Review of Case Law from the General Court (2015 to Mid-2020)

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Review of case law from the General Court (2015 to mid-2020)

1. INTRODUCTION

This article will provide an overview of the case law of the General Court (GC) in the period 1 January 2015 to end of June 2020 related to public procurement. At a meta level there the GC may face three main types of cases concerning public procurement which also materialise in the identified dataset, cf. below sc. 1.3, namely cases concerning annulment of:

- Decisions made by the EU institutions relating to public procurement
- Commission Decisions with legal basis in the public procurement directives
- Commission Decisions under State aid or competition law

In the first type of cases, the GC acts as review body in the first instance, similar to national review bodies, and it handles the same kinds of disputes. In the second, the GC is the first instance in reviewing the acts adopted by the Commission with legal basis in the public procurement directives, such as Decisions regarding exemption from the Utilities Directive from 2014,[1] and the delegated acts which the Commission is empowered to adopt under the public procurement directives.[2] In the final type of cases, the GC is the first instance in reviewing Commission Decisions adopted under State aid and competition law. These cases relate to the relation between public procurement law and these other areas of law.

1.1 Why is the case law from the GC not given much attention?

Some of the reasons why the GC has perhaps been awarded less interest than it deserves in a public procurement context are considered briefly below.

[1] Art. 34-35 of Directive 2014/25/EU [2014] O.J. L94/243 (Utilities Directive from 2014).

[2] Art. 103 of the Utilities Directive from 2014, Art. 87 of Directive 2014/24/EU [2014] O.J. L94/65 (the Public Procurement Directive from 2014) and Art. 48 of Directive 2014/23/EU [2014] O.J. L94/1; together these directives are referred to as "the public procurement directives from 2014".

First, the GC acts as a court of first instance and in cases related to procurement of EU institutions, it thus deals with facts in addition to law in terms of the application of the Financial Regulation that contains the procurement rules for the EU institutions.[3] The inherent dependence on the specific facts of the cases may imply that the judgments could be perceived as of less general interest.

Second, in public procurement disputes, the GC applies the Financial Regulation and the only contracting authorities subject thereto are the EU institutions; hence, the pool of parties interested in the case-law is significantly smaller than that interested in the interpretation/application of the public procurement directives. As indicated above, the GC is only competent in cases regarding the public procurement directives in very specific types of cases.

Third, and related, the GC (primarily) applies the Financial Regulation which among other things lays down procurement rules specific to the EU institutions. The Financial Regulation is complicated because it provides an administrative framework which is wider than procurement law. In particular, the Financial Regulation 2012 application was complex because it had to be read in conjunction with Implementing Regulation 2012; this system was terminated by Financial Regulation 2018 and which greatly simplifies things. The procurement rules for the EU institutions generally resemble those in the public procurement directives applicable to contracting authorities in the Member States, cf. Table 1 below which attempts to provide an overview, also of the terminology which will be used in this article.

Table 1: Financial Regulations relevant for the judgments in the period examined; terminology used in the article; applicability; and, description of how the rules compare to those of the public procurement directives

Regulation		**Period of applicability**	**Comparison to the public procurement directives**
1	**Financial Regulation 2012**[4] Title V (Articles 101-120 and 190-191)	1 January 2013-2 August 2018 (as amended on 1 January 2016, cf. no. 3 below)	Rules for awarding public contracts "based on" the 2004 public procurement directive,[5] cf. rec 40.
2	**Implementing Regulation 2012**[6] Title V (Articles 121-172)	1 January 2013-2 August 2018 (as amended on 1	

[3] See further on the Financial Regulation below.

[4] Regulation No 966/2012/EU [2012] O.J. L298/1.

[5] Directive 2004/18/EC [2004] O.J. L134/114.

[6] Commission Delegated Regulation No 1268/2012/EU [2012] O.J. L362/1.

		January 2016, cf. below no. 4).[7]	
3	**2015 Amendment to Financial Regulation 2012**[8] Article 1(5)-(23)	1 January 2016-2 August 2018	Adopted to align the procurement rules of the Financial Regulation 2012 to the public procurement directives from 2014.
4	**2015 Amendment to Implementing Regulation 2012**[9] Article 1(8)-(18)	1 January 2016[10]-2 August 2018	Adopted to align the procurement rules of the Financial Regulation 2012 to the public procurement directives from 2014.
5	**Financial Regulation 2018**[11] Title VII (Articles 160-179) and Annex I.	2 August 2018-current	Contains rules for awarding public contracts and concession contracts which are very similar to the public procurement directives from 2014. However, some modifications or additions are made, providing an implementation of the rules for the purpose of the procurement of the EU institutions, e.g. rules for low value contracts. Whereas certain provisions are specific to public contracts and concessions, respectively, the general framework is the same.

Finally, there is the risk of appeal of the judgments from the GC, and thus, frankly speaking, until the ECJ has spoken, the state of law laid down by the GC has a sphere of temporarily-ness to it. The risk of appeal or of the ECJ overruling the approach adopted by the GC in other unrelated case-law presents a risk for national review bodies, legal counsel and academics when basing themselves on cases from the GC. This risk may be exaggerated, as in 2019, the ECJ ruled on 210 appeals from the GC (on all matters, not just procurement), and only 28 were set aside, i.e. below 15 %.[12]

[7] Implementing Regulation 2012 and (implicitly) 2015 Amendment to Implementing Regulation 2012 were repealed by Commission Decision 2018/1520/EU [2018] O.J. L256/67. The repeal was based on simplification of the rules, implying that all the procurement rules are now collected in Financial Regulation 2018.

