DECISION OF THE BOARD OF APPEAL OF THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

7 February 2020

(Application for annulment – ACER Decision No. 10/2019 – Transparency – Equal treatment)

Case number	A-006-2019
Language of the case	English
Appellant	Operator Gazociągów Przesyłowych GAZ-SYSTEM S.A. ('GSA' or 'Appellant') Represented by: Piotr Kuś, GSA Platform representative and Deputy Director, and Adam Bryszewksi, Director
Defendant	European Union Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER') Represented by: Christian Zinglersen, Director / Daldewolf s.c.r.l.
Interveners	PRISMA European Capacity Platform GmbH ('PRISMA') Represented by: Falk Porzig, Head of Legal and Regulation (On behalf of Defendant, partially granted) President of Energy Regulatory Office, Poland Represented by: Malgorzata Kozak, Director (On behalf of Appellant)
Application for	The revision or annulment of the Decision of the Agency for the Cooperation of Energy Regulators No. 10/2019 of 6 August 2019 on the selection of a web-based booking platform to be used by TSOs

for the offering of bundled gas transmission capacity at the "Mallnow" physical interconnection point and "GCP" virtual interconnection point ("Decision No. 10/2019" or "Contested Decision"), and for access to the respective file

THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairperson), Yvonne Fredriksson (Rapporteur), Viorel Alicus, Jean-Yves Ollier, Michael Thomadakis, Dominique Woitrin (Members).

Registrar: Andras Szalay

gives the following

Decision

I. Background

Legal background

1. Regulation (EU) 2017/459[1] establishes rules for capacity allocation mechanisms in gas transmission systems, including the establishment of capacity booking platforms.

2. Under Article 37(1) of Regulation (EU) 2017/459, transmission system operators ("TSOs") are to apply this Regulation by offering capacity by means of one or a limited number of joint web-based booking platforms, to be operated by themselves or via an agreed party.

3. Under Article 37(3) of Regulation (EU) 2017/459, transmission system operators shall reach a contractual agreement to use a single booking platform to offer capacity on the two sides of their respective interconnection points or virtual interconnection points. If no agreement is reached by the transmission system operators within that period, the matter shall be referred immediately by the transmission system operators to the respective national regulatory authorities ("NRAs"). The national regulatory authorities

[1] Commission Regulation (EU) No 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013.

shall then, within a period of a further 6 months from the date of referral, jointly select the single booking platform for a period not longer than 3 years. If the national regulatory authorities are not able to jointly select a single booking platform within 6 months from the date of referral, Regulation (EU) 2019/942[2] and, in particular, Article 6(10)b thereof shall apply and the Agency shall decide on the booking platform to be used, for a period not longer than 3 years, at the specific interconnection point or virtual interconnection point.

Facts giving rise to the dispute

4. On 13 April 2018, Prezes Urzçdu Regulacji Energetyki ('URE'), national regulatory authority ('NRA') of the Republic of Poland informed the Agency that URE and BundesNetzAgentur ('BNetzA'), NRA of the Federal Republic of Germany, were not able to jointly select a single booking platform. BNetzA confirmed the same facts on 19 April 2018, thus the matter was referred to the Agency on 19 April 2018. Therefore, under the provisions of Article 37(3) of the CAM NC and Article 8(1) of Regulation (EC) No 71 3/2009, the Agency became responsible to adopt a decision concerning the selection of the single booking platform at the 'Mallnow' Interconnection Point ('IP') and the 'GCP ' Virtual Interconnection Point ('VIP') by the referral.

5. After the concerned NRAs and TSOs were consulted on 18 May 2018, a public consultation was launched on 5 June 2018, a public workshop was held on 19 June 2018, and on 19 July 2018 the Agency requested offers from capacity booking platform operators.

6. The Agency received three offers: one from the Appellant, Operator Gazociągów Przesyłowych GAZ-SYSTEM S.A ('GSA'), one from FGSZ Natural Gas Transmission Closed Company Limited Regional Booking Platform ('RBP') and one from PRISMA European Capacity Platform GmbH ("PRISMA"). After assessment, the Agency concluded that all booking platforms complied with the relevant EU legal requirement as well as with national requirements.

[2] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators.

7. Following an assessment of the award criteria, the Agency designated GSA as the booking platform to be used, for a period no longer than three years, at the "Mallnow" IP and the "GCP" VIP, in its Decision No. 11/2018 of 16 October 2018 (the "Agency Decision of 16 October 2018"), in accordance with Article 37(3) of Commission Regulation (EU) 2017/459 and Article 8(1) of Regulation (EC) 713/2009.

8. On 14 December 2018, PRISMA filed an appeal with the Registry of the Board of Appeal against the Agency Decision of 16 October 2018. Both GSA and the President of the Energy Regulatory Office of Poland were granted leave to intervene in this proceeding in support of the Defendant.

9. On 14 February 2019, the Board of Appeal adopted Decision A-002-2018, in which it annulled the Agency's Decision of 16 October 2018 and remitted the case to the Director of the Agency ("Board of Appeal Decision A-002-2018"). The Board of Appeal decided that, given the absence of a proven predetermined evaluation method of the offers, the Agency had infringed its duty to duly reason its Decision, and to duly document the procedure leading up to it, in breach of the principle of good administration.

10. On 22 February 2019, the Agency launched a new procedure for the selection of a joint web-based booking platform to be used by TSOs for the offering of bundled gas transmission capacity at the "Mallnow" IP and "GCP" VIP.

11. Between 9 and 30 April 2019, the Agency launched a public consultation about the selection criteria for the single web-based capacity booking platform to be used at the "Mallnow" IP and "GCP" VIP and received 21 responses, including responses from the Appellant, RBP and PRISMA.

12. On 8 May 2019, following the results of the public consultation, the Agency launched an Open Call GAS-2-2019 for the selection of a web-based booking platform to be used by TSOs for the offering of bundled gas transmission capacity at the "Mallnow" IP and "GCP" VIP, allowing any operator of booking platform of natural gas to submit an offer. The Open Call described the requirements for the submission of offers, the selection procedure (minimum criteria) and the evaluation and submission of offers, with a catalogue of criteria and templates in annex, as well as a communication on confidentiality and a Case Study description.

13. On 6 August 2019, the Agency issued Decision No. 10/2019 by which it designated RBP as the booking platform to be used, for a period of three years or until that time when the concerned TSOs come to an agreement on the permanent use of a booking platform, if sooner, at the "Mallnow" IP and "GCP" VIP, in accordance with Article 37(3) of Commission Regulation (EU) 2017/459 and Article 6(10)(b) of Regulation (EU) 2019/942.

Procedure

14. On 7 October 2019, Operator Gazociągów Przesyłowych GAZ-SYSTEM S.A.GAZ-SYSTEM S.A. ('Appellant' or 'GSA') submitted an appeal to the Registry of the Board of Appeal against ACER Decision No. 10/2019.
15. On 10 October 2019, the announcement of appeal was published on the website of the Agency.
16. On 23 October 2019 the Registrar communicated the composition of the Board of Appeal to the Parties.
17. By the deadline of 25 October 2019, two applicants filed their requests for intervention with the Registry. On 22 November 2019, both applicants were granted the right to intervene; PRISMA was granted the right to partially intervene on behalf of the Defendant whereas the President of Energy Regulatory Office (Poland) was granted the right to intervene on behalf of the Appellant.
18. On 12 November 2019, ACER filed its Defence with the Registry requesting the BoA to dismiss the appeal.
19. On 26 November 2019, the Chairperson of the Board of Appeal requested additional information from the Agency with regard to the confidentiality claim included in its Defence regarding Annex 6 and Annex 15 and requested, in particular (i) to identify the legal provisions on which the claim "*to avoid illegal exchange of information between the operators"* was based and (ii) to explain the request concerning the timing of the Chairperson´s decision on confidentiality, namely *"not to rule on confidentiality before ruling on the pleas developed by the Agency"*). The Agency replied on 29 November 2019, justifying the non-disclosure of the scoring (especially Annexes 6 and 15) and providing the reasoning of its request for the timing of the confidentiality decision.
20. On 3 December 2019, the Chairperson of the Board of Appeal, acting under Article 14(2) of the Board of Appeal Rules of Procedure, issued a Decision on the

Confidentiality Claim requested by the Agency. This Decision on the Confidentiality Claim (i) rejected the Agency's request not to rule on the confidentiality issue before ruling on the pleas developed, as this could potentially lead to an infringement of the right to the defence and (ii) granted confidential treatment to:

- The entire Annex 6 (confidential, including the Appellant),
- The entire Annex 14,
- The entire Annex 15 (confidential, including the Appellant),
- The entire Annex 18,
- The entire Annex 20 (confidential, including the Appellant),
- The entire Annex 22 (confidential, including the Appellant),
- The entire Annex 23,
- Paragraphs 65, 66, 150 and 151 of the Defence.
- Annexes 6, 15, 20 and 22 (confidential, including for the Appellant); entire Annex 14, 18 and 23; and paras 65, 66, 150 and 151 of the Defence.

21. On 13 December 2019, the Appellant submitted a reply to the Defence in which it found ACER's arguments to be unjustified. On 3 January 2020 the Agency lodged its rejoinder.
22. On request of the Appellant, the Board of Appeal held an oral hearing on 9 January 2020. On the same date, the written part of the proceeding was closed.

Main arguments of the Parties

23. The Appellant requests the Board of Appeal to (i) annul Decision No. 10/2019 (the "Contested Decision") in its entirety and remit the case to the competent Agency body; (ii) to order the Agency to grant the Appellant the right to inspect ACER´s case-file related to the Contested Decision in full or, alternatively, to disclose the scoring in Annex 1 to the Contested Decision; then, (iii) to enable the Appellant to supplement the Appeal with further arguments based on new information revealed to the Appellant in result of case-file inspection; and (iv) to hold a hearing for the involved Parties where the Appellant´s arguments could be presented in full[3].

24. The Appellant's claims can be summarized as follows:[4]

[3] Appeal, p.3.
[4] Appeal, p.2.

Ad 1) breach of the rule of law enshrined in Article 2 of the Treaty of the European Union ("TEU"), the transparency principle enshrined in Article 15 of the Treaty on the Functioning of the European Union ("TFEU") and Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') by arbitral change of the requirements related to the technical quality requirements criteria that must be met by submitted offers without giving any justification of its change;

Ad 2) breach of the principle of transparency (Article 15 TFEU and Article 41 of the Charter) by not providing the proper explanation of requirements of the Case Study which affected preparation of offers by capacity booking platforms;

Ad 3) breach of the principle of equal treatment, principle of transparency enshrined in Article 15 TFEU and Article 41 of the Charter, by setting requirements for Case Study in Task B(i) and B (ii) in an arbitrary way that favoured platforms which had not fulfilled the basic requirements at the time the offers were submitted;

Ad 4) breach of Article 296 of TFEU, Article 41 (2) (e) and Article 47 of the Charter, Article 14 (7) of Regulation (EU) 2019/942, by not giving due reasons for the Contested Decision, i.e. not disclosing in Annex 1 being an integral part of the Contested Decision and essential part of justification of the choice of RBP, neither overall nor particular scores awarded to each offer, and by providing the internally inconsistent reasoning for the Contested Decision;

Ad 5) breach of Article 41 (l) of the Charter and Article 14 (7) of Regulation 2019/942 by not granting the Appellant the full access to the case-file relating to the Contested Decision, in particular by not disclosing PRISMA's offer at all as well as neither overall nor particular scores awarded to each offer included in the Annex 1 to the Contested Decision;

Ad 6) breach of Article 41 of the Charter, the principle of equal treatment, principle of transparency and rule of law by evaluation of case studies presented by each platform and awarding scores to them in a totally discretionary manner and thus exceeding the margin of discretion beyond the confines of law, which led to committing a manifest error of assessment;

Ad 7) breach of Article 41 of the Charter, the principle of good administration, the principle of transparency and the principle of non-discrimination and equal treatment by committing a manifest error of assessment during the evaluation of submitted offers, which led to the Appellant, RBP and PRISMA being incorrectly awarded points.

25. The Defendant argues that it fully and duly complied with its obligations under EU Law and correctly assessed the three offers which led to the Contested Decision. The Defendant therefore requests the Board of Appeal to dismiss the Appeal in its entirety as unfounded.

II. Admissibility

Admissibility of the appeal

Ratione temporis

26. Article 28(2) of Regulation (EU) 2019/942 provides that *"[t]he appeal shall include a statement of the grounds for appeal and shall be filed in writing at ACER within two months of the notification of the decision to the person concerned, or, in the absence thereof, within two months of the date on which ACER published its decision"*.

27. The Appeal was submitted on 7 October 2019, challenging ACER Decision No.10/2019, which was published on its website on 7 August 2019.

28. The Appeal was received by the Registry *by e-mail* on 7 October and it contained the statement of grounds.

29. Therefore, the Appeal is admissible *ratione temporis*.

Ratione materiae

30. Article 28(1) of Regulation (EU) 2019/942 provides that decisions referred to in Article 2(d) may be appealed before the Board of Appeal.

31. The Contested Decision was issued, among others, on the basis of Article 37(3) of Regulation (EU) 2017/459 as well as of Article 6(10) of Regulation (EU) 2019/942, which is explicitly mentioned in Article 2(d) of Regulation (EU) 2019/942.

32. Therefore, since the appeal fulfils the criterion of Article 28(1) of Regulation (EU) 2019/942, the Appeal is admissible *ratione materiae*.

Ratione personae

33. Article 28(1) of Regulation (EU) 2019/942 provides that "[a]*ny natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person*."

34. In accordance with Article 6 of the Contested Decision, the Appellant is one of the addressees of the Contested Decision.

35. The Appeal is therefore admissible *ratione personae*.

III. Merits

Remedies sought by the Appellant

36. The Appellant requested the Board of Appeal to annul the Contested Decision in its entirety and remit the case to the competent Agency body.

37. The Appellant further requested that the Board of Appeal grants the Appellant right to inspect the Defendant's case-file related to the Contested Decision in full or, alternatively, to disclose the scoring in Annex 1 to the Contested Decision and then to enable the Appellant to supplement the Appeal with further arguments based on new information revealed to the Appellant.

Pleas and arguments of the Parties

First plea - The rules applicable to the Agency's Decision when acting under Articles 6(10)(b) of Regulation (EU) 2019/942 and 37(3) of Regulation (EU) 2017/459

38. The Board of Appeal considers it appropriate to briefly reiterate the law applicable to the Contested Decision. The applicable law was set out in detail in Board of Appeal Decision A-002-2018[5].

