for the exclusion of CA's bid from the tender procedure in light of the applicable rules that forbid a second submission in the same bidding round.

(64) As regards the alleged unequal treatment of the various bids made after the tender procedure, the Commission considers that the difference in treatment between negotiating the price upwards with the successful bidder while refusing to consider the complainant's bid of EUR 162 million may, given the existing doubts about the latter's legality, be accepted as permissible practice in a tender procedure. Furthermore, the Commission cannot lend credibility to the complainant's inadmissible bid of EUR 162 million because it was made only after the tender procedure and in breach of its procedural rules.

(65) As regards the suggestion that the whole procedure could have been cancelled, it has been stated by the Greek authorities that this would have meant re-running the procedure, potentially risking a further reduction in the price to be obtained.

(66) The Greek authorities have also stated that the terms of reference of the public procurement contract were not amended by Law 3139/2003 or in any other way.

(67) As regards the price obtained, the Commission notes that the price finally paid for the casino of EUR 120 million ([36]), while still short of the inadmissible bid of EUR 162 million that the complainant claims to have been ready to make after its exclusion from the procedure, is however higher than both the highest bid

([36]) According to documentation provided by the Greek authorities (see footnote 21 above), the price actually paid for the stake in the casino was further improved to EUR 120 million, EUR 10 million higher than previously understood.

of EUR 107 million the complainant appears to have tendered and, by an even greater margin (25,5 %), the expert valuation of the stake at EUR 95,4 million made in advance of the procedure.

6.3. **Conclusion**

(68) Following the opening of the formal investigation, the Greek authorities addressed the preliminary doubts expressed by the Commission in the opening decision in a satisfactory manner. In particular, the Commission has not found evidence that allows the conclusion that preferential treatment was given to the alleged beneficiary leading to the granting of any advantage. By selling its share in the casino to the highest bidder in an open, unconditional and non-discriminatory bidding procedure, Greece is assumed to have obtained the highest price on the market and not to have foregone State resources. The Commission can therefore accept that, under similar circumstances, a market economy operator would have sold the relevant stake in the Casino at a similar price. Consequently, the Commission considers that the sale by the Greek State of its 49 % stake in the capital of Mont Parnès casino does not entail any advantage and hence does not constitute State aid.

7. **CONCLUSION**

(69) The Commission finds that the sale by the Greek State of its 49 % stake in the capital of Mont Parnès casino does not constitute aid,

HAS ADOPTED THIS DECISION:

Article 1

The sale by the Greek State of its 49 % stake in the capital of Mont Parnès casino does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 24 May 2011.

For the Commission
Joaquín ALMUNIA
Vice-President