[8] Regulation 2015/1929/EU [2015] O.J. L286/1.

[9] Commission Delegated Regulation (EU) 2015/2462 [2015] O.J. L342/7.

[10] Except from e.g. certain time limits which apply from a later point in time; see Art. 2 of 2015 Amendment to Implementing Regulation 2012.

[11] Regulation 2018/1046/EU [2018] O.J. L193/1.

[12] European Court of Justice – Annual report 2019, p. 54, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra_pan_2019_interieur_en_final.pdf (lastly accessed February 2021).

1.2 Why is the case-law from the GC related to public procurement interesting?

First, as mentioned, the GC gets the same type of cases as national review bodies. This implies that the GC must give a final judgment on the specific details of the case. This is different from the ECJ which in preliminary rulings only rules on interpretation of EU law and does not decide the dispute before the national court. As the applicants to the GC are tenderers which may also be active in national procurement procedures, it is not unlikely that some of the disputes brought before the GC are "inspired" by national disputes which have not led to the posing of preliminary questions to the ECJ. Further, it might be that certain "run of the mill" issues are dealt with by the GC and its handling of those could be informing national review bodies, such as interim measures, the obligation to state reasons etc. There is a good chance that some disputes have been solved by the GC in specific cases, before a more general, conceptual issue is raised before the ECJ.

Second, the GC handles cases in disputes on public procurement law and its interaction with other areas of law, as the GC is also first instance in competition law and State aid law disputes, cf. below sc. 4. This may be interesting to national review bodies whose competence is not limited to public procurement law.

1.3 Dataset

The search function on the website of the Court of Justice was used to identify case law of the GC in the period 1 January 2015 till 30 June 2020 leading to the identification of a total of 135 judgments and orders concerning EU institutions procurement. In addition, one judgment concerning the Utilities Directives from 2004 was identified. Further, 13 judgments concerning the relation between public procurement and State aid rules and competition rules; two judgments concerning the obligation to tender contracts under EU-financed projects; and, two judgments concerning access to documents, have been included in the dataset, in order to make the survey of the GC's judgments regarding public procurement more complete.[13] Thus, the total dataset consists of 153 judgments and orders. Each case may be represented several times in the dataset, as each judgment and order are counted.

[13] http://curia.europa.eu/juris/recherche.jsf?language=en. The period 01/01/2015-30/06/2020 was marked. In the entry "Court" only the GC was marked. In the entry "documents" only 'judgments' and 'orders' were marked, including those *not* published in the ECR. In the entry "subject-matter" the subject 'European Union Public Contracts' was marked. To make the results more complete, in the entry "text" searches were made for each 'tender', 'procurement' and 'marchés publics'. These text searches were repeated also without the subject-matter entry marked. The latter search contributed in particular with judgments concerning the relation between procurement rules and State aid and competition rules, judgments concerning access to documents and judgments concerning EU financed projects. Two orders relating to correction of earlier judgments or orders are not included in the dataset; further three other judgments/orders in the search results have for various reasons not been included in the dataset.

1.4 Description of the judgments in the examined period

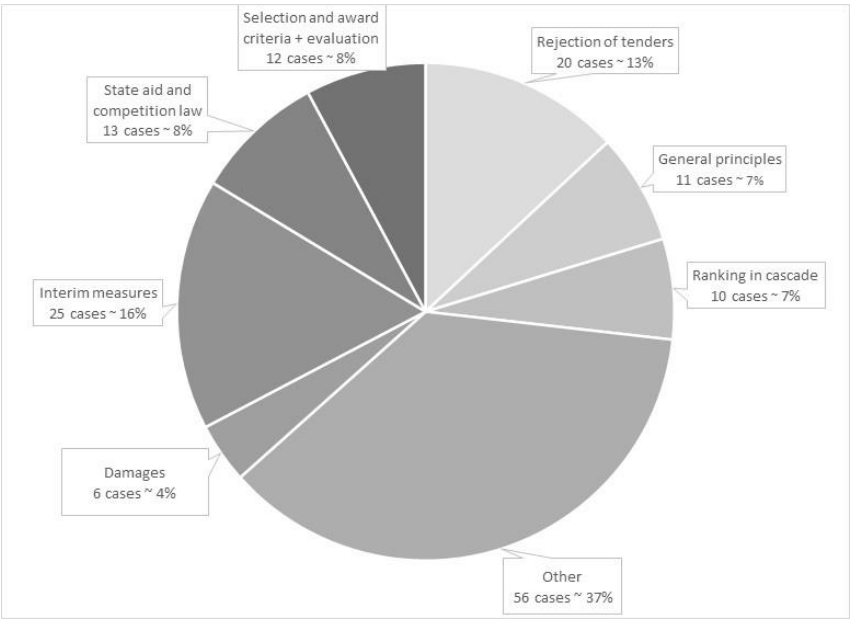
The part of the judgments handed down by the GC every year in the examined period concerning public procurement by the EU institutions (ranging from 22 to 31 cases, excluding 2020)[14] constitutes roughly 2.5-3.5 % of the case load of the court (varying from 755-1009 cases, excluding 2020)[15].