39. Board of Appeal Decision A-002-2018 stressed that the applicable law was key to the outcome of the Appeal against the Agency´s Decision No.11/2018 of 16 October 2018, since the precise requirements and principles that governed the procedure varied depending on the applicability of the Directives on public procurement, the Financial Regulation[6] or merely of EU general principles[7].

[5] Paras 40 to 61 of Board of Appeal Decision A-002-2018.
[6] Regulation (EU, Euratom) No. 2018/1046 of the European Parliament and of the Council, of 18 July 2018, on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014, and Decision No. 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012.
[7] Para 44 of Board of Appeal Decision A-002-2018.

40. According to Board of Appeal Decision A-002-2018, the Agency´s procedure to designate a capacity booking platform operator does not constitute a procurement procedure[8]. The Agency is not seeking to select a contractor to provide a service; rather, it is exercising its regulatory competences to issue a decision in order to meet the obligations set out in Article 37 of Regulation (EU) 2017/459[9].

41. Although the procurement Directives and Regulation are not applicable to the current case, the Agency must comply with the fundamental rules of the TFEU and the general principles of EU law[10]. This includes the free movement of goods (Article 34 TFEU), the right of establishment (Article 49 TFEU), the freedom to provide services (Article 56 TFEU), the Charter, and the principles of non-discrimination and equal treatment (Articles 8 and 10 TFEU), transparency (Article 15 TFEU) and proportionality (Article 69 and 276 TFEU, as well as Protocol No. 2 TFEU)[11].

42. Moreover, the case-law of the European Courts clearly sets out that transparency and equal treatment obligations upon contracting authorities stem from the very principles of equal treatment and transparency that are reflected in the Directives and Regulations governing these procurement or selection procedures (as clearly stated in Case T-461/08 *Evropaïki Dynamiki v EIB*[12]). As a result, the European Courts have applied these principles consistently to contracting authorities, even in cases where neither the Procurement Directives nor the Financial Regulation were applicable[13].

43. Any administrative action is bound by the general principles of EU law, irrespective of whether it is bound by any Directive or Regulation[14]. Hence, irrespective of the application of secondary EU law, the Agency is bound by the principles of equal treatment and non-discrimination, transparency and good administration, even more so

[8] Para 51 of Board of Appeal Decision A-002-2018.
[9] Para 51 of Board of Appeal Decision A-002-2018.
[10] Para 52 of Board of Appeal Decision A-002-2018.
[11] See, by analogy (limited by the fact that this case concerned public procurement), Case T-461/08 *Evropaïki Dynamiki v. EIB* EU:T:2011:494, para 88.
[12] Case T-461/08 *Evropaïki Dynamiki v EIB* EU:T:2011:494, para 89 ; para 53 of Board of Appeal Decision A-002-2018
[13] E.g. Case C-226/09 *Commission v Ireland* EU:C:2010:697; para 53 of Board of Appeal Decision A-002-2018.
[14] European Parliament, Directorate General for Internal Policies, Policy Department C "Citizens´ Rights and Constitutional Affairs, "The General Principles of EU Administrative Procedural Law In-depth Analysis upon request by the JURI Committee", PE 519.224 EN, 2015: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA(2015)519224_EN.pdf; para 54 of Board of Appeal Decision A-002-2018.

when it is substituting TSOs and NRAs in the management of a public tender procedure. The Board of Appeal notes that these general principles of EU law have been codified by the Charter of Fundamental Rights (Articles 20, 21 and 41 of the Charter), which acquired the same legal status as the Treaties with the entry into force of the Lisbon Treaty[15].

44. In *HI*,[16] the Court of Justice of the European Union ("CJEU") held that, even though Directive 92/50 did not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities were nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality, in particular referring also to *Telaustria and Telefonadress*.[17]

45. By analogy, in the present case, the Directives on public procurement and Financial Regulation are specific applications of the general principles of equal treatment and transparency and the Agency is bound to comply with those general principles of EU law[18]. To hold that the Agency is not required to respect the general principles of EU law would amount to granting it discretion beyond the confines of the law and allowing it to adopt decisions in breach of the rule of law[19].

46. It stands to reason that, if these obligations derive from these general principles, they must also apply in a context such as the present, where the Agency acts under its regulatory powers, rather than as a contracting authority[20]. As it is adopted under the powers granted to the Agency by Article 37(3) of Regulation (EU) 2017/459, the Contested Decision also had to comply with the relevant rules and principles of this Regulation, and, more broadly, of the EU legal framework applicable to the Agency and to gas transmission systems[21].

[15] Para 54 of Board of Appeal Decision A-002-2018.
[16] Case C-92/00 *HI* EU:C:2002:379, para 47; para 55 of Board of Appeal Decision A-002-2018.
[17] Case C-324/98 *Telaustria and Telefonadress* EU:C:2000:669, para 60; para 55 of Board of Appeal Decision A-002-2018.
[18] Para 56 of Board of Appeal Decision A-002-2018.
[19] Para 56 of Board of Appeal Decision A-002-2018.
[20] Para 58 of Board of Appeal Decision A-002-2018.
[21] Para 58 of Board of Appeal Decision A-002-2018.

47. In conclusion, in this case, the Contested Decision, and the procedure leading up to its adoption was subject neither to the Procurement Directives, nor to the EU budgetary Regulation[22]. However, the Treaty and the general principles of EU law do apply[23]. Thus, it is not a matter of dispute that, when issuing the Contested Decision, the Agency was required to comply with the principles of non-discrimination and equal treatment, transparency and proportionality[24].

48. By analogy with public procurement procedures, the principle of transparency requires that, when acting under Article 37(3) of Regulation (EU) 2017/459, the possibility of favouritism or arbitrariness by the Agency is excluded[25]. This implies that all the conditions and detailed rules for the selection be drawn up in a clear, precise and unequivocal manner beforehand, and made available in a timely fashion, so as to enable all reasonably well-informed candidates exercising ordinary care to understand their exact significance and to interpret them in the same manner, and to enable the Agency to verify whether in fact the submissions meet the criteria.[26]

49. When acting in accordance with Article 37(3) of Regulation (EU) 2017/459, the Agency is called on to exercise regulatory functions which, in some cases, entail analysis of significantly complex and technical matters[27]. This tends to be the case, namely, as regards the choice of award criteria, weightings, sub-criteria and evaluation methodology, as well in the assessment of how these criteria are met, in light of the documents and information submitted to it[28].
50. The Board of Appeal observes that the Appellant[29] expressly agrees with Board of Appeal Decision A-002-2018 as regards the applicable law.

The Board of Appeal´s limited review of ACER´s complex, technical assessment

51. The Board of Appeal has a consistent decision-making practice according to which, in the limited timeframe it is given to decide on the appeal of Agency decisions,

[22] Para 59 of Board of Appeal Decision A-002-2018.
[23] Para 59 of Board of Appeal Decision A-002-2018.
[24] Para 59 of Board of Appeal Decision A-002-2018.
[25] Para 60 of Board of Appeal Decision A-002-2018.
[26] See, by analogy, Case T-10/17 *Proof IT v EIGE* EU:T:2018:682, paras 36-37 (and case-law quoted therein); para 60 of Board of Appeal Decision A-002-2018.
[27] Para 61 of Board of Appeal Decision A-002-2018.
[28] Para 61 of Board of Appeal Decision A-002-2018.
[29] Para 7 of the Appeal.

considering the principle of procedural economy, and with regard to the complex economic and technical issues involved, it is not able to, and should not, carry out its own complete assessment of each of the complex technical issues raised in the Agency´s proceedings[30].

52. The ACER Regulation establishes the Board of Appeal not as an independent judicial body, but as a body *"which should be part of ACER, butt independent from its administrative and regulatory structure"*[31]. The former ACER Regulation expressly granted the Board powers to adopt any decision within the competence of the Agency and to issue orders to other bodies of the Agency[32]. This, together with the composition of the Board, and the reference to the creation of this appeal procedure as being based on *"reasons of procedural economy"* (rather than judicial review), suggest that the Board of Appeal is an administrative body and that the appeals before it are similar to administrative appeals to a hierarchical superior body. Yet the quasi-judicial characteristics of the Board of Appeal - especially the requirements for independence and impediments[33], as well as the quasi-judicial characteristics of the appeal procedure[34], the limitation of its decision-making powers, the procedural economy and the principle of effectiveness imply that the Board of Appeal cannot and should not attempt to exercise the same level of analysis as has been carried out by the Agency before, and thus that the only advisable and possible level of control (given resources and timeframe) that it can exercise is limited to a control of legality.

53. Whereas the Agency's Director has a full-time staff of technical experts at his disposal, the members of the Board of Appeal exercise these functions on a part-time basis, and they are selected precisely because of their current or former experience as staff of national or EU authorities in the energy sector. A Board of Appeal thus composed cannot be expected, nor was it intended, to replicate the in-depth assessment of highly complex technical issues as the Agency. Instead, in the event of complex technical matters, the Board limits itself to decide whether the Agency made a manifest error of assessment.

[30] Case C-12/03 P *Commission v Tetra Laval* EU:C:2005:87, para 39; Case T-201/04 *Microsoft v Commission* EU:T:2007:289, para 89; Case T-301/04 *Clearstream v Commission* EU:T:2009:317, para 95; Case T-398/07 *Spain v Commission* EU:T:2012:173, para 62; Case C-452/10 *BNP Paribas v Commission* EU:C:2012:366, para 103; Case T-29/10 *Netherlands et al v Commission* EU:T:2012:98, para 103; Case T-68/89 *Società Italiana Vetro v Commission* EU:T:1992:38, para 160.
[31] Recital 34 of Regulation (EU) 2019/942.
[32] Article 19(5) of Regulation (EC) 713/2009.
[33] Article 18(4) to (7) of Regulation (EC) 713/2009 and Articles 26 and 27 of Regulation (EU) 2019/942.
[34] Article 19 of Regulation (EC) 713/2009 and Article 28 of Regulation (EU) 2019/942.

This limitation does, however, not apply to non-complex matters of fact or to matters of law. The appeal procedure has been set up as a second opportunity for the disputing parties to have their positions heard and considered, still within the framework of the Agency, by a body composed of specialists from this field, before moving on to appeal the Board of Appeal´s Decision before a Court.

54. There are examples of types of administrative appeals to the European Commission which are limited by EU law – as confirmed by the Court – to a mere control of legality[35], which means that such a limitation is not only possible, but the EU legislator, with the Court's confirmation, has identified circumstances when it is justified and advisable for an administrative appeal to be limited to control of legality. Such circumstances are also present in the case of appeals before the Board of Appeal. As noted, these appeals have been established with a concern for *"procedural economy"* and the Board has much more limited resources and time to decide on the same issues that have already been assessed by the Agency in greater detail and over a longer period of time.

55. Moreover, the Board of Appeal considers that the Agency should be granted a certain margin of discretion when adopting the decision provided for in Article 37(3) of Regulation (EU) 2017/459[36].

56. This is similar to the standard of judicial review of public procurement procedures. It is settled case-law that, *"for the purpose of examining whether the evaluation of the applicant's tender is vitiated by manifest errors of assessment,* (…) *the contracting authority has broad discretion with regard to the factors to be taken into account when an invitation to tender is launched and that the review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers"*[37].

First plea – Arbitrary change of the requirements related to the technical quality

[35] See, e.g.: Case T-283/12 *FIS'D v Commission* EU:T:2014:933; and Case T-176/08 *Infeurope v Commission* EU:T:2009:264.
[36] See also para 63 of Board of Appeal Decision A-002-2018.
[37] Case T-10/17 *Proof IT v EIGE* EU:T:2018:682, para 38 (and case-law quoted therein); Case T-481/14 *European Dynamics v EIT* EU:T:2016:498, para 61; see also para 64 of Board of Appeal Decision A-002-2018.

57. By its First Plea, the Appellant argues that the Agency infringed Article 2 TEU, as regards the rule of law and principle of legal certainty, Article 15 TFEU, as regards the principle of transparency, and Article 41 of the Charter, as regards the right to good administration, due to what is submitted to have been an arbitrary change of the technical quality criteria introduced by the Agency in the new tender without justifying this change[38]. The Appellant also invokes Article 10(1) of the European Code of Good Administrative Behaviour and the Model of Rules on EU Administrative Procedure, although both did not constitute binding legal acts at the time the Contested Decision was issued.

58. Although the lawfulness of the criteria of the new tender were not as such put into question in this Plea, the Appellant emphasizes that the Agency "*completely did alter requirements for offers in terms of technical quality*"[39], while the Defendant states that the Agency "*did not set new award criteria*" and that it merely carried out a "*refining of the evaluation methodology*"[40].

59. In its Decision A-002-2018, the Board of Appeal stated: *"The Agency should therefore rectify the tendering procedure to ensure its compliance with its duty to respect the principles of due reasoning of decisions and of good administration. In doing so, the Agency is free to decide the best course of action. It can either choose to reiterate the entire tendering procedure from its very beginning, asking for new offers by the tenderers. However, in the absence of flaws in the first step of the procedure prior to the evaluation by the Agency and assuming that the Agency continues to adopt the same evaluation method, there is nothing to prevent the Agency from continuing this procedure from this second step, rectifying the procedural shortcomings, as the absence of evidence of the evaluation method (which need not be made available to candidates beforehand) or of the justification of the scoring has no impact on the candidates' drafting of their proposals, which have already been submitted to the Agency"*[41].

60. The Board of Appeal annulled the Agency Decision of 16 October 2018, remitted the case to the Director of the Agency and left it up to the Agency to decide "*the best course*

[38] Paras 9-18 of the Appeal.
[39] Para 10 of the Appeal.
[40] Para 42 of the Defence and paras 3 and 24 of the Rejoinder.
[41] Para 99 of Board of Appeal Decision A-002-2018.

of action"[42], leaving it up to the Agency to choose between two possible scenarios. The first scenario implied "*to reiterate the entire tendering procedure from its very beginning, asking for new offers by the tenderers"*[43]. The second scenario implied the continuation of the procedure from a later stage (the opening of the proposals): *"assuming that the Agency continues to adopt the same evaluation method, there is nothing to prevent the Agency from continuing this procedure from this second step, rectifying the procedural shortcomings*

61. Although the Appellant argues that the Agency's decision to initiate the proceeding from the beginning would have had some impact on the market[44], it is clear from the above that the Agency's decision to restart the procedure from the outset is fully in line with the possible courses of action identified in Board of Appeal Decision A-002-2018. As noted in the Agency's Defence, the decision to start the procedure from the beginning was taken, among other reasons, because of the expiry of the validity of the offer submitted by PRISMA[45]. The Board observes, furthermore, that the Appellant qualifies its stance in its Reply: *"In response to GSA Platform Operator´s allegations presented in the Appeal, ACER sustains that it was entitled to restart the entire procedure, to revise the proposed criteria and to refine its evaluation methodology. The Applicant does not question the very competence of ACER to take those actions as a rule, but points out that those actions <u>were not justified in casu.</u>"*[46] It adds that ACER decided for the revision of the procedure *"although such revision <u>was not objectively justified (required)</u>"*[47].

62. The Board of Appeal concludes that the Agency was entitled to restart the procedure from the outset. The

    Board of Appeal therefore turns to the question whether the Agency was entitled to introduce amendments to the technical criteria when issuing its new tender.

63. First, the Appellant claims that the Agency "*should have based its second decision on the same requirements regarding the technical quality of the platform, since the BoA*

[42] Para 99 of Board of Appeal Decision A-002-2018.
[43] Para 99 of Board of Appeal Decision A-002-2018.
[44] Para 17 of the Appeal and para 13 of the Reply. The Appellant considers that the decision to restart the procedure impeded the auction of the incremental capacity product on the Polish-German border in July 2019.
[45] Para 38 of the Defence.
[46] Para 2 of the Reply.
[47] Para 6 of the Reply.

Decision did not question them"[48]. The Appellant is partially right, in the sense that the Board of Appeal did not question the evaluation criteria. The annulment of the first iteration of these tender proceedings was based on the absence of a proven predetermined evaluation method of the offers. Additionally, the arguments put forward in that appeal did not concern the lawfulness of the evaluation criteria itself.

64. In this regard, the Board of Appeal stated in its Decision A-002-2018: *"The method described in para 106 of the Defence, by its very content and nature, would have been incapable of favouring any of the tenderers. It follows that the definition of this specific method after the opening of the proposals – if there were evidence that indeed this method had been adopted – would not, in itself, have been capable of leading to an infringement of the principle of equal treatment. Unfortunately, there is no evidence, in the case file, that this method was adopted and followed. It would infringe the rule of law for the Board of Appeal to assume that this method was indeed followed, rather than a different method which could very well have infringed the principle of equality"* [49].

However, the reasoning of Board of Appeal Decision A-002-2018 and its conclusion does not imply that the Agency was prevented from revising the specifications for the new tender. It did not result from that decision that the requirements on technical quality had to remain unchanged.

65. In addition, the Board of Appeal observes that the Appellant argues that the change of the technical criteria was arbitrary without providing any argument or evidence to support this claim and highlights, again, that, as set out in the above-mentioned case-law, the Agency has a broad discretion to decide upon the measures to be taken in order to give due effect to Board of Appeal Decision A-002-2018.

66. The following case-law is applicable to the present dispute by analogy:

"In the first place, it must be recalled that, according to the case-law, following the annulment of a tendering procedure, the contracting authority is entirely at liberty to decide on what subsequent action to take in respect of the contract (judgments of 8 October 2008, Sogelma v EAR, T 411/06, EU:T:2008:419, paragraph 136, and of 29

[48] Para 11 of the Appeal.
[49] Para 98 of Board of Appeal Decision A-002-2018.

October 2015, Direct Way and Direct Way Worldwide v Parliament, T 126/13, EU:T:2015:819, paragraph 68). It may thus reopen a new procedure by making, if necessary, any amendment to the specifications which it considers appropriate"[50].

67. The Board of Appeal also notes that, before the Open Call was launched, a public consultation took place with the purpose of exchanging views with stakeholders on the definition of the criteria to be used. In that public consultation, the criteria for the new tender were debated and assessed by the interested parties, including the Appellant[51]. The Agency decided to revise or refine the criteria on the basis of the result of the public consultation. It subsequently launched the Open Call, which was not only open to the Appellant, RBP and PRISMA but to any other booking platform operator wishing to participate, which highlights, again, the novel nature of the tender process.

68. It follows that the Agency was entitled not only to restart the entire procedure from the outset, but also to introduce amendments to the technical criteria. Moreover, given that the introduction of a Case Study – aimed at carrying out a pragmatic evaluation of the candidates´ proposed services in practice, in particular their ability *"to implement a good practice in IT service management when serving Mallnow IP and GCP VIP"*[52] - is the main difference between the Agency´s first (annulled) iteration of the tender proceedings and the second (new) iteration of the tender proceedings, it could even be argued that this amendment merely refined the criteria and strengthened the overall methodology, without adding *stricto sensu* any new criterion, in line with the Defence[53]. However, it is not necessary for the Board to take a stance on this issue given that the Agency was entitled to amend the technical criteria and that the Appellant had been aware, since the public consultation, of the criteria that the Agency would follow for the new tender.

69. It follows that the Appellant's claim that the new tender and, in particular its technical criteria, had to be identical to the first (annulled) iteration of these tender proceedings is not well founded.

[50] Case T-450/17 *Eurosupport/EIGE* EU:T:2019:137, para 71.
[51] Para 12 and footnote 3 of Board of Appeal Decision A-002-2018.
[52] Para 22 of the Contested Decision.
[53] See in this sense, paras 3, 4, 24 and 25 of the Rejoinder. *A contario:* para 16 of the Reply.

70. Additionally, the Appellant refers to the Model of Rules on EU Administrative Procedure and to the Opinion of the Advocate General in case C-281/18 P to claim a breach of the principle of legal certainty[54]. The Appellant emphasises that, when revoking acts, relevant institutions have to take precautions due to the impact of revocations on individual rights that may have been granted to the acts´ beneficiaries. In its opinion, the Agency did not take the necessary precautions and adversely affected the legal position of the Appellant, who was the beneficiary of the Agency´s Decision No.11/2018.

71. However, in the case at hand, ACER´s Decision No.11/2018 was not revoked. As Advocate-General Campos Sanchez-Bordona explains in his Opinion (used by the Appellant to support its argument): *"(…) the term 'revocation' in its broadest sense denotes two legally distinct concepts which may affect administrative acts the tenor of which is favourable to the person concerned:*

– *first, a decision pursuant to which an institution sets aside its own earlier, not necessarily unlawful, act, based on considerations of appropriateness; and*

– *second, an 'ex officio review' on grounds of legality, which is carried out (subject to compliance with certain conditions) where an earlier act is vitiated by defects which render it unlawful"*.[55]

72. ACER´s Decision No.11/2018 was not revoked but annulled by the Board of Appeal following an appeal by one of the tenderers. Moreover, the Appellant intervened before the Board of Appeal in support of the lawfulness of ACER´s Decision No.11/2018. The Appellant cannot infer any individual right from an annulled decision. Consequently, in with the above-mentioned case-law, the Agency was entirely at liberty to decide on what subsequent action to take in respect of the contract following the annulment of the first iteration of these tender proceedings.

73. Finally, the Appeal refers, in a generic manner, to a potential misuse of powers, due to the fact that the Agency had, when setting the criteria for the new tender, knowledge of the offers submitted by the tenderers in the first (annulled) iteration of these tender proceedings. The Appellant claims that "*by setting new evaluation criteria may*

[54] Paras 14 and 15 of the Appeal.
[55] Case C-281/18 P *Repower* EU:C:2019:426, para 28.

potentially determine them in a way that would favour a particular offeree and its platform" [56].

74. First, before launching the Open Call, the Agency conducted a public consultation in order to gather the stakeholders´ views on the criteria for the new tender. In so doing, the Agency clearly set out that these criteria could be used for the upcoming tender (in compliance with the principle of good administration). The Board of Appeal reiterates that the Agency was allowed to amend the specifications that it considered appropriate according to the settled case-law. In this context, the Agency´s knowledge of the offers of the first (annulled) iteration of these tender proceedings when setting the criteria for the new tender does not evidence any misuse of powers.

75. Second, the Appellant does not provide any proof of misuse of powers by the Agency. According to the CJEU´s settled case-law, "*a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case*"[57]. The Appellant´s mere claim that the Agency was aware of the offers of the first (annulled) iteration of these tender proceedings, without any evidence or reasoning in support of this claim, is not sufficient to find a misuse of powers.

76. The Board of Appeal considers that the Agency neither infringed Article 2 TFEU, as regards the rule of law and principle of legal certainty, nor Article 15 TFEU, as regards the principle of transparency, nor Article 41 of the Charter, as regards the right to good administration. It follows that the Appeal's First Plea must be dismissed as unfounded.

Second plea – Failure to properly explain the requirements of the Case Study

77. In its Second Plea, the Appellant argues that the Agency infringed the right to good administration and the principle of transparency (Article 15 TFEU and Article 41 of the Charter) because the requirements of the Case Study were "*too general in nature and*

[56] Para 17 of the Appeal.
[57] Case C-72/15 *Rosneft* EU:C:2017:236, para 135; Cases C-274/11 and C-295/11 *Spain and Italy v Council* EU:C:2013:240, para 33, and the case-law cited therein.

therefore the offeror had no information how these tasks should be properly prepared"[58].

78. In this Plea, the Appeal focuses on an alleged lack of clarity of the criteria (completeness, consistency, robustness, relevance and efficiency), and of how they had to be applied to the Case Study, which allegedly made it impossible for the tenderers, including the Appellant, to submit proposals in accordance with the Agency's expectations. However, this argument is exclusively based on a generic reference to some requirements of a single feature of the Case Study, namely the resource plan (budget, human resources and skills). The Appellant highlights that all three booking platforms submitted offers with shortcomings regarding the resource plan (referring to Annex 1 to the Contested Decision confirms).

79. First, the Board of Appeal notes that the criteria followed by the Agency for the new tender were identified, defined and described during the public consultation: completeness, consistency, robustness, relevance and efficiency. These criteria and their respective weighting were, subsequently, clarified in the Open Call. The Open Call also contained various annexes. Annex 6 to the Open Call described the Case Study in detail and described, in particular, each of the Case Study´s features (i.e. description, list of activities, risk assessment, timeline, and resource plan). The offers with respect to the Case Study´s features were evaluated on the basis of the criteria of the Open Call, namely completeness, consistency, robustness, relevance and efficiency.

80. Second, the Appellant erroneously bases this plea on Board of Appeal Decision A-002-2018, quoting the latter decision with respect to the general obligation to disclose award criteria, sub-criteria and their weighing and the exceptional circumstances in which this can be disregarded[59]. However, in the case at hand, contrary to the issue discussed in Board of Appeal Decision A-002-2018, the Appellant does not argue that the Agency disclosed sub-criteria and their weighing after the time-limit to submit the offers. In fact, the Agency did not revise or disclose criteria or sub-criteria after the Open Call. The Agency's assessment of the offers was exclusively based on the criteria disclosed in the Open Call, in line with the principle of transparency. It follows that the Appellant's

[58] Para 21 of the Appeal.
[59] Para 19-20 of the Appeal and para 72 of Board of Appeal Decision A-002-2018.

reference to Board of Appeal Decision A-002-2018 regarding disclosure prior to the time-limit to submit the offers is ineffective to support its claim.

81. Third, the Board of Appeal highlights the applicable case-law on the correct formulation of award criteria. Award criteria must be formulated - in the contract documents or the contract notice - in such a way as to be clear and comprehensible and should allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way[60]. It follows that the Board of Appeal must assess whether the Appellant was unable to understand the award criteria at issue and whether a reasonably well-informed and normally diligent tenderer would have understood them whilst exercising ordinary care.

82. The applicable case-law also demonstrates the need to consider whether the tenderers could submit requests for clarification and, if so, whether the tenderer concerned effectively requested clarifications before submitting the tender[61]. Board of Appeal Decision A-002-2018 expressly stated that this case-law does not, in itself, allow concluding that tenderers who did not request clarifications from the contracting authority before submitting their offers had to be considered to have implicitly admitted that no additional information was required[62]. The Board of Appeal notes, however, that for this new tender in question, the three booking platforms had been actively involved in the drafting of the criteria and had been able to request clarifications on the criteria during the public consultation and, subsequently, during the Open Call.

83. Fourth, the Appellant's argument that the requirements for the Case Study were *"too general"* focuses solely on the resource plan[63]. The Appeal correctly indicates that all the three offers had shortcomings when it came to the resource plan[64]. However, this is *per se* manifestly insufficient to show that the criteria associated to the resource plan were unclear. Otherwise, whenever tenderers would have shortcomings in one of the features assessed in a tender, they would be able to successfully argue - without producing any additional evidence - that the shortcomings derive from a lack of clarity of the criteria regarding these features.

[60] By analogy: Case C-538/13 *eVigilo* EU:C:2015:166, paras 53-54, and Case C-19/00 *SIAC Construction* EU:C:2001:553, para 42.
[61] By analogy: Case C-538/13 *eVigilo* EU:C:2015:166, para 56.
[62] Para 91 of Board of Appeal Decision A-002-2018.
[63] Paras 21-22 of the Appeal.
[64] Para 22 of the Appeal. See also paras 18-20 of the Reply.

84. The Appellant does not explain nor specify why the requirements of the Case Study are, in its view, "*too general in nature*" [65]. Consequently, the Appellant does not meet its burden of proof concerning the alleged lack of clarity. It would have been expectable for the Appellant to, *inter alia*, try to demonstrate that, considering the allegedly vague and general terms of the criteria, its offer was valid and should, or at least could, have received a higher score. Reading this Plea together with Section 7.3 of the Seventh Plea of the Appeal[66], the Appellant appears to be challenging the evaluation method of this feature rather than the clarity of the respective criteria[67]. Although this will be further analysed in the assessment of the Seventh Plea, it suffices to state that the Agency has some leeway in carrying the evaluation in order to assess and rank the tenders in accordance with the circumstances of the case.

85. Additionally, when describing the content of the offers to be submitted by the candidates, the Open Call clearly requested "*a resource plan having regard to the budget, human resources and skills committed for the implementation*" of the relevant task[68]. The Open Call cannot be said to be confusing or ambiguous, as it did not mention any other set of requirements regarding the resource plan. Neither did it convey that these requirements were optional.

86. Based on the criteria set by the Agency and on the Case Study submitted by the Appellant, the Board of Appeal concludes that the criteria associated to the resource plan were clear and comprehensible to the Appellant, and would also have been clear and comprehensible to a reasonably well-informed undertaking in the same position, exercising ordinary care.

87. Finally, the Appeal refers to a paragraph of Board of Appeal Decision A-002-2018 regarding the case-law on the principle of transparency, which requires that the possibility of favouritism or arbitrariness be excluded[69]. However, the Appellant does not put forward any argument which directly or indirectly argues or supports that the Agency, when assessing the offers, favoured one of the platforms or that the assessment

[65] Para 21 of the Appeal.
[66] Section 7.3 The Agency wrongfully awarded points to the Appellant in relation to the resource plan.
[67] See in this respect para 35-42 of the Rejoinder.
[68] Annex 5 – Open Call for GAS 2-2019.
[69] Para 23 of the Appeal.

was arbitrary. Nor has it been argued in this plea that the Case Study requirements allowed the Agency to introduce favouritism or arbitrariness.