Considering the dataset of 153 judgments, we have categorised each judgment to illustrate the topics and case types dealt with by the GC, cf. Figure 1. The categorisation has for simplicity and to avoid inconsistencies been based on the keywords provided at the top of each judgment/verdict. Some discretion has been exercised by the authors in this regard. However, as a main rule, all orders with an R after the case number has been categorised as concerning interim measures, even if this is not explicitly stated in the keywords. Similarly, all cases where the keywords indicate that the GC has found that there is no need to adjudicate are in the category "other". Further, more specific keywords (e.g. selection criteria, ranking of a tenderer in the cascade procedure, abnormally low tender, exclusion) have been prioritised over generic keywords (e.g. obligation to state reasons, non-contractual liability, admissibility). The order of the more specific keywords has been decisive for the categorisation, even though this keyword does not necessarily represent the main dispute of the case. This is also the reason why the categorisation does not necessarily determine in which context the judgment or order is analysed below.

[14] In the examined part of 2020, 10 cases concerning European Union public contracts were completed. The judgments on State aid and competition law are not included in these numbers.

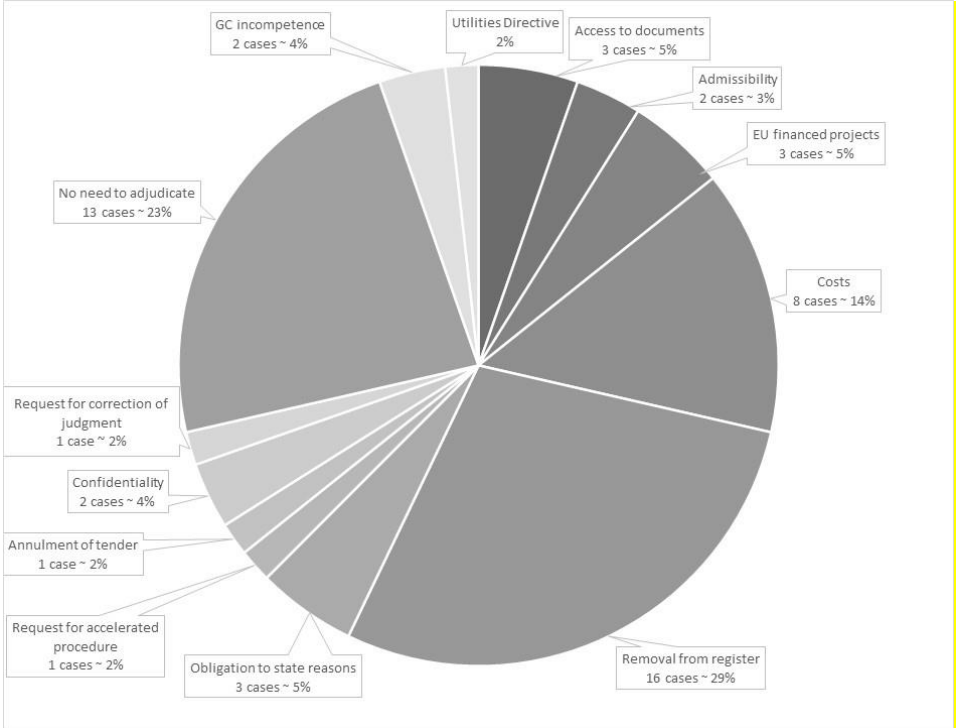
[15] The total number of cases completed by the GC is mentioned in the annual reports from the Court of Justice of the European Union, accessible here: https://curia.europa.eu/jcms/jcms/Jo2_7000/en/ (last accessed February 2021). The numbers may not be entirely comparable, as it seems that applications for interim measures are not included in the number in some years, cf. the annual reports from 2017, p. 138, and 2018, p. 159, but it is unclear whether that is the case for the other years. The percentage also fits for the part of 2020, which is included in the study, but this relies on our own search on curia for the total number of cases in the period 1 January 2015-30 June 2020 (285). The total number of cases completed from the GC in 2020 must be expected to be lower than previous years, due to the COVID-19 restrictions which have also affected the judicial activity of the European Courts.

Figure 1: Dataset – what does each judgment/order concern



The category "other" covers more than a third of the cases in the dataset. Please see Figure 2 for a breakdown of this category.

Figure 2: Breakdown of the category "other" in Figure 1



1.5 Themes and main discoveries

As mentioned in sc. 1, the dataset is divided into three case types, i.e. decisions made by the EU institutions relating to public procurement (sc. 2); Commission Decisions with legal basis in the public procurement directives (sc.3); and, Commission Decisions under State aid law (sc. 4). However, further categorisation was necessary to select the cases to be discussed in more detail. The selection emerges from the illustration of the dataset in Figure 1, cf. above cc. 1.3. Not all judgment in each category are accounted for in the analysis, and not all judgments are referenced individually; for each section only the most interesting findings are presented.[16]

Since we adopted a 'bottom up' approach to our categorisation and analysis, using only a given timeframe and connection with public procurement to guide us, it is difficult to briefly summarise the entire analysis or to draw overarching conclusions from such a broad swathe of different cases. It is worth pointing out however that the GC regularly decides on a wide range of legal issues which are relevant for procurement practitioners and that this case-law also provides useful insight into how the case-law of the ECJ is

[16] Thus, e.g. the identified judgments concerning competition law are not considered in detail, as they concern bid-rigging and the facts are related to public procurement procedures, but the claims concerns competition law.

interpreted and applied. In addition, it can be mentioned that the case law from the GC in public procurement works as an early warning system for procurement issues which may be dealt with later by the ECJ due to direct appeal pathway available in some of the cases.

2. CASES CONCERNING DECISIONS MADE BY THE EU INSTITUTIONS RELATING TO PUBLIC PROCUREMENT

2.1 Change of procedure – the general principles

In the dataset, several judgments concerning the general principles were identified. According to the Financial Regulation, all public contracts financed in whole or in part by the EU budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.

Only one judgment has been chosen for analysis in this section, as it concerns a topic which the ECJ has not handled.

Direct Way[17] concerns the relation between the open and negotiated procedure The GC had to consider whether in the context of a negotiated procedure after an open procedure was called off, the award of a contract to a tenderer at a price which was higher than the one initially suggested by the applicant was a breach of the principle of equal treatment or could amount to a breach of the prohibition against making substantial changes of the contract. After initially having received two tenders, the contracting authority decided to close the procedure and initiate a negotiated procedure instead. Under Article 127(1) of the applicable Implementing Regulation,[18] contracting authorities may use the negotiated procedure if they receive unacceptable tenders as a result of an open or restricted procedure or a competitive dialogue which has been completed, in similar conditions to those of Article 32(2)(a) of the Public Procurement Directive from 2014. At the end of the negotiated procedure, the contracting authority awarded the contract for a slightly higher price than the bids received under the open procedure which it had considered unacceptable.

The applicant claimed that the award of the contract at a higher price than the one which was initially rejected by the contracting authority amounts to a breach of the principle of equal treatment. Thus, the GC had to consider, whether the Parliament was entitled to award the contract at such higher price, particularly as the open procedure was terminated because of the unacceptable price.[19] Unfortunately,

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[17] Case T-126/13 *Direct Way, Directway Worldwide v European Parliament* [2015] ECLI-819.

[18] Article 127(1)(a) of Commission Regulation No 2342/2002 [2002] O.J. L 357/1.

[19] T-126/13 (fn. 17), para. 48.

the GC ended up not providing a substantive answer as it considered the plea inadmissible since it would have made the GC calling into question the decision of closing of the open procedure well beyond the procedural time limits. This is a puzzling justification since what the applicant was questioning was not the decision to close the open procedure but if the grounds invoke for the negotiated procedure had been breached or not, therefore potentially affecting the validity of the award decision arising from the negotiated procedure. This is not to say the immediate conclusion would be that they were, since it is possible the situation had changed in the meanwhile or as a result of the negotiations. Furthermore, as mentioned earlier the increase in price was minor and not particularly significant.

In consequence, the GC limited itself to assess whether the two tenderers had been treated in an unequal manner during the evaluation of the tenders in the negotiated procedure. The GC found that this was not the case and found that the contracting authority had not breached the principle of equal treatment in the negotiated procedure.

2.2 Assessment of tenderers[20]

This section covers case-law concerning the first phase of the procurement procedure and covers exclusion and selection of tenderers.

2.2.1 Exclusion grounds

The Financial Regulation establishes an Early Detection and Exclusion System,[21] to identify applicants and tenderers which are covered by exclusion grounds and must be excluded from inter alia procurement procedures. The EDES collects information from various sources in a database which EU contracting

[20] Some of the cases concerning topics where ample case-law of the CJEU exists will not be considered, e.g. a judgment on lack of technical capability by a sub-contractor, cf. Case T-420/13 *Alain Laurent Brouillard v Commission* [2015] ECLI-633, and judgments on conflict of interest (e.g. Case T-403/12 *Intrasoft International SA v European Commission* [2015] ECLI-774; Case T-556/11 *European Dynamics Luxembourg and others v EUIPO* [2016] ECLI-248; Case T-182/15 *Sopra Steria Group v Parliament* [2019] ECLI-228, and judgments on tenders not meeting the tender terms and conditions, e.g. Case T-652/14 *AF Steelcase v EUIPO* [2016] ECLI-370. In addition, Case T-200/16 *Gfi PSF v Commission* [2017] ECLI-294, concerning the rejection of a tender on the ground that the tender had been opened prior to receipt by the contracting authority will not be examined further as the obligation to conduct electronic procurement procedures has eliminated this problem.

[21] The predecessor of the EDES was the Early Waring System (EWS) which was adopted by Commission Decision in 2004. The GC held in Case T-320/09 *Planet v Commission* [2011] ECLI-172, para. 68-70, and in the final judgment in the case [2015] ECLI-223, para. 71, that the Commission did not have any legal basis for establishing the EWS, and that the EWS disrespected the presumption of innocence in Article 48(1) of the European Charter of Fundamental Rights, because there was no right to provide explanations before being registered in the EWS. The Decision establishing the EWS in force at the time of the factual circumstances was therefore annulled. This ruling was upheld by the CJEU in Case C-314/11 P *Commission v Planet* [2012] ECLI-823. The legal basis is now provided by Article 135-136 in Financial Regulation 2018. See also https://ec.europa.eu/info/strategy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes_en. The EDES replaced the EWS on 1 January 2016.

authorities must consult prior to awarding contracts.[22] The exclusion grounds resemble the mandatory and voluntary exclusion grounds in the 2014 public procurement directive, but are all made mandatory[23]; however, the principle of proportionality must guide the exclusion.[24] In situations where no final judgment establishes that the tenderer must be excluded, a panel must be constituted to assess the case and issue recommendations on the envisaged exclusion.[25]