88. It follows from the above that the Appeal's Second Plea must be dismissed as unfounded.

Third Plea – Infringement of the principles of equal treatment as regards tasks encompassed in the Case Study

89. By its Third Plea, the Appellant argues that the Agency has breached the principles of transparency and equal treatment enshrined in Article 15 TFEU and Article 41 of the Charter because "*some of the requirements regarding the scope of the individual tasks encompassed in the case-study might have favoured some booking platform(s)*" [70]. Specifically, the Appellant alleges that the formulation of Task B(i) breached the principles of transparency and equal treatment, and that the formulation of Task B(i) and (ii) breached the principle of equal treatment[71].

90. Task B(i) of the Case Study was aimed at evaluating the candidates' ability to improve the user-friendliness of their booking platforms. Annex 6 to the Open Call reads as follows:

"A description of the potential improvements you may offer in order to improve user friendliness of your interface in order to meet the constraints of 3 minutes and have the change process implemented in at most nine months. If you already meet the requirement, describe any additional improvement you may offer in order to improve the actual values of processing time with at least 30% in terms of completing any operation from the users' perspective from the start to the end of the existing processes for any transaction." [72]

91. Task B(ii) of the Case Study was aimed at evaluating the candidate's ability to provide the helpdesk service on a multi-channel platform in addition to the already existing channels. Annex 6 to the Open Call reads as follows:

[70] Para 25 of the Appeal.
[71] Paras 25-30 of the Appeal.
[72] Annex 12 containing Annex 6 Case Study Assignment, p.3.

"A description of the potential improvements you may offer in order to improve helpdesk to allow the use of more than two channels and decrease the response time with 20% the current response time the platform has at the time of the submission of the case study to the Agency. If you already have three channels, please increase the number of channels with one more and improve with at least 20% the current response time the platform has at the time of the submission of the case study to the Agency." [73]

92. The Board of Appeal refers to its previous statements on the rules applicable to the Agency's Decision when acting under Articles 6(10)(b) of Regulation (EU) 2019/942 and 37(3) of Regulation (EU) 2017/459 set out above as regards the obligation for the Agency to respect the general principles of EU law, including the principle of transparency and the principle of equal treatment.

93. Regarding the compliance of Task B(i) of the Case Study with the principle of transparency, the Appellant merely argues that "*the criterion of 3 minutes seems to be completely arbitral*" and that "*ACER did not explain why such a criterion was set*" [74]. The Board of Appeal considers that the Appeal does not sufficiently clarify the reasoning behind the claim of arbitrariness. It is a general rule of procedure that each party must justify and, where applicable, support with evidence, its own claims, without courts being obliged (or being able) to guess the intention or the reasoning of each party or, more importantly, to substitute the party in its duties and responsibilities to justify and substantiate its claims. Such possibility would, moreover, contravene the principle of equality of arms between the parties.

94. Additionally, the Board of Appeal observes that the Agency justifies the choice of this time-limit as being a reasonable estimation of an *"acceptable duration"* for online booking platforms *"for completing any operation from the start to the end"*[75]. It is settled case-law that European agencies and institutions have a broad discretion to select the factors to be taken into consideration and evaluated in tender procedures[76] and the choice of the above-mentioned criterion falls within this margin of discretion.

[73] Annex 12 containing Annex 6 Case Study Assignment, p.3-4.
[74] Para 26 of the Appeal and paras 33-34 of the Reply.
[75] See para 87 and footnote 36 of the Defence.
[76] Case T-914/16 *Proof IT SIA/EIGE* EU:T:2018:650, para 104; Case T-457/07 Evropaïki Dynamiki v EFSA, EU:T:2012:671, paragraph 40; Case C-386/10 P *Chalkor AE Epexergasias Metallon v. Commission* EU:C:2011:815, para 64; Case C-469/15 P *FSL et al v Commission* EU:C:2017:308, para 80; Case T-90/11 *ONP et al v Commission* EU:T:2014:1049, para 353; Case-426/10 *Moreda-Riviere Trefilerías v Commission*

95. It follows that the argument of breach of the principle of transparency must be dismissed as unfounded.

96. Regarding the compliance of Task B(i) of the Case Study with the principle of equal treatment, the Appellant argues that the distinction between, on the one hand, candidates unable to process in 3 minutes when presenting their offer - which were required to achieve a 3 minutes process – and, on the other hand, candidates able to process in 3 minutes when presenting their offer - which were required to improve their timing by at least 30% - constitutes "*an unequal treatment of bidders, since it is less difficult to achieve the 3 min requirement than to improve it by further 30%*" and that it led to "*the preferential scoring of the lower quality platforms*".[77] The Appellant makes a similar allegation regarding Task B(ii) of the Case Study, which distinguishes between, on the one hand, candidates unable to allow the use of more than 2 channels when presenting their offer - which were required to enable the use of more than 2 channels – and, on the other hand, candidates allowing the use of 3 channels when presenting their offer - which were required to enable the use of 4 channels -[78].

97. The Defendant recognises that both Tasks B(i) and (ii) distinguish between two options. However the Defendant explains that both tasks aim at evaluating the *"ability to make improvements"*[79] *"whatever the applicable option"*[80]. The Defendant adds that under both options, *"the nature of Task B was exactly identical"* and that the options *"had no influence on the final deliverable"* (the improvement), *"were equally reasonable: they may have requested different resources, but the five criteria were completely independent from the quantities (human resources and time) involved"*[81] and *"were not relevant to appraise the offers based on their respective qualities"*[82]. The Defendant added at the Oral Hearing that the Agency´s assessment was not about the status of advancement of the booking platforms, that both options had been assessed in an equal fashion and that the five criteria of the Open Call - completeness, consistency,

EU:T:2016:335, para 504; Case-380/10 *Wabco Europe et al v Commission* EU:T:2013:449, para 196 (applicable by analogy hereto).

[77] Para 27 of the Appeal and paras 23-31 of the Reply.

[78] Para 29 of the Appeal.

[79] Paras 92-94 of the Defence and para 10 of the Rejoinder.

[80] Para 93 of the Defence.

[81] Paras 93 of the Defence.

[82] Paras 94 of the Defence.

robustness, relevance and efficiency - had been assessed irrespective of the chosen option, enabling a "like with like" assessment[83].

98. The Board of Appeal states, in this respect, that *"it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified"*[84]. The purpose of this principle is *"to ensure the development of effective competition, leading to the selection of the best bid"*[85]. Even though, as set out above, public procurement rules are not applicable to the present case, these rules clarify the application of the general principle of equal treatment to tender procedures: technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition[86]; also, the equal position of bidders applies during the preparation and the evaluation of the offers[87].

99. Irrespective as to whether the Case Study introduces a new criterion or merely refines the criteria of the first (annulled) iteration of these tender proceedings as set out above in Plea 1, the Board of Appeal acknowledges that the evaluation of an ability to improve is not incompatible with the principle of equal treatment.

100. However, the Board of Appeal considers that the issue at stake is whether the evaluation of an ability to improve from different starting points, in the absence of any information on the equality or similarity of the level of efforts or resources to attain these improvements from different starting points (e.g. because of potential diminishing marginal productivity factors), is compliant with the principle of equal treatment.

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[83] Summary Minutes of the Oral Hearing, p. 17: "*The Agency did not assess the status of advancement of each booking platform: the Agency did neither attribute points for, nor did it consider advantageous the state for the advancement of the booking platform".*

[84] Case C-21/03, C-34/03 *Fabricom v Belgium,* EU:C:2005:127 para 27; Case C-434/02 *Arnold André* EU:C:2004:800, para 68; and Case C-210/03 *Swedish Match* EU:C:2004:802, para70.

[85] Case C-243/89 *Commission v Denmark* EU:C:1993:257C-21/03, para 33 and Case T-211/17 *Amplexor v Commission,* EU:T:2018:392 para 35.

[86] E.g. Article 60(2) of Directive 2014/25/EU of 26/2/2014 on procurement by entities operating water, energy, transport and postal services sectors.

[87] Cases T-345/03 *Evriopaïki Dynamiki v Commission,* EU:T:2008:67 para 76 and T-211/17 *Amplexor v Commission,* EU:T:2018:392, para 41.

101. In particular, regarding Task B(i), the issue is whether the evaluation of an improvement to achieve a 3-minute goal from whichever initial position (5 minutes, 4 minutes, etc.) and the evaluation of an improvement of at least 30% from an initial position of at least 3 minutes are, from a technical perspective, objectively comparable situations to be treated equally. Regarding Task B(ii), the issue is whether the evaluation of an improvement to achieve a 3-channel goal from whichever initial position (e.g. 2 channels, 1 channel etc.) accompanied by a 20% decrease of response time and the evaluation of an improvement to achieve 1 additional channel to an initial position of 3 channels accompanied by decrease of response time of at least 20% are, from a technical perspective, objectively comparable situations.

102. Yet it is not necessary for the Board of Appeal to rule on whether the options of Tasks B(i) and (ii) amount to comparable or different situations and on whether the options amount to an objectively justified differential treatment[88] because the offers demonstrates that all three offers applied the same option, i.e. regarding Task B(i), the option to demonstrate the ability to improve timing with at least 30% from an initial position of at least 3 minutes and, regarding Task B(ii), the option to demonstrate the ability to achieve 1 additional channel accompanied by a decrease of response time of at least 20%. Hence, all 3 bidders applied similar options to their offers and were, hence, in comparable situations.

103. Significant, too, is the fact that the Appellant has not demonstrated *in concreto* how an alleged unequal treatment was capable of affecting its position in the tender process and merely states that it led to "*the preferential scoring of the lower quality platforms*"[89]. In its Appeal and Reply, the Appellant merely stated *in abstracto* that it had been affected by the alleged unequal treatment because it had led to a different manner of evaluating the different candidates. This was confirmed at the Oral Hearing[90].

104. In light of the above, the Board of Appeal concludes that Tasks B(i) and (ii) of the Case Study do not constitute a breach of the principle of equal treatment.

105. It follows that the Appeal's Third Plea must be dismissed as unfounded.

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[88] Cases T-764/14 *European Dynamics Luxembourg and Evriopaïki Dynamiki v Commission* EU:T:2016:723, para 257 and T-211/17 *Amplexor v Commission*, EU:T:2018:392 para 35.
[89] Para 27 of the Appeal and paras 23-31 of the Reply.
[90] Summary Minutes of the Oral Hearing, p. 18: *"The Appellant answered that during the hearing it was the first time for him to find out that all the platforms have chosen the option 2 (further improvement)."*

Fourth and Fifth pleas – Failures to duly reason the Contested Decision and to grant access to files of the proceedings

106. By its Fourth and Fifth Pleas, which are best assessed jointly, the Appellant argues, in essence, that the Agency infringed Article 296 TFEU, Articles 41(1) and (2)(c) and 47 of the Charter, and Article 14(7) of Regulation (EU) 2019/942 by failing to give due reasons for the Contested Decision, specifically by not disclosing in the Contested Decision (including its Annex 1) notified to the Appellant neither the overall nor the particular scores awarded to each offer, by not disclosing PRISMA's offer, and by not granting the Appellant full access to the case-file of the proceedings, as well as by providing internally inconsistent reasoning for the Contested Decision[91].

107. As a preliminary step, it should be recalled that the Appellant (*inter alia*), as well as an Intervener, requested the Board of Appeal to grant it the right to inspect the Agency's files relating to the Contested Decision in full or, alternatively, to disclose the scoring in Annex 1 to the Contested Decision and, then, enable the Appellant to supplement the Appeal with further information based on the new revealed data. The Board of Appeal notes that, under the Board of Appeal's Rules of Procedure, these requests are dealt with in the appeal procedure under a specific framework. For a ruling on these issues to be timely and effective, it must occur prior to the final Board of Appeal ruling, and the Rules of Procedure set out how this may occur. When filing its Defence, the Agency must provide the Board of Appeal – as it did in this case – with the confidential versions of the files in question (i.e., the Agency's files relating to the Contested Decision, including the scoring in Annex 1 to the Contested Decision), and, if it chooses to, it submits a justified request that some of these documents be treated as confidential in relation to the Appellant and/or third parties, under Article 14(1) of the Rules of Procedure. The Chairperson, acting on behalf of the Board of Appeal under Article 14(2) of the Rules of Procedure, then evaluates, with the assistance of the Registrar, the confidentiality request and accepts/rejects it in full or in part. Article 14(3) requires the Agency to then provide to the Registry "non-confidential" and "marked confidential" versions of the relevant documents. Finally, the Appellant (or Intervener) is given access to all the documents submitted by the Agency, excluding those which have been

[91] Paras 31-52 of the Appeal; paras 35 to 50 of the Reply. See also paras 17-18 of Intervention of the President of Energy Regulatory Office of Poland.

qualified as confidential by the Board of Appeal Chairperson (or parts thereof). Through this procedure, the Appellant (or Intervener) has access to any and all information which the Board of Appeal deems to have been illegitimately qualified as confidential by the Agency. If the Appellant (or Intervener) is given access to information which was previously not provided to it, it has the right and opportunity to supplement its Appeal (or submission) with any additional facts or references, based on that new information. The admissibility of new evidence and pleas in law which might be put forward by the Appellant, in this context, would be judged by the Board of Appeal on the basis of Article 17(1) and (2) of the Rules of Procedure.

108. In the present proceedings, the Chairperson of the Board of Appeal acting under Article 14(2) of the Board of Appeal Rules of Procedure, issued, on 3 December 2019, a Decision on the Confidentiality Claim requested by the Agency, in which the Chairperson agreed with the Agency's interpretation of the scope of information which should be deemed confidential vis-à-vis the Appellant and accepted the Agency's request for confidentiality of certain documents and parts of documents[92]. The effect of this decision was the rejection of the Appellant's and Intervener's requests to inspect the Agency's files relating to Decision No. 10/2019 in full or, alternatively, to disclose the scoring in Annex 1 to the Contested Decision. As a result, the present Decision of the Board of Appeal no longer has to address these requests.

109. The Agency provided the Board of Appeal with the confidential version of the relevant documents, allowing it to carry out a full review of the assessment in the confidential version of the Contested Decision..

110. As stated in Board of Appeal Decision A-002-2018[93] and reiterated above, even though the Public Procurement Directives[94] and the EU Financial Regulation[95] are not applicable to the present case, the Agency must comply with the fundamental rules of

[92] See para 17 of the present Decision *supra.*
[93] Para 52-54 of Board of Appeal Decision A-002-2018.
[94] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.
[95] Regulation (EU, Euratom) No. 2018/1046 of the European Parliament and of the Council, of 18 July 2018, on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014, and Decision No. 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012.

the TFEU (including Article 296 TFEU) and the general principles of EU law, and this includes the Charter and the principles of transparency and good administration (Article 15 TFEU).

111. It is not in dispute between the parties that the Agency has a duty to duly reason its decisions. This obligation is specifically foreseen in Article 14(7) of Regulation (EU) 2019/942, and would, in any case, derive from the TFEU and the general principles of EU Law mentioned above.

112. In a context such as the present one, where an agency of the European Union *"has a broad power of appraisal, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to provide adequate reasons for its decisions. Only in this way can there be judicial review of whether the factual and legal elements upon which the exercise of the power of appraisal depends were present"*.[96]

113. As stated by the Court, *"in the light of the obligation to state reasons laid down in the second paragraph of Article 296 TFEU, the author of the measure must disclose its reasoning in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its power of review. In addition those requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations* (…). *Furthermore, the obligation to state reasons is an essential procedural requirement, as distinct from the question of whether the reasons given are correct, which goes to the substantive legality of the contested measure"*.[97]

[96] Case T-299/11 *European Dynamics* EU:T:2015:757, para 125 (and case-law quoted therein; applicable by analogy).
[97] Case T-299/11 *European Dynamics* EU:T:2015:757, para 126 (and case-law quoted therein; applicable by analogy). See also, e.g.: Case C-376/16 P *EUIPO v European Dynamics* C:EU:2018:299, para 59; Case C-629/11 P *Evropaïki Dynamiki v Commission* EU:C:2012:617, para 23; Case T-411/06 *Sogelma v EAR* EU:T:2008:419, paras 119-120; Case T-700/14 *TV1 v Commission* EU:T:2017:447, para 79; Case T-556/11 *European Dynamics* EU:T:2016:248, paras 240-241; Case T-339/10 and T-532/10 *Cosepuri v EFSA* EU:T:2013:38, paras 43-44.

114. In the present case, the Appellant has not argued that the full version of the Contested Decision is unduly reasoned. In relation to various points of the Contested Decision's assessment and reasoning which were not deemed confidential, and to which the Appellant had full access, the Appellant has not argued that the reasoning in those points was insufficient. Rather, it has argued that the blocking-out of information in the non-confidential version of the Contested Decision rendered the reasoning insufficient to meet the Agency's duty of reasoning in relation to the Applicant, preventing it from effectively exercising its rights of defence and access to justice.

115. Thus, the disagreement between the parties, in the present dispute, focuses on disclosure of confidential information. The issue is whether, by invoking confidentiality and refusing disclosure of certain information to the Appellant, the Agency infringed its duty to duly reason the Contested Decision and/or to grant access to the proceeding files.[98]

116. EU Law, as clarified by the case-law of the Court, does not grant a general right of unrestricted access to information and documents held by EU Institutions and bodies. Limits are imposed on the principle of transparency. EU Institutions, bodies and agencies are required to protect confidential information and to safeguard public and private interests which merit protection,[99] as was the case in the proceedings in question. *Inter alia*, Article 4(2) and (6) of Regulation (EC) No 1049/2001[100] requires access to a document, or part thereof, to be refused *"where disclosure would undermine the protection of commercial interests of a natural or legal person"*. The case-law has specifically clarified that *"the principle of transparency* (…) *must be reconciled with the requirements of protection of the public interest, of the legitimate business interests of public or private undertakings and of fair competition"*.[101]

[98] It should be noted that a similar issue was raised by PRISMA in the appeal against ACER's Decision No.11/2018 in the first (annulled) iteration of these tender proceedings leading to Board of Appeal Decision A-002-2018. There, too, the Appellant argued that restricting access to the procedure's documents infringed Article 41(1) of the Charter. In that case, the Board of Appeal ordered the reiteration of certain procedural steps, thus rendering moot the question of whether the Defendant should have been ordered to grant right to inspect the files related to the original proceedings which led to the Contested Decision (see paras 152-155 of Board of Appeal Decision A-002-2018). It should be stressed that GSA raised no objections in the previous iteration of these tender proceedings concerning the information which was then deemed confidential, following the same logic as the Agency followed in the present proceedings.

[99] See, e.g., Case T-195/08 *Antwerpse Bouwwerken v Commission* EU:T:2009:491, para 84.

[100] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[101] Case T-339/10 and T-532/10 *Cosepuri v EFSA* EU:T:2013:38, para 49. See also Case T-536/11 *European Dynamics v Commission* EU:T:2015:476, para 49.

117. Specifically, in what concerns access to tender case-files, the case-law sets out a limited right of access. In the words of the General Court of the European Union, *"according to settled case-law,* (…) *the contracting authority cannot be required to communicate to a tenderer who was unsuccessful, first, in addition to the reasons for the rejection of its tender, a detailed summary of how each detail of its tender was taken into account when the tender was evaluated and, second, in the context of the notification of the characteristics and relative merits of the successful tender, a detailed comparative analysis of the successful tender and that of the unsuccessful tenderer. Similarly, the contracting authority is not under an obligation to provide an unsuccessful tenderer, upon written request from it, with a full copy of the evaluation report* (…). *The EU judicature nevertheless verifies whether the method applied by the contracting authority for the technical evaluation of the tenders is clearly set out in the tender specifications including the various award criteria, their respective weighting in the evaluation (that is to say in the calculation of the total score) and the minimum and maximum number of points for each criterion"*.[102] The EU agency *"is not obliged to provide the unsuccessful tenderer access to the full version of the tender of the successful tenderer awarded the contract at issue or the complete version of the evaluation report"*.[103]

118. EU legislation foresees the protection and non-disclosure of information in public procurement procedures, *inter alia*, when such disclosure would infringe rights or harm commercial interests of third parties and fair competition on the market. When regulating the procedure applicable to tenders by EU Institutions (applicable hereto by analogy), EU legislation has systematically set out that the contracting authority must provide certain information to non-selected tenderers, but that *"the contracting authority may decide to withhold certain information where its release would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators or might distort fair competition between them"*.[104] The same is true for EU Law applicable to public tenders by Member

[102] Case T-299/11 *European Dynamics* EU:T:2015:757, para 129; Case C-376/16 P *EUIPO v European Dynamics* C:EU:2018:299, para 57; Case C-629/11 P *Evropaïki Dynamiki v Commission* EU:C:2012:617, para 21 (and case-law quoted therein; applicable by analogy).

[103] Case T-299/11 *European Dynamics* EU:T:2015:757, para 131 (and case-law quoted therein; applicable by analogy). See also, e.g.: Case C-376/16 P *EUIPO v European Dynamics* C:EU:2018:299, para 58; Case C-629/11 P *Evropaïki Dynamiki v Commission* EU:C:2012:617, para 22; Case T-536/11 *European Dynamics v Commission* EU:T:2015:476, paras 50 and 53.

[104] EU Financial Regulation, Article 170(3). Previously in Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, Article 113(2).

State authorities: *"Certain information on the contract award* (…) *may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators"*.[105]

119. As noted by the Court, *"both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them"*.[106] Specifically addressing concerns with impact on competition, the Court has noted that *"it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an on-going procurement procedure or in subsequent procedures"*.[107]

120. This approach led to the affirmation of a *"general presumption according to which that access to the bids submitted by tenderers would, in principle, undermine the interest protected"*, which may be refuted by showing that disclosure of a given document or passage thereof is not covered by the presumption or that there is a higher public interest justifying disclosure.[108]

121. From the outset, it should be noted that the Appellant does not argue that the information, which was blocked out, and to which it was not given access, is not commercially sensitive and unmeritorious of protection as confidential. In fact, the Appellant himself asked the Agency to keep the corresponding information, from its own offer, confidential in relation to the other platforms and third parties. Harmoniously with its belief that its own sensitive information should be deemed confidential, the Appellant did not argue that the equivalent information of the other platforms should be

Previously in Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, Article 100(2).

[105] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Article 50(4) (see also Article 55(3)).

[106] Case C-450/06 *Varec* EU:C:2008:91, para 36 (applicable by analogy).

[107] Case C-450/06 *Varec* EU:C:2008:91, para 35 (applicable by analogy).

[108] See, e.g.: Case T-363/14 *Secolux* EU:T:2016:521, paras 49-50.

public. Similarly, PRISMA, intervening in these proceedings, has underlined the need to keep the full version of the offers and, especially, the financial terms thereof confidential[109].

122. The information which was not provided to the Appellant related, fundamentally, to economic and technical information (prices and specific options for the provision of services). Contrary to what is asserted by the Appellant,[110] the version of Annex 1 to the Contested Decision which was disclosed to it explained the methodology used by the Agency while assessing case studies. As detailed in the subsequent analysis, all information which was not provided to the Appellant, and which would have had to have been disclosed on equal terms to the three platforms, is important for competition on the markets in question, to the extent that it relates to the individual nature and appeal of the platform's offers,[111] and may be replicated and/or adjusted to. Removal of uncertainty (in particular, in the context of a short-term Decision) would potentially lead to future parallel behaviours and facilitate coordination in a narrowly oligopolistic market (only three players). The Appellant's attempt to draw analogies with the alleged effects of transparency in markets for household appliances and electronic equipment[112] cannot be accepted, as any transparency in those markets relates to heterogeneous prices practiced in retail markets with atomized structure of supply (the *"wide range of sellers"* the Appellant himself refers to). The Board of Appeal thus agrees with the Agency's assessment[113] that, in this case, the disclosure of this information would be detrimental to the maintenance of fair and undistorted competition on the market[114]. This is not the

[109] PRISMA´s Application for Intervention, p.3.
[110] See, e.g., para 39 of the Reply.
[111] See, e.g.: Case T-136/15 *Evropaïki Dynamiki v EP* EU:T:2017:915, para 69; Case T-363/14 *Secolux* EU:T:2016:521, paras 52-54; Case T-488/12 *CIT Blaton v EP* EU:T:2014:195, para 46.
[112] Para 49 of the Reply.
[113] Para 126 et ss. of the Defence and Para 74 et ss. of the Rejoinder.
[114] As summed up by Sanchez-Graells: *"transparency in procurement procedures, and in particular during the post-award debriefing and litigation phases, can result in distortions and restrictions of competition* (…). *Economic operators have a clear incentive to manipulate competitive tendering procedures to extract rents from the public buyer. The risk of collusion in tenders for public contracts is all too obvious to economists. The rules governing public procurement can make communication among rivals easier and promote bid rigging beyond the risks of cartelisation that exist in other markets. Procurement regulation significantly increases transparency and facilitates collusion among tenderers through repeated interaction. Post-award disclosure of competition-sensitive information also reduces the costs of monitoring the anticompetitive behaviour of fellow cartelists participating in collusive agreements, which greatly facilitates their enforcement. In that regard, it is worth stressing that the OECD has recommended that contracting authorities, «[w]hen publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward»"* – Sanchez-Graells, A., "Transparency and Competition in Public Procurement: A Comparative View on Their Difficult Balance", in Halonen, K.-M., Caranta, R. & Sanchez-Graells, A. (eds), *Transparency in EU Procurements: Disclosure within Public Procurement and during Contract Execution*, Edward Elgar, 2019, p. 33.

same as stating that disclosure of information would lead an infringement of competition law, which is not the relevant standard. It is sufficient to justify non-disclosure that such disclosure would create conditions and incentives for a reduction of competition. The concern, in this case, is precisely that disclosure and the resulting transparency on prices and decrease in uncertainty could lead to parallel behaviour and greater convergence in prices, without the undertakings having to adopt collusive behaviour which would infringe Article 101 TFEU.

The Board of Appeal takes special note of the fact that the greater degree of transparency provided in the previous (annulled) iteration of these tender proceedings was followed by **[CONFIDENTIAL]** changes in the prices presented by the platforms in the offers submitted in the present proceedings[115], in line with the Defence[116]. The Appellant, in particular, **[CONFIDENTIAL]** increased its offered price,[117] to a level convergent with the prices put forward by the other platforms in the first (annulled) iteration of the tender proceedings. At the Oral Hearing, the Appellant alleged that *"the fact, observed by ACER, that in the second proceeding the price offered by the platforms were more convergent that in the first one is rather typical in the repeated proceeding of quasi procurement form. Rather lack of changes in the second price offers would indicate that undertaking, who lost in the first proceeding, are not intending to win in the second repeated procedure and its offer may indeed be only a courtesy bidding"*[118]. The Board of Appeal finds that there was no change in the specifications of the services to be provided which could justify a **[CONFIDENTIAL]** change of prices. The Board of Appeal also takes note of PRISMA's agreement that disclosure would raise competitive concerns[119].

123. In any case, arriving at this conclusion requires the assessment of complex technical and economic realities, wherein the Agency has a margin of discretion. The Court has noted that in *"the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender,* (…) *the contracting authorities* [have] *the discretion to withhold certain information where its release would prejudice*

[115] The clear effect of the greater transparency on prices in the first (annulled) iteration of these proceedings was that the price of the selected platform in the second proceedings was significantly higher than the price of the selected platform in the first proceedings.
[116] Annex 22 containing the confidential Evolution of the Financial Offers; para 33 of the Defence; para 79 of the Rejoinder.
[117] **[CONFIDENTIAL]**
[118] Summary Minutes of the Oral Hearing, p. 23.
[119] PRISMA´s Application for Intervention, p.3.

the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers".[120] The Appellant has provided no counter-arguments to the idea that disclosure of the information in question would be detrimental to other persons' rights and interests and to fair competition on the market. The Board of Appeal finds that there is no indication of a manifest error of assessment in the Agency's exercise of its discretionary margin in this regard.

124. It follows from all the above that the Agency was, *a priori*, right to deem the non-disclosed information in question confidential and to refuse to disclose it to the Appellant. Indeed, the Agency was required by EU Law to do so, in the specific circumstances of this case, as discussed above.

125. It is settled case-law that protection of information in circumstances such as those described above, where access restrictions are necessary to protect business secrets and important public interests, such as the maintenance of fair competition, do not infringe fundamental rights as long as the rights of access to justice are duly weighed.[121]

126. Thus, in the present proceedings, it is not the confidentiality of the relevant information *per se* which is in dispute. Instead, the dispute focuses on the weighing of conflicting interests: the protection of confidentiality and fair competition v. the rights of the defence and of access to justice. As noted by the Court, in the context of the review of a decision of this nature, the conflicting interests must be duly weighed.

127. To this end, first of all, *"the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets"*,[122] which was the case in the present proceedings.