In *Transtec v Commission*,[26] the applicant had submitted evidence to the Commission allegedly showing that a successful tenderer had been accused of acts of embezzlement and dubious attribution of public contracts by British public authorities which therefore did not award public contracts to this company. The GC stated that in a situation where no final judgment or administrative decision prevails, the contracting authority must assess whether it has sufficient evidence that the behavior of the tenderer in question was liable to constitute serious professional misconduct threatening the financial interests of the Union, before constituting the abovementioned panel.[27] The evidence submitted by the applicant showed that the successful tenderer voluntarily had withdrawn from tendering in public procurement procedures of the Department for International Development of the Government of the United Kingdom subsequent to allegation of fraud, and that in fact, the successful tenderer had not been awarded new contracts from Department for International Development and the Foreign and Commonwealth Office during 2017. The GC held that as the evidence was limited to reporting that the company had been the subject of "allegations", without further specifying the circumstances in which the irregularities allegedly occurred, the evidence was not sufficient to establish that the conduct of the company was liable to constitute serious professional misconduct threatening the financial interests of the Union.[28]

If the EU contracting authority has entered into a contract with a tenderer that should have been excluded for particular reasons – including the mandatory exclusion grounds in the 2014 public

[22] Article 142 in Financial Regulation 2018. The sources are e.g. the European Anti-Fraud Office (OLAF).

[23] Article 136(1) in Financial Regulation 2018.

[24] Article 136(3) in Financial Regulation 2018.

[25] Article 143 read in conjunction with Article 136 in Financial Regulation 2018; see also e.g. Case T-228/18 *Transtec v Commission* [2019] ECLI-336, para. 54.

[26] T-228/18 (fn. 25).

[27] Ibid., para. 55.

[28] Ibid., para. 58-59.

procurement directive[29] – a financial penalty may under certain circumstances be imposed.[30] Further, companies may be excluded from participation in future tenders (for up to 3-5 years depending on the reason for exclusion), if they commit violations in the context of projects funded by the EU that brings them within the remit of applicability of exclusion grounds, such as breach of a contract.[31] Thus, the system for exclusion of tenderers which are not eligible is based on the 2014 public procurement directive but the implementing, comprise of procedures and sanctions which are specific to the Financial Regulation and the EU institutions' procurement.

In the examined period, case law has concerned firstly, the conditions for exclusion from participation in future public procurement procedures under the EDES system,[32] and the procedural requirements for such exclusion, in particular the right to be heard.[33] Secondly, the cases have concerned disputes regarding the registration of detection in the system, i.e. applicants contest be registered in the EDES database (or the predecessor EWS).[34]

In addition to the case-law mentioned above, there has been a case concerning the changes to tenderers in the vein of *MT Højgaard/Züblin*.[35] In *Sopra*[36], the GC had to decide whether a decision to change an award decision regarding one of the Lots in a contract for the supply of IT services amounted to infringement of the exclusion criteria set out in the tender specifications as well as an infringement of the principles of transparency, proportionality, and equal treatment. The specifications imposed limitations on the combination of lots tenderers could bid for, therefore foreclosing the possibility of any given tenderer bidding for all lots for conflict of interest reasons. After awarding the contracts, the Parliament was informed of a merger that had taken place between two of the winning tenderers (Sopra

[29] Article 57(1) of the Public Procurement Directive from 2014.

[30] Article 138 in Financial Regulation 2018. Before issuing financial penalties, the panel mentioned in Article 143 must be consulted. Case T-664/17 *eSlovensko v Commission* [2018] ECLI-559, concerns the imposing of such a penalty, but the application was found to be inadmissible by the GC.

[31] Article 139(1)(b) of Financial Regulation 2018. The possibility of self-cleaning is incorporated in that procedure. Similarly to last indent of Article 57(6) of the Public Procurement Directive from 2014 which deprive tenderers who have been excluded by final judgment from participating in procurement or concession award procedures, there is no possibility for further self-cleaning (at a later stage) for tenderers who have been penalised by exclusion from participation in future tenders.

[32] E.g. Case T-151/16 *NC v European Commission* [2017] ECLI-437 concerning fraud in an EU funded project; the judgment however mainly concerned which version of the Financial Regulation and Implementing Regulation that applied.

[33] Case T-280/17 *GE.CO. P. Generale Costruzioni e Progettazioni SpA v Commission* [2018] ECLI-889.

[34] E.g. Case T-298/16 *East West Consulting SPRL v Commission* [2018] ECLI-967; Case T-290/18 *Agmin Italy SpA v Commission* [2020]ECLI-196.

[35] Case C-396/14 *MT Højgaard A/S and Züblin AS v Banedanmark* [2016] ECLI-347.

[36] T-182/15 (fn.20).

Steria Group and Groupe Steria) and which resulted in the breach of the abovementioned rules. This led to the decision from the Parliament to annul the award decision regarding one of the lots and the decision to rank another economic operator first for one of the lots.[37] The applicant sought the annulment of the decision, in part by alleging an infringement of the principles of transparency, proportionality and equal treatment.