128. The question which remains to be answered by the Board of Appeal, presently, is whether the Appellant needed to have access to confidential information denied to it, in order to effectively appeal the Contested Decision and exercise its rights. To carry out this assessment of proportionality between the conflicting interests, it is appropriate to assess, one by one, the categories of information which the Appellant was not provided with.

[120] Case C-450/06 *Varec* EU:C:2008:91, para 38 (applicable by analogy).
[121] See, e.g.: Case C-450/06 *Varec* EU:C:2008:91, paras 44-50.
[122] Case C-450/06 *Varec* EU:C:2008:91, paras 51-52 (applicable by analogy).

129. Comparing the confidential version of the Contested Decision to the version which was notified to the Appellant, and the additional elements provided through the letter of 2 September 2019 – which are also relevant to assess compliance with the duty to duly reason the Contested Decision[123] –, the following summary may be provided of information provided to the Appellant, in what concerns the assessment of the three offers:

a) Correspondence exchanged between the Agency and the three platforms

Disclosed.

b) Offers submitted by the other platforms

Non-confidential version of offer submitted by RBP disclosed.

Offer submitted by PRISMA not disclosed.

c) Description of the assessment procedure (Contested Decision, s. 2.3)

Fully disclosed.

d) Formal completeness (Annex 1 to Contested Decision, s. 1)

Fully disclosed.

e) Assessment of minimum legal requirements (Decision, §§28-29; Annex 1 to Contested Decision, s. 2.1)

Fully disclosed.

f) Assessment of minimum IT requirements (Decision, §§30-32; Annex 1 to Contested Decision, s. 2.2)

Decision fully disclosed.

Annex 1 disclosed, except for individual and total scores.

g) Assessment of the Technical Quality ("Case Study Points", including completeness, consistency, robustness, relevance and efficiency)[124]

[123] As stated in Case T-299/11 *European Dynamics* EU:T:2015:757, paras 130 and 132 (and case-law quoted therein). See also Case C-629/11 P *Evropaïki Dynamiki v Commission* EU:C:2012:617, paras 37-40.
[124] Paras 33-37 of the Contested; Annex 1 to the Contested Decision, p. 4-20.

Decision fully disclosed, including:

"§35: The assessment of the proposal formulated by GSA showed limitations with regard to completeness, consistency, robustness and efficiency. The proposal in particular revealed limitations concerning resource planning and the detailed listing of activities to be performed in order to address the Case Study.

§36: The assessment of the proposal formulated by PRISMA showed limitations with regard to its robustness and efficiency. The proposal in particular revealed limitations concerning the proposed risk assessment and resource planning.

§37: The assessment of the proposal formulated by RBP showed limitations with regard to its completeness, robustness and efficiency. The proposal in particular revealed limitations concerning the resource planning, its risk-assessment and the detailed listing of activities to be performed in order to address the Case Study."

Annex 1 partly disclosed

Full disclosure of descriptions of criteria and justification of points given in each criterion.

Full disclosure of points awarded to Appellant's Case Study.

Points awarded to RBP and PRISMA's Case Study not disclosed.

h) Assessment of the Financial Offer ("Price Points") (Contested Decision, §§39-40; Annex 1 to Contested Decision, p. 21);

Decision fully disclosed, including:

"§40: RBP has emerged as having the most favourable offer presenting the highest technical quality-price combination, based on the consolidated evaluation sheet prepared by the Agency."

Annex 1 partly disclosed

Only the tables and the way the information was structured was divulged, not the prices offered and their respective scoring.

i) Total Points (Case Study Points + Price Points)

Not disclosed. Neither the Contested Decision nor Annex 1 explicitly indicate the total points, which are arrived at by simply adding the Case Study Points and the Price Points.

130. The Appellant was not provided with the following:

a) Individual and total points for IT requirements;
b) Offer submitted by PRISMA;
c) Confidential information in RBP's offer;

d) RBB and PRISMA's Case Study Points; and
e) All platforms' Price Points (and Total Points), and RBP's and PRISMA's corresponding financial offers (prices).

131. In the procedure under analysis, in order to succeed, a platform had, first, to meet the minimum legal and IT requirements, and, second, to obtain the highest score resulting from the sum of the total scores for the Technical Quality and for the Financial Offer. Each of these could be awarded a maximum of 100 points[125]. The score for Technical Quality accounted for 60% of the final score (meaning the score was divided by 100 and multiplied by 60), and the score for the Financial Offer accounted for 40% of the final score (meaning the score was divided by 100 and multiplied by 40).

132. Although the individual and total scores in the assessment of minimum IT requirements[126] were not disclosed, this information was not relevant to allow the Appellant to effectively exercise its right to challenge the Contested Decision. These criteria were pass/fail and it was not necessary to know the precise score in order to be able to challenge whether another platform met the minimum criteria.

133. As for PRISMA's offer, as rightfully pointed out in the Agency's letter of 2 September 2019, it is not necessary for the Appellant to have access to that offer in order to assess and appeal the selection of RBP as the winning platform. The Appellant has not shown how access to this offer would be relevant to achieve the goals it seeks in the present appeal.

134. As for RBP's offer, the Appellant had access to the non-confidential version thereof[127]. This non-confidential version allowed the Appellant to have a detailed understanding of the nature of the confidential contents in this offer. The Agency thus provided the Appellant with a non-confidential version that namely allowed the Appellant to perceive the nature of the blocked-out information. Since the Appellant invoked an exception to the protection of confidentiality, it was for the Appellant, in order to allow the Board of Appeal to weigh the conflicting interests and to apply the proportionality test, to provide a justification for why it needed to have access to specific information contained in RBP's offer. Instead, the Appellant requested access to the case-file in full. Such a

[125] Para 23 of the Contested Decision.
[126] Annex 1 to the Contested Decision.
[127] Annex 19 – RBP Offer disclosed to GSA.

generic request of access to the entire confidential version of the file, and of this document in particular, is manifestly disproportionate. The Appellant has merely alleged, vaguely, that it needed access to all of the case-file (including the confidential version of RBP's offer) to exercise its right of appeal, failing to explain why this was so, generally or specifically.[128] Additionally, the disclosed details in the Contested Decision and its Annex 1 were sufficient, in themselves, for the Appellant to identify the specific points in which an offer was better than the others, and the respective reasons, and it cannot be argued that the Agency's assessment is incomprehensible without access to the confidential version of RBP's offer.[129]

135. As for the assessment of the Case Study - Technical Quality, the Appellant did not have access to the Case Study Points awarded to RBP and PRISMA, but it did have to its own Case Study Points, as well as to the reasoning for the score given to each individual criterion for each platform. Indeed, for Task A and Task B, the respective tables of Annex 1 to the Contested Decision provide a succinct, but sufficiently clear, explanation for the scoring awarded for "Description", "List of activities", "Risk assessment plan", "Timeline" and "Resource plan", and broken down, for each of these, into "completeness", "consistency", "robustness", "relevance" and "efficiency". The version of Annex 1 to the Contested Decision received by the Appellant provides a high level of reasoning for the assessment of each offer, on each of these criteria. This reasoning, and the very small degree of potential variation of points in each specific criterion (10 points divided by 5 sub-criteria, meaning 2 points each), is sufficient for the Appellant to make reasonable assumptions about the differentiation of scores given to each platform. The fact that the Appellant did not know the precise Case Study Points of RBP and PRISMA did not prevent it from comparing the assessment carried out of the various offers, and from challenging the Agency's detailed qualitative assessment. Providing the Appellant with RBP and PRISMA's Case Study Points would have allowed it to extrapolate all platforms' Price Points and, from there, the prices put forward by each platform[130].

136. As for the Price Points awarded to the three platforms, the Agency disclosed to the Appellant the calculation method used. This method is purely mathematical and is based on the comparison between the offer in question and the lowest offer, as follows:

[128] See, by analogy: Case T-536/11 *European Dynamics v Commission* EU:T:2015:476, para 48.
[129] See, by analogy: Case T-339/10 and T-532/10 *Cosepuri v EFSA* EU:T:2013:38, para 46.
[130] Paras 119-125 of the Defence.

Price Points = (Lowest offer / Offer of the Platform) x 40

Accordingly, the platform with the lowest offer was necessarily awarded 40 Price Points. Disclosing the Price Points would be the same as disclosing the financial offer of each platform.[131] There is no discretionary margin for the assessment by the Agency of the Price Points awarded to the other platforms, as these result automatically from this mathematical formula. The Appellant did not challenge the fairness or legitimacy of the formula, which was disclosed. In this context, the only reason why disclosure of the Price Points could be relevant for the purposes of challenging the Contested Decision would be to argue that the Agency had committed an error in its calculations. The Board of Appeal finds that it would be disproportionate to disclose the confidential information in question, just for this purpose, as nothing prevents the Appellant from expressing its concern that there may have been a miscalculation, and the Board of Appeal has access to the full confidential version of the case-file, and is in a position to confirm – as it has done – that no miscalculation has occurred.

137. As for the Total Points, because these are the sum of the Case Study Points and Price Points, it is not possible to provide the Total Points for the Appellant's offer without revealing its Price Points (identifiable by subtracting the disclosed Case Study Points). The reasons for not disclosing RBP and PRISMA's Case Study Points and Price Points logically apply also to the disclosure of their Total Points. If the Total Points were known, and based on the justifications disclosed for the Case Study Points, the Appellant would be able to make reasonably approximate extrapolations of the Financial Points.

138. As for the argument that the Contested Decision provided internally inconsistent reasoning, the Appellant made this argument by remission to its Sixth Plea and it will, thus, be dealt with under the respective Plea.

139. In short, the Appellant had access to the detailed evaluation method (award criteria) used by the Agency, including weighing and minimum and maximum points, as well as to the non-confidential version of the winning tender and to the detailed qualitative justification of the points and differentiation between the offers in what concerns the Case Study, allowing it to understand and challenge the preference of one offer over another in any given specific assessment criterion, and to make reasonable guesses as to

[131] See, e.g.: Case T-363/14 *Secolux* EU:T:2016:521, paras 49-59.

the specific scores awarded, given the small degree of possible variation of points for each criterion (2 points each). As for Price Points (and the financial offer), which seem to be the main focus of the Appellant's request of access to information, the absence of discretionary margin of the Agency in applying the formula disclosed to the Appellant means that the Appellant had all the information it needed to understand why one offer was given more points than the other and to challenge the reasoning of the differentiation of points between them.

140. The only information which was not disclosed to the Appellant was the information which was confidential, disclosure of which would be detrimental to the legitimate rights and interests of private persons and to fair competition between economic operators on the markets in question, for the reasons noted above.

141. The Board of Appeal agrees with the Agency's assessment that the disclosed information allowed the Appellant to identify the comparative advantages of its proposal and those of RBP, and to verify the consistency between the technical evaluation of its proposal and its quotation, globally and for each specific criterion[132]. It is apparent from the Appellant's detailed arguments set out in its Appeal, in particular in its Sixth and Seventh Pleas, that it had sufficient knowledge of the relative advantages of the successful platform's offer in what concerns the Case Study, **[CONFIDENTIAL],** being in a position to adequately challenge the Agency's assessments which were not purely mathematical and the methods for scoring the platforms.

142. It follows that the Appeal's Fourth and Fifth Pleas must be dismissed as unfounded.

Sixth plea – Manifest error of assessment in the evaluation of case studies

143. By its Sixth Plea, the Appellant argues, in essence, that the Agency committed a manifest error of assessment, and consequently infringed the principle of equal treatment, when evaluating the case studies presented by each platform, to the extent that there are internal inconsistencies between the assessments expressed in paras 36-37 of the Contested Decision and in the respective parts of its Annex 1.[133]

[132] As detailed in para 104 of its Defence.
[133] Paras 53-62 of the Appeal; paras 51 to 52 of the Reply.

144. Firstly, the Appellant is concerned that Annex 1 to the Contested Decision identified deficiencies in RBP's offer in four areas (completeness, consistency, robustness and efficiency), but that the wording of the Contested Decision does not mention consistency[134]. Thus, it fears *"shortcomings in terms of consistency of the RBP's Description (Task B), List of Activities (Task B) and Resource Plan (Tasks A and B) were overlooked by ACER during the allocation of points"*, and that shortcomings in the Description of Task B were also overlooked[135]. Secondly, the Applicant raised concerns about possible similar inconsistencies in the assessment of PRISMA's offer[136]. The Appellant adds that these inconsistencies imply an infringement of the principle of good administration and of the duty to duly reason a decision, or *"could also be a signal"* of a manifest error of assessment[137]. The crux of the Appellant's argument is summarized as follows: *"Therefore, if the Agency did not subtract points in case of RBP and PRISMA despite founding the shortcomings in the above mentioned parts of their proposals, it evidently must be treated as a manifest error of assessment"*[138]. Accordingly, the Appellant asks the Board of Appeal to confirm whether the scoring awarded by the Agency was not manifestly erroneous, i.e. *"whether ACER has correctly awarded points to particular platforms"*[139]. In its Reply, the Appellant focused instead on the idea that it should, itself, be able to determine whether there was a manifest error of assessment, and that this is only possible if it is given access to the scoring[140].

145. The Board of Appeal finds that the Contested Decision – of which Annex 1 is an integral part, has the same value as, and must be interpreted jointly with, the main body of the Contested Decision – is duly reasoned, allowing the Appellant to fully understand the Agency's qualitative assessment of the offers and the differentiation between them, in each sub-criterion, as is shown in the Appeal itself.

146. As noted above, the Appellant's concern in this Plea is summarized by its request that the Board of Appeal confirm whether the Agency subtracted Case Study Points from RBP and PRISMA's offer in all the sub-criteria where Annex 1 identified shortcomings. The Board of Appeal has confirmed that, in the Evaluation Report contained in Annex

[134] Para 37 of the Contested Decision.
[135] Para 54 of the Appeal.
[136] Para 55 of the Appeal.
[137] Para 57-58 of the Appeal.
[138] Para 59 of the Appeal.
[139] Paras 61-62 of the Appeal.
[140] Para 51 of the Appeal.

1, the Agency has indeed subtracted points in all the sub-criteria in which it identified shortcomings, as described in its qualitative assessment, and specifically in those mentioned by the Appellant[141]. The Applicant has been able to raise this issue and have it fully and effectively reviewed by the Board of Appeal. In this specific case, it has, thus, been unnecessary, under the principle of proportionality, to provide the Applicant with the confidential details of the scoring, in order for it to exercise its rights of appeal.

147. The Appellant also argues that the Contested Decision may have infringed the principle of equal treatment. The Appellant does not indicate specific grounds for this argument, other than stating that this would be suggested by *"any differences in the reduction of the points awarded in respect of the inadequately prepared subsections of the case studies"*[142].

148. The Board of Appeal finds that Annex 1 of the Contested Decision provides sufficiently detailed justifications for the differentiation between the scoring granted to each sub-criterion, and that any *"differences in reduction of the points awarded"*, which the Appellant refers to, adequately correspond to the differences in the qualitative assessment of the offers set forward in the detailed justifications. The scoring of each sub-criterion implies a degree of discretion. The Board of Appeal finds that there is no manifest error of assessment on behalf of the Agency in this regard.

149. It follows that the Appeal's Sixth Plea must be dismissed as unfounded.

Seventh plea – Manifest error of assessment

150. In its Seventh Plea, the Appellant argues that the Agency committed a manifest error of assessment when evaluating the offers, in particular with respect to the Case Study, which led to the wrongful award of points to the three tenderers[143]. It argues that this manifest error of assessment contravenes Article 41 of the Charter, the principle of good administration, the principle of transparency and the principle of non-discrimination and equal treatment.

[141] Paras 54-55 of the Appeal.
[142] Para 60 of the Appeal.
[143] Para 63 to 91 of the Appeal.

151. In this Plea, the Appellant challenges the validity of the evaluation of a combination of criteria/features of the offer of the tender´s awardee, RBP, as well as the evaluation of every combination of criteria/features where the Appellant did not get the maximum scoring.

152. First, as an introductory remark, the Appellant emphasises again that "*ACER did not give sufficient and clear statement of reasons and thus made practically impossible to appraise how broad its margin of discretion in fact was*"[144]. However, as previously reasoned, the Board of Appeal finds that Annex 1 of the Contested Decision provides sufficiently detailed justifications for the differentiation between the scoring granted to each sub-criterion and the reasoning behind the points awarded to the different offers.

153. In addition, as set out above [145], it is settled case-law that, when complex economic and technical issues are involved, as is the case of the issues raised by the Appellant, the appraisal of the facts is subject to more limited review upon appeal, being limited to identifying a manifest error of assessment.

154. As a preliminary point to the Seventh Plea, the Board of Appeal refers to Annex 1 to the Contested Decision, which contains a clear explanation of the evaluation methodology of the Case Study (emphasis by the Board):

> *"**1. Scoring per booking platform (maximum 100 points)***
> *The Evaluation below contains the Agency's assessment of the technical case studies provided by the three platforms which were considered to meet the minimum criteria to be further evaluated.*
>
> *The Agency scored the technical case studies uniformly on **five criteria**, **each valued with a maximum of 20 points**:*
> *a. Completeness (in the sense of including all the requested information in detail, including duly considered constraints);*
> *b. Consistency (in the sense of describing a workable and realistic project that could be implemented in practice, with means staff, skills and contracts which are already available);*

[144] Paras 65 of the Appeal.
[145] The Board of Appeal´s limited review of ACER´s complex, technical assessment.

c. Robustness (in the sense of allowing adjustments in scope and time, mitigating expected and unexpected events);

d. Relevance (in the sense of being in line with existing working practices and functioning of the platform); and

e. Efficiency (in the sense of, as a minimum, being in line with time or other constraints established in the Case Study).

Given that the Case Study required the description of the implementation plan for two tasks – ***Task A and Task B (with the latter containing three sub-tasks)*** *– the Agency valued each of the above-mentioned criteria with a* ***maximum of 10 points per task****.* ***Therefore, offers could be assigned a maximum score of 50 points per task and a total score of 100 points for the full Case Study****. In some instances, several criteria were affected by the same shortcoming, usually lack of clarity or information. For example, in the case of unclear resource plans, the scoring often decreased for several criteria for the underlying reason that the information on the resource plans did neither meet the criterion on efficiency, nor on robustness, consistency or completeness.*

The Agency evaluated the five criteria for each of the five distinct features, established in the Open call of the Agency requesting offers (Annex 2, Chapter 6). The Agency distinguished five Case Study features, as follows: (i) description of the task, (ii) list of activities of the task, (iii) risk assessment/plan with the requirement that three major risks are defined and risk mitigation is proposed, (iv) required implementation timelines and (v) proposed resource plans. The five features shall suitably explain the proposals of the platforms for Tasks A and B of the Case Study.

The Agency evaluated the case-study features individually along the above-mentioned five criteria. Hence, ***each feature was evaluated in terms of completeness, consistency, robustness, relevance and efficiency****. This meant that a* ***single feature could score a maximum of 10 points****, if it fulfilled adequately the requirements of the* ***five criteria****. The* ***maximum score for a feature evaluated per a single criterion*** *was* ***2 points****; the* ***smallest reduction of score for a unique feature per a single criterion*** *was established as* ***0.25 point****."*[146] (emphasis added)

155. It follows from the above that the evaluation methodology used by the Agency was detailed and precise and allowed a very limited margin for discretion to the evaluators:

[146] Annex 1 to the Contested Decision, p. 4.

each combination of criterion and feature accounts for a maximum of 2 points; given that there were 50 combinations in total for both Tasks A and Task B, this resulted in a maximum of 100 points to be awarded for the Case Study.

156. The Board of Appeal notes that the Agency explained in its Defence that *"it adopted such an assessment methodology in order to focus, for both Task A and Task B, on each specific criterion required for each feature (i.e. to focus on each matrix of the bid evaluation table separately). Therefore, the total absence of the required criterion for a specific feature in the offer of the booking platform resulted in the granting of 0 points; while the existence, in the offer of the booking platforms, of some required elements of the criterion for a specific feature, led to the granting of 0.25 up to 2 points. In the light of the above, it follows that the discretion left to the Agency and the evaluators was marginal"*[147].

157. The Board of Appeal also observes that, when disclosing its evaluation method, the Agency went beyond its strict disclosure obligations[148]. Contracting authorities enjoy leeway as regards the evaluation method[149]. The CJEU has held that *"an evaluation committee must be able to have some leeway in carrying out its task and thus it may, without amending the award criteria set out in the tender specifications or the contract notice, structure its own work or examining and analysing the submitted tenders"* [150]. The Board of Appeal observes, furthermore, that - in accordance with settled CJEU case-law with respect to the principles of equal treatment and transparency - there is no obligation for the Agency to provide a detailed summary of how each detail of a tender was taken into account during the evaluation or to provide a detailed comparative analysis of the successful tender and of the unsuccessful tender[151].

Finally, the Board of Appeal notes that the Appellant has been given access to Annex 18, containing the confidential version of the Evaluation Report in relation to the Appellant´s

[147] Para 146 of the Defence.
[148] Para 73 of Board of Appeal Decision A-002-2018; Case T-10/17 *Proof IT SIA* EU:T:2018:682, para 51; Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, paras 27- 28; Case T-514/09 *BPost NV* EU:T:2011:689, para 86.
[149] Para 73 of Board of Appeal Decision A-002-2018; Case C-252/10 P *Evropaïki Dynamiki v EMSA* EU:C:2012:789, para 35; Case T-10/17 *Proof IT SIA* EU:T:2018:682, paras 53-54 and 120.
[150] Para 73 of Board of Appeal Decision A-002-2018; Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, para 29; see also Case T-10/17 *Proof IT SIA* EU:T:2018:682, para 120.
[151] Para 123 of Board of Appeal Decision A-002-2018; Case C-629/11 P *Evropaïki Dynamiki v Commission* EU:C:2012:617, paras 21-22; Case C-376/16 P *EUIPO vs European Dynamics Luxembourg SA and Others* EU:C:2018:299 paras 57-61; Case T-514/09 *BPost NV* EU:T:2011:689, paras 116-118.

Case Study, as well as the Appellant´s detailed scores for the Case Study (see above, para 129(g)).

7.1 The Agency wrongfully awarded points to RBP for Task B (iii) of the Case Study

158. The Appellant argues that RBP should not have been awarded points for Task B(iii) of the Case Study, because its offer did not indicate whether it had already implemented Edig@s and what actions it had already taken or was going to take to implement this functionality[152].

159. The Appellant sets out that Task B(iii) is described in the Case Study as "*the implementation of document-based data exchange with AS4 protocol and Edig@s -XML data format for the communication between the booking platform and the TSOs. If AS4 and Edig@s -XM L were already implemented, please describe that process*" [153] and refers to Annex l to the Contested Decision, which expressly states, in relation to RBP, that "*[t]he description of Sub-task B(iii) does not clarify whether Edig@s -XML needs to be implemented or is already implemented*"[154] and that "*it is unclear if the requirement concerning Edig@s -XML is in scope of the proposed implementation project or not*" [155].

160. The Appellant considers that the issue as to whether Edig@s had already been implemented and the actions for its implementation constituted the very core of Task(iii) and that RBP should, therefore, not have been awarded any points for this task[156].

161. The Defendant, by contrast, holds that the Agency correctly deducted points from RBP´s scoring because its offer did not include all the required elements for Task B(iii). However, the Agency did not grant 0 points to RBP´s offer for Task B(iii) because the offer did not amount to a total non-compliance with Task B(iii) [157].

[152] Para 68 of the Appeal and para 53 of the Reply.
[153] Annex 12 containing Annex 6 Case Study Assignment, p.2.
[154] Annex 1 to the Contested Decision, p.16.
[155] Annex 1 to the Contested Decision, p.16.
[156] Para 68 of the Appeal.
[157] Para 149 of the Defence and para 102 of the Rejoinder.

162. First, the Board of Appeal finds, in effect, that the Evaluation Report contained in Annex 1 to the Contested Decision expressly lists shortcomings with regard to the completeness of the description of Task B(iii) that *"the description of Sub-task III does not clarify whether Edig@s-XML needs to be implemented or is already implemented";* with regard to the consistency of the description of Task B(iii) that *"one exception has been identified in Sub-task(iii), where it is unclear if the requirement concerning Edig@s-XML is in scope of the proposed implementation project or not"*; with regard to the completeness of the list of activities of Task B(iii) that *"For Sub-task(iii), there is no list of the activities associated with Edig@s-XML"*; and with regard to consistency of the list of activities of Task B(iii) that *Nevertheless for Sub-task B(iii) the proposal does not provide sufficient details about the Edig@s-XML implementation. Therefore, the proposal does not completely reflect the requirements for the implementation of Task B."*[158].

163. Second, the Board of Appeal highlights the Agency´s evaluation methodology which is set out in the Seventh Plea´s introductory statements and implies that each combination of criterion and feature accounts for a maximum of 2 points.

164. Third, the Board of Appeal observes that Annex 6 to the Open Call describes Task B(iii) as follows: *"The third request consists in the implementation of document-based data exchange with AS4 protocol and Edig@s -XML data format for the communication between the booking platform and the TSOs. If AS4 and Edig@s -XML were already implemented, please describe that process."* [159] Hence, Task B(iii) dealt with the implementation of data exchange tools Edig@s and AS4 Protocol. At the Oral Hearing, the Agency clarified that, even though from an IT perspective, these tools can be provided jointly or separated, both tools had the same weighting in the evaluation of Task B(iii)[160].

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[158] Annex 1 to the Contested Decision, p.16. See Annex 19 Part II containing the confidential Offer of RBP as disclosed to GSA, p.1-4.

[159] Annex 12 containing Annex 6 Case Study Assignment, p.2.

[160] Summary Minutes of the Oral Hearing, p. 20: "*With respect to AS4 Protocol and Edig@s-XML, the Defendant clarified that the two requested elements cover different aspects of the communication flow in the context of the booking platforms. The defendant explained that, while Edig@s-XML provides a way for operators to exchange machine understandable messages about the operations, the AS4 protocol defines the way that those messages can be exchanged at lower level. In this respect the two "standards" can work independently: having this in mind, it can be derived that the presence of one element was independent from the presence of the other and that both received the same weight as the presence of one of them would not have excluded the presence of the other, and vice versa."*

165. Fourth, given that Task B(iii) therefore was not limited to the requirement of Edig@s-XML, the shortcomings with respect to Edig@s-XML could not in themselves lead the Agency to the award of 0 points for the completeness of the description, the consistency of the description, the completeness of the list of activities and the consistency of the list of activities, which each accounted for a maximum score of 2 points.

166. Fifth, the Board of Appeal verifies in the confidential version of Annex 1 to the Contested Decision, contained in Annex 15, that the Agency deducted points from RBP´s scoring with regard to the completeness of the description of Task B(iii), the consistency of the description of Task B(iii), the completeness of the list of activities of Task B(iii) and the consistency of the list of activities of Task B(iii)[161].

167. To conclude, the Board of Appeal establishes that the Agency identified the shortcomings of RBP's offer and accordingly deducted points from RBP´s scoring. It follows that the Agency did not commit a manifest error of assessment.

7.2 The Agency wrongfully deducted points from the Appellant´s score for Tasks B (i) and (ii) of the Case Study.

168. The Appellant argues that the Agency erroneously deducted points from the Appellant´s score for Tasks B(i) and (ii) of the Case Study[162].

169. The Appellant sets out that the aim of Task B(i) was to improve the user-friendliness of the graphical user interface by its simplification in order to allow completing any possible operation in less time and that Task B(ii) was focused on the provision of the helpdesk on a multichannel platform in addition to the already existing channels. The Appellant notes that, as "*it is visible from the description, both tasks were based on ensuring the communication between the platform and network users*", concluding that "*disruption of communication between GSA and its users being the possible result of the cyberattack was a significant risk in the analysed situations*"[163]. The Appellant also highlights that "*cybersecurity is currently one of the main areas of risks*"[164].

[161] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.29.
[162] Para 73 of the Appeal and para 55 of the Reply.
[163] Para 71 of the Appeal.
[164] Para 72 of the Appeal.

170. The Appellant claims that the Agency wrongly assessed that one of the risks was not specific enough in its offer in the context of Tasks B(i) and B(ii). The Appellant argues that the feature risk assessment in Task B(i) and (ii) was assessed by the Agency "*without sufficient grounds and thus constitutes manifest error of assessment*".[165]

171. The Defendant explains that the Appellant´s risk assessment plan only addressed the risk of cyber-attacks in a general fashion and failed to provide the three required and specific risks related to the management of the change requested for these sub-tasks B(i) and B(ii). Therefore, the Agency deducted points from the Appellant´s score in accordance with its evaluation methodology.

172. First, the Board of Appeal finds, in effect, that the Evaluation Report contained in Annex 1 to the Contested Decision expressly mentions the following shortcoming with regard to the relevance of the risk assessment plan of Task B(i) and (ii): *"Nevertheless, on the content, one of the risks (ID 3) is too general in nature and is not specific enough in the context of Sub-tasks B(i) and B(ii)."*[166] The Board of Appeal observes that the Appellant does not only refrain from challenging but also expressly confirms the exactitude of the Agency's description of the Appellant´s offer in Annex 1 to the Contested Decision when confirming that its risk assessment focused on the loss of information security caused by a cyber-attack[167].