In short, the applicant argued that the incompatibility clause was improperly applied since the merger of the companies happened after the bids were submitted and thus there was no conflict of interest that could vitiate the preparation of the tenders. [38]

The GC had to consider whether the failure to provide information could amount to a breach of Article 107(1)(a) of the Financial Regulation 2012 which entails that a contract cannot be awarded to "a tenderer who is guilty of misrepresenting the information required by the contracting authority as a condition of participation in the procurement procedure or fail to supply that information". Sopra Steria's obligation to inform the Parliament of factors capable of creating a situation that could give rise to a conflict of interest, as per Article 107(1)(b) of the Financial Regulation 2012.[39] The GC concluded that there were sufficient factors capable of creating a situation that could give rise to a conflict of interest. Consequently, the contracting authority was right to take such measures into account by the time of the award of the contract and Sopra Steria was indeed under the obligation of informing the Parliament of its merger plans.[40]

As for the infringement of the general principles, the applicant made five arguments to support their plea, none of which was accepted by the GC. Hence, the GC rejected the entire action. In particular, the GC found that the Parliament was not only correct, but also *obliged* to perform an automatic exclusion of the merged parties, since they had neglected to inform the Parliament about the merger. Doing otherwise would amount to favouring a tenderer since the awards were made on the basis of incomplete information from the tenderer.[41]

Article 57(4)(h) of the Public Procurement Directive from 2014 contains an exclusion ground similar to Article 107(1)(a) of the Financial Regulation 2012, which is cited above. However, a crucial difference is that the exclusion ground in the Public Procurement Directive from 2014 is voluntary and its application

[37] Ibid., para. 30-31.

[38] Ibid., para. 55.

[39] Ibid., para. 75-77.

[40] Ibid., para. 101.

[41] Ibid., para. 126.

therefore depends on the contracting authority having decided that it applies to the procurement procedure.

2.2.2 Selection criteria

According to the GC, the wide discretion of the contracting authority to organise its procurement and determine terms and conditions also applies to the selection criteria.[42]

The distinction between selection and award criteria which the *Lianakis* case-law settled in relation to the public procurement directives,[43] has (as is the case in the Member States) given rise to disputes in relation to procurement of EU institutions. The GC refers to the case-law of the ECJ and then makes a specific assessment of the circumstances of the case. In line with this case-law, even if the selection criteria contain criteria which concern the general quality of the tenderer, if the object of the contract to be awarded justifies it, the award of the contract may be based on the technical capability of the team proposed.[44]

Further, the GC has considered the scope for supplementing information to be submitted by tenderers. It has held that if a list of reference has been submitted with the tender, the contracting authority may after the time limit for submission of tenderers has run out request a missing certificate of good performance related to work on the submitted list of references.[45] Under the specific circumstances of the case, this appears to be in line with *Manova* case-law.[46]

Regarding more specific issues in relation to selection, in *Solelec v Parliament*,[47] the applicant alleged that the successful tenderer should have been rejected, as the annual reports submitted to document its economic and financial capacity in breach of Luxembourgish law had been filed too late to the trade and companies register. The GC rejected the claim pointing out that neither the tender terms, the applicable financial regulation or the applicable implementing regulation stipulated that only annual reports filed timely under national law are eligible as evidence of the tenderers economic and financial capacity. In this case, the GC also held that the contracting authority is not required to ensure that the successful

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[42] Case T-321/15 *GSA and SGI v Parliament* [2015] ECLI-834, para. 33 and the references therein; Case T-281/16 *Solelec and others v Parliament* [2017] ECLI-711, para. 23.

[43] Case C-532/06 *Lianakis and others* [2008] ECLI-40.

[44] E.g. Case T-764/14 *European Dynamics Luxembourg and Evropaïki Dynamiki v Commission* [2016] ECLI-723.

[45] T-281/16 (fn. 42), para. 60-76.

[46] Case C-336/12 *Manova* [2013] ECLI-647.

[47] T-281/16 (fn. 42).

tenderer has a legal personality for the duration of the contract – same as with authorisations – as long as prolongation is possible.[48]

2.3 Assessment of tenders

This section concerns the last phase of a procurement procedure, namely the assessment of tenders. The section covers minimum quality requirements, abnormally low tenders, award criteria and evaluation method.

2.3.1 Minimum requirements in terms of quality

The Union Courts accept that tenders from qualified tenderers may be rejected from the procurement procedure if the tender does not fulfil a minimum quality level,[49] and it is evident from the dataset that this is a very common award process for EU institutions.[50]

First, a situation where the criteria by which the minimum level of quality required is clearly stated in the tender documents, i.e. constitute minimum requirements.[51] This approach is unproblematic in terms of equal treatment and transparency if the criteria applied are quantitative, e.g. minimum number of hours or number of staff or it is similarly easy to assess for the tenderer whether its tender will meet the minimum specified (and it is therefore worth the effort to submit a tender). However, if the quality is measured qualitatively by the contracting authority, this approach to selection between tenders seems less transparent because the contracting authority may have a wide discretion in assessing the quality.[52] The interesting issue in this regard is the level of reasoning for rejection the contracting authority must apply. Even though the requirements in the Financial Regulation are not identical to those in the public procurement directives, some general conclusions can still be reached. Three judgments of the GC in the examined period concerned rejection on ground of insufficient quality of tenders for translation services,

[48] Ibid., para. 37-42.

[49] E.g. Case T-495/04 *Belfass v Council* [2008] ECLI-160 and Case C-546/16 *Montte* [2018] ECLI-752.