173. Second, the Board of Appeal observes that Annex 6 to the Open Call describes the risk assessment/plan for Tasks B(i) and (ii) as follows: *"The risk assessment/plan focusing on three major risks related to the management of the change request"*[168] Hence, the risk assessment/plan for Tasks B(i) and (ii) required the tenderers to identify three major risks.

174. Third, the Board finds that the Appellant simply argues that it is a good practice to analyse possible cyber-attacks from a "*wide*" perspective, because a "*too detailed description of the given risk might result in missing some significant threat*"[169]. In this respect, the Board of Appeal notes that any disagreement with the tasks and sub-tasks of the Case Study should have been raised during the public consultation.

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[165] Para 71 of the Appeal.
[166] Annex 1 to the Contested Decision, p.12.
[167] Para 71 of the Appeal.
[168] Annex 12 containing Annex 6 Case Study Assignment, p.3 and 4.
[169] Para 72 of the Appeal. See also Annex 14 containing the confidential Offer of GSA, p. 12 and 17.

175. Fourth, the Board of Appeal verifies in the confidential version of Annex 1 to the Contested Decision, contained in Annex 15, that the Agency deducted points from the Appellant´s scoring with regard to the relevance of the risk assessment plan of Tasks B(i) and (ii)[170].

176. To conclude, the Board of Appeal finds that the Agency identified the shortcomings of the Appellant's offer and accordingly deducted points from the Appellant´s scoring. It follows that the Agency did not commit a manifest error of assessment.

7.3 The Agency wrongfully deducted points from the Appellant´s score for Tasks A and B of the Case Study.

177. The Appellant argues that the Agency erroneously deducted points from the Appellant´s score regarding the evaluation and consequent scoring of the Appellant's resource plan (one of the features of the Case Study), both for Tasks A and B of the Case Study[171].

178. As preliminary point, the Appellant argues that the Open Call was not detailed enough and only contained a general reference to the areas that should be covered by the resource plan[172].

179. The Board of Appeal considers that when describing the content of the proposal to be submitted by the candidates, the Open Call and its Case Study assignment in Annex 6 clearly requested "*a resource plan having regard to the budget, human resources and skills committed for the implementation*" of the relevant task[173].

180. The Open Call is not confusing or ambiguous, as it did not mention any other set of requirements regarding the resource plan. Neither did it convey that these requirements were optional. As for the vagueness the Appellant claims, the Board of Appeal finds that the requirements regarding the resource plan were explained with sufficient clarity in the Open Call, especially when interpreted with the rest of the requirements of the Case

[170] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.25 and Annex 18 containing the confidential evaluation of GSA´s Case Study.
[171] Para 74-86 of the Appeal and para 56 of the Reply.
[172] Para 75-76 of the Appeal.
[173] Annex 12 containing Annex 6 Case Study Assignment, p.3.

Study. The Board of Appeal notes, again, that any doubt, concern or disagreement with the requirements of the Case Study should have been raised during the public consultation and that the Appellant could have requested a detailed clarification from the Agency in case of doubts on the scope or the extent of the requirements.

181. Before turning to the analysis of the Appellant´s claims regarding the Agency´s assessment of its offer´s resource plan under some of the Open Call´s criteria, the Board of Appeal observes that the resource plan is a feature of the tender´s Case Study and notes that case studies are, per definition, pragmatic exercises. The present Case Study was aimed at assessing the candidates´ ability to implement good practices in IT service management when serving the Mallnow IP and GCP VIP[174]. The candidates were asked to submit a detailed proposal of how they would deal with service requests in case they were selected as booking platform for the said interconnection points for a period of 3 years. In so doing, the candidates had to provide information in order to sufficiently demonstrate the feasibility of the assignment, with realistic expectations of resources and costs and of the productive allocation of such resources to deliver the tasks at hand. In other words, the very nature of a Case Study implies that the information provided by the candidates should be detailed enough to allow the contracting authority to assess the workability of each proposal by reference to the tender´s criteria.

182. Furthermore, when examining the Agency´s evaluation of the Appellant´s resource plan in Tasks A and B of the Case Study from a perspective of the criteria of completeness, consistency, robustness and efficiency, the Board of Appeal observes that all shortcomings identified by the Agency stem from the absence of the same information.

183. First, with respect to the criterion of completeness, the Agency considered that the Appellant´s resource plan was unclear[175].

184. With respect to the budget, the Appellant´s proposal did not include the budget allocation **[CONFIDENTIAL]** and that the budget allocation seemed to be associated to **[CONFIDENTIAL]**. It also failed to specify **[CONFIDENTIAL]** [176]. The Appellant argues that its proposal described the structure of the calculation of the costs and fees of

[174] Para 22 of the Contested Decision. Annex 12 containing Annex 6 Case Study Assignment, p.1.
[175] Para 151 of the Defence.
[176] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study. See Annex 14 containing the confidential Offer of GSA, p. 5, 10-11 and 15-16.

the different services and the platform's billing policy in detail, but that it did not provide detailed figures because the Open Call (i) did not ask for detailed figures and (ii) did not specify the national requirements, making it impossible to assign an exact cost to this task. When reviewing the offer submitted by the Appellant, the Board of Appeal finds that, even if its proposed resource plan designated the three possible categories (operation, maintenance and development) to which the budget could be allocated, it did not allow the Agency to assess the costs that each task was foreseen to generate and the resources allocated to cover such costs[177].

185. Furthermore, the Agency considered that, even though there was a high-level description of how the platform estimated and allocated IT budget in general, the operation and maintenance cost coverage was not detailed[178]. The Board of Appeal finds, in this respect, that the candidates were required to submit a resource plan regarding, among others, the available budget to implement the tasks described in the Case Study. As already mentioned, the very nature of a Case Study requires such proposal to be sufficiently realistic to assess the ability of the booking platform to implement good practices in IT service management. To achieve that, the candidate's proposal had to include realistic goals and realistic limitations, such as the available budget to implement the requirements and the costs that the budget would have to cover. To this end, the Board considers that it was indispensable to provide an indicative estimation of the budget and its allocation. Despite the Appellant's claim that the national requirements lacked clarity, the wording of its proposal suggests it sufficiently understood and knew the national requirements included in the Case Study. Indeed, the Appellant´s proposal even makes a specific reference to these national requirements as described in the Open Call[179].

186. As regards the human resources and skills, the Agency found that the Appellant's proposal **[CONFIDENTIAL]** It adds, regarding Task A, **[CONFIDENTIAL]** and, regarding Task B, **[CONFIDENTIAL]**[180]. The Appellant argues that

[177] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study. See Annex 14 containing the confidential Offer of GSA, p. 5, 10-11 and 15-16.
[178] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study. See Annex 14 containing the confidential Offer of GSA, p. 5, 10-11 and 15-16.
[179] Annex 14 containing the confidential Offer of GSA, p. 5, where it indicates that **[CONFIDENTIAL]**
[180] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study.

[CONFIDENTIAL]. The Board of Appeal finds that the information included in the Appellant's Case Study **[CONFIDENTIAL]**. The same applies to **[CONFIDENTIAL]**. It its offer, the Appellant **[CONFIDENTIAL]**. However, neither did it **[CONFIDENTIAL]** nor **[CONFIDENTIAL]**[181]. In this sense, the Board of Appeal finds that it cannot be sustained that the Appellant´s description of the recruitment process and of required skills entirely fulfils the requirements of the Case Study.

187. Second, with respect to the criterion of consistency, the Agency considered the Appellant´s resource plan workable, although **[CONFIDENTIAL]** impeded the Agency to assess its feasibility for Tasks A and B (e.g. **[CONFIDENTIAL]**)[182].

188. The Board of Appeal finds that the information included in the Appellant's Case Study was not sufficiently detailed to allow the Agency to ascertain whether the proposal was realistic and feasible, as it did not contain detailed information with respect to **[CONFIDENTIAL]**. This also applies to **[CONFIDENTIAL]** rendered it impossible to determine whether the Appellant would be able to be fully and successfully implement the Case Study tasks[183].

189. Third, with respect to the robustness criterion, the Agency found that the Appellant's proposal lacked sufficient details[184]. Even though the Agency acknowledged that the Appellant introduced **[CONFIDENTIAL]**,[185] the lack of clarity on **[CONFIDENTIAL]** for both Task A and Task B did not allow the Agency to assess to which extent the proposal for the implementation of these Tasks could be **[CONFIDENTIAL]**. This lack of clarity also raised uncertainty on the solidness of **[CONFIDENTIAL]**[186].

190. The Board of Appeal verifies that the Agency duly took account of the Appellant´s proposed **[CONFIDENTIAL].** However, the Board of Appeal also finds that, contrary

[181] Annex 14 containing the confidential Offer of GSA, p. 5, 10-11 and 15-16.
[182] Para 151 of the Defence; Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study.
[183] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study. See Annex 14 containing the confidential Offer of GSA, p. 5, 10-11 and 15-16.
[184] Para 151 of the Defence.
[185] See Annex 14 containing the confidential Offer of GSA, p. 6, 10 and 15.
[186] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study. See Annex 14 containing the confidential Offer of GSA, p. 5, 10-11 and 15-16.

to the Appellant´s claims, the robustness of its resource plan - which, according to the Open Call, had to include the budget, human resources and professional skills - was not **[CONFIDENTIAL].**

191. Fourth, with respect to the criterion of efficiency, the Agency pointed out that it could not assess whether the allocation of resources was efficient and solid, as the Appellant's proposal did not include any such information[187]. The Agency found that the resource plan did not provide **[CONFIDENTIAL]**. In particular, the lack of clarity on **[CONFIDENTIAL]** hinder the systematic assessment of potential efficiencies with respect to the implementation proposed for Tasks A and B[188]. The Appellant argues that the Agency only evaluated **[CONFIDENTIAL]**. The Agency explains in its Defence that the efficiency criterion was intended to measure the relation between the available resources and the costs expected from the implementation of the tasks[189].

192. The Board of Appeal verifies that, without the detailed relevant information on **[CONFIDENTIAL]**, the efficiency of the resource plan could not be reliably evaluated. Accordingly, the broader process efficiency alleged by the Appellant could not have been assessed either, because **[CONFIDENTIAL]**. As a consequence, the Board of Appeal finds that the Agency could not have assessed the process of implementation planned by the Appellant, since its efficiency would also depend on **[CONFIDENTIAL].**

193. To conclude, the Board of Appeal establishes that the Agency identified the shortcomings of the Appellant's offer and deducted the corresponding points from the Appellant´s scoring in accordance with its evaluation methodology. It follows that the Agency did not commit a manifest error of assessment.

7.4 The Agency wrongfully deducted points from the Appellant´s score for Task B(iii) of the Case Study

[187] Para 151 of the Defence.
[188] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.23 and 25 and Annex 18 containing the confidential evaluation of GSA´s Case Study.
[189] Para 151 of the Defence.

194. The Appellant argues that the Agency erroneously deducted points from the Appellant´s score for Task B(iii) of the Case Study[190]. The Appellant argues that there was no requirement for the platform operator to provide the Agency with **[CONFIDENTIAL].** That is why, according to the Appellant, the Agency should not have deducted points when evaluating the Appellant´s list of activities on the basis of the completeness criterion. The Appellant makes a similar claim with respect to the assessment of its list of activities on the basis of the criterion of consistency, stating that the description was exhaustive and that the process was already implemented.

195. The Board of Appeal finds that the Agency´s Evaluation Report assessed the Appellant´s list of activities of Task B(iii) as follows under the criteria of, respectively, completeness and consistency: **[CONFIDENTIAL]**[191] and **[CONFIDENTIAL]**[192].

196. The Board of Appeal also finds that the Case Study includes in the scope of sub task B(iii) "*the implementation of document-based data exchange with AS4 protocol and Edig@s-XML data format for the communication between the booking platform and the TSOs*" [193]. Moreover, the Case Study expressly required "*[i]f AS4 and Edig@s-XML were already implemented, please describe that process*"[194]. In addition, the Case Study, in its instructions for Task B(iii), also includes the following: "*[a] description of how the platform will implement task B(iii) or how it was already implemented in your platform*" [195]. It is clear from the above that even if a candidate had already implemented AS4 and Edig@s-XML, it had to explain the process of these data exchange tools in detail.

197. As explained by the Defendant[196], although some operators had already implemented AS4 Protocol and Edig@s-XML Data Format, this implementation did not exempt them from providing the Agency with a complete description of their processes in order to fulfil both criteria of completeness and consistency as requested by the Case Study.

[190] Para 87-91 of the Appeal and para 57 of the Reply.
[191] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.24 and Annex 18 containing the confidential evaluation of GSA´s Case Study. See Annex 14 containing the confidential Offer of GSA, p. 18-22.
[192] Annex 15 containing the confidential version of Annex 1 to the Contested Decision, p.24 and Annex 18 containing the confidential evaluation of GSA´s Case Study. See Annex 14 containing the confidential Offer of GSA, p. 18-22.
[193] Annex 12 containing Annex 6 Case Study Assignment, p.2.
[194] Annex 12 containing Annex 6 Case Study Assignment, p.2.
[195] Annex 12 containing Annex 6 Case Study Assignment, p.4.
[196] Para 152 of the Defence.

Hence, given that the Appellant did not provide this information, the Agency could not assess the proposal on the basis of information *in concreto*, but only on assumptions. And this is exactly what a Case Study tries to prevent. In its Rejoinder, the Agency indicated that the Appellant only stated that it had implemented Edig@s and AS4 but had not demonstrated *"its capability to run a project by itself"* [197].

198. To conclude on the Seventh Plea, the Board of Appeal finds that the Contested Decision correctly states that *"the assessment of the proposal formulated by RBP showed limitations with regard to its completeness, robustness and efficiency. The proposal in particular revealed limitations concerning the resource planning, its risk-assessment and the detailed listing of activities to be performed in order to address the Case Study"*[198] and that *"the assessment of the proposal formulated by GSA showed limitations with regard to completeness, consistency, robustness and efficiency. The proposal in particular revealed limitations concerning resource planning and the detailed listing of activities to be performed in order to address the Case Study*[199].

199. Consequently, the Appeal's Seventh Plea must be dismissed as unfounded.

[197] Para 16 of the Rejoinder.
[198] Para 37 of the Contested Decision.
[199] Para 35 of the Contested Decision.

DECISION

On those grounds,

THE BOARD OF APPEAL

Hereby confirms the Contested Decision and dismisses the Appeal for annulment.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 29 of Regulation (EU) 2019/942 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

SIGNED	SIGNED
Andris Piebalgs	Andras Szalay
Chairperson of the Board of Appeal	Registrar of the Board of Appeal