[50] A few examples are: Case T-554/10 *Evropaïki Dynamiki v Frontex* [2015] ECLI-224; Case T-764/14 *European Dynamics Luxembourg and Evropaïki Dynamiki v Commission* [2016] ECLI-723.

[51] C-546/16 (fn. 49), para. 39.

[52] This problem is recognised by the CJEU which however pointed out that the principles in Article 18 of the Public Procurement Directive from 2014 must always be adhered to; ibid. para. 38.

where the quality was measured on basis of a test translation provided by the tenderer.[53] The tenderers only got the reason for the rejection that their test translations did not obtain the sufficient number of points to meet the required quality level. The GC pointed out that according to article 161(3) of the applicable Financial Regulation, a contracting authority is obliged to notify all candidates or tenderers, whose requests to participate or tenders are rejected, of the grounds on which the decision was taken.[54] Article 161(3) of the 2015 Amendment to Financial Regulation 2012 had removed the following sentence: *"Unsuccessful tenderers or candidates may request additional information about the reasons for the rejection [of their tender]"* from that provision,[55] and in any event, the applicant had not made such a request. Further, it stated that the reasoning required by Article 161(3) of the applicable Financial Regulation must be assessed on the basis of 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.[56] In this particular case, the quality requirement had been clearly stipulated in the tender documents, and thus the GC found that the reason that this quality requirement was not met, was sufficient. These cases concern a situation where there was a "correct" reply to the test case; however, a more detailed reasoning is required under circumstances where this is not the case.[57]

2.3.2 Abnormally low tenders

The issue of abnormally low tenders is a much debated topic.[58] Case-law of the ECJ has mainly focused on the obligation to verify tenders that appear to be abnormally low, before they are rejected, and this case law has left a wide discretion with contracting authorities to assess when tenders appear to be

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[53] Case T-66/18 *BQ v Court of Justice de l'Union européenne* [2019] ECLI-566; Case T-51/18 *BP v Court of Justice de l'Union européenne* [2019] ECLI-570; T-50/18 *Smaro Tassi v Court of Justice de l'Union européenne* [2019] ECLI-573. Below, reference is only made to the *Smaro Tassi* judgement as the cases are very similar.

[54] Article 161(3) of Financial Regulation 2012 as amended by the 2015 Amendment to Financial Regulation 2012; Article 51(1) of the Public Procurement Directive from 2014 only requires the contracting authority to *inform* candidates and tenderers of decisions reached.

[55] Article 51(2)(b) has such a requirement for contracting authorities in the member States. The difference must be due to the requirement for reasoning in Article 161(3) of the Financial Regulation 2012 as amended by the 2015 Amendment to Financial Regulation 2012. On the obligation to state reasons under the Financial Regulation 2018, see below sc. 2.4.

[56] T-50/18 (fn.53), para. 22. The same must apply to the reasoning required under Article 51(2)(b) of the Public Procurement Directive from 2014.

[57] E.g. T-554/10 para 81 and 100 (fn. 50), where the reasoning was not sufficient.

[58] E.g. GS Ølykke *Abnormally Low Tenders – with an Emphasis on Public Tenderers* (DJØF Publishing 2010); A Sanchez-Graells, "Rejection of abnormally low and non-compliant tenders in EU public procurement: A comparative view on selected jurisdictions" in M Comba and S Treumer (eds) *Award of Contracts in EU Procurements* (DJØF Publishing 2013) 227; S Arrowsmith, *The Law of Public and Utilities Procurement* (vol. 1, 3. ed., Sweet & Maxwell 2014) 802 ff; GS Ølykke and J Nyström "Defining abnormally low tenders – a comparison between Sweden and Denmark" [2017] JCLE 666.

abnormally low and when they are in fact abnormally low. The new obligations in Article 69 of the public procurement directives from 2014 to verify apparently abnormally low tenders and to reject tenders which are abnormally low for particular reasons have not yet produced case-law from the ECJ that assists in defining (apparently) abnormally low tenders.[59]

In the examined period, the GC has adjudicated on several cases regarding abnormally low tenders. The applicants are mainly unsuccessful tenderers who claim that the winning tender is abnormally low[60]; in no case has such claim let to an overruling of the assessment of the contracting authority. In some cases, the contracting authority has verified the tenders and subsequently accepted the tenders. Only one case concerns the rejection of an abnormally low tender and the contracting authority's assessment was upheld by both the GC and the ECJ.[61] Regarding the obligation to reject tenders for particular reasons in Article 69(3) of the procurement directive from 2014, some cases before the GC have comprised claims related to the winning tenderers alleged non-adherence to labour law and social obligations, but none of the applicants have been successful in demonstrating that tenders were abnormally low on these grounds.[62]

The GC has repeatedly held that the assessment by contracting authorities of the existence of abnormally low tenders takes place in two stages: first, the assessment of whether any tenders appear to be abnormally low and, only if that is the case, second, the verification of whether such tenders are in fact abnormally low.[63]

The GC does not have the luxury of deferring decisions on the facts to national review bodies but must make the specific assessment of whether tenders appear to be and ultimately are abnormally low. In line with the case-law of the CJEU[64] the GC has held that the contracting authority has wide discretion in

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[59] However, in Case C-367/19 *Tax-Fin-Lex* [2020] ECLI-685, the ECJ held that a tendered price of EUR 0 is apparently abnormally low.

[60] A similar pattern may be observed in some Member States, cf. Ølykke and Nyström, op. cit.

[61] Case T-570/13 *Agriconsulting Europe v Commission* [2016] ECLI-40 as upheld by Case C-198/16 P *Agriconsulting Europe v Commission* [2017] ECLI-784.

[62] See e.g. T-228/18 (fn.25), para. 76; Case T-741/17 *Trasys International and Axianseu - Digital Solutions v AESA* [2019] ECLI-572. However, an applicant managed to obtain suspension of the procedure because the contracting authority should have found that a tender appeared to be abnormally low and thus should have verified whether that was in fact the case – which it turned out not to be, cf. order T-784/17 R *Strabag Belgium v Parliament* [2018] ECLI-17 and the follow-up judgment Case T-299/18 *Strabag Belgium v Parliament* [2019] ECLI-411.

[63] E.g. Case T-392/15 *European Dynamics Luxembourg and others v European Union Agency for Railways* [2017] ECLI-462, para. 87; T-228/18 (fn.25) [2019] ECLI-336, para. 73.

[64] E.g. Case C-568/13 *Data Medical Service* [2014] ECLI-2466, para. 50.

assessing of whether a tender appears to be/is abnormally low,[65] but that the assessment must be specific in relation to the composition of the tender and the object of the contract.[66]

The GC has clarified that a tender does not necessarily appear to be abnormally low, just because it is lower than other tenders,[67] but that this – together with e.g. the expected market price[68] – may be elements to take into consideration when screening for apparently abnormally low tenders.[69] It has elaborated on the concept of an apparently abnormally low tender and stated that such tenders give rise to the suspect that the tenderer will not be able to fulfill the contract on its terms. It has added that such suspicion in particular arises if it is doubtful whether the price offered covers the cost of adhering to the legislation in the Member State where the contract is to be performed with regard to wages, social contributions, health and safety in the workplace and rules prohibiting sale at a loss, and if it is doubtful whether the price offered covers the total cost which the technical aspects of the tender will entail.[70]

Regarding the concept of an abnormally low tender, the GC has indicated that the total price of the contract must be abnormally low, not just individual prices or prices for specific parts of the tender.[71] However, the specific tender's terms and conditions may imply that specific price elements are important for the assessment of whether the tender is abnormally low and the GC seems willing to cater its approach for such situations.[72] It has, in the same way as regarding the elaboration of the concept of an apparently abnormally low tender mentioned above, held that a tender is *not* abnormally low, if the contracting authority has verified that the price offered covers the cost of adhering to the legislation in the Member State where the contract is to be performed with regard to wages, social contributions, health and safety

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[65] E.g. Case T-698/14 *European Dynamics Luxembourg and Evropaïki Dynamiki v Commission* [2016] ECLI-476, para. 64-65.

[66] T-570/13 (fn. 61), para. 55; T-392/15 (fn.63), para. 83; T-228/18 (fn. 25), para. 69; T-299/18 (fn. 62), para. 60; T-741/17 (fn. 62), para 40.

[67] See already Case T-148/04 *TQ3 Travel Solutions Belgium v Commission* [2005] ECLI-274, para. 28-29 and 71; this viewpoint was confirmed by the ECJ in joined cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECLI-277, para. 26. In the examined period: e.g. Case T-90/14 *Secolux v Commission* [2015] ECLI-772, para. 64; T-281/16 (fn 42), para. 134 (29,07% difference) – interestingly, no interim measures were adopted by the GC as the condition of fumus boni juris was not fulfilled, cf. order T-281/16 R *Solelec and others v Parliament* [2016] ECLI-659; Case T-700/14 *TV1 v Commission* [2017] ECLI-35, paras. 57-60 (11% difference); Case T-725/17 *Clestra Hauserman v Parliament* [2019] ECLI-190, para. 61 (8.38% difference); T-228/18 (fn. 25) [2019] ECLI-336, para. 78-80 (2.3-17.33% difference).

[68] Which may be prices obtained in other tenders for similar contract objects, cf. T-698/14 (fn. 65), para. 70.

[69] E.g. T-392/15 (fn. 63), para. 88; T-741/17 (fn. 62), para. 43.

[70] T-90/14 (fn. 67), para. 61-62; T-700/14 (fn. 67), para. 41, T-392/15 (fn. 63), para. 86; T-228/18 (fn. 25), para. 72; T-741/17 (fn. 62), para. 43. See also order T-644/13 R *Serco Belgium and others v Commission* [2014] ECLI-57, para. 55.

[71] T-570/13 (fn. 61), paras. 60-61.

[72] E.g. T-784/17 R (fn. 62).

in the workplace and rules prohibiting sale at a loss, and that the price offered includes the total cost which the technical aspects of the tender will entail.[73] In this regard, the contracting authority may require specific documentation from the tenderer.[74] Further, the GC has indicated that the contracting authority may subject the explanations from the tenderer for the low price to a reality check by comparing the tendered price to prices accepted in tenders for similar contracts, including in the references provided by the tenderer.[75]

The GC has also elaborated to the duty to state reasons regarding abnormally low tenders, in particular it has held that contracting authorities are only required to give reasons to unsuccessful tenderers who find that the accepted tender is too low, if they are specifically asked to do so.[76] It is not sufficient to state that the tender did not appear to be abnormally low,[77] but the reasons do not have to be detailed, i.e. they may be limited to stating that the tender did not appear to be abnormally low e.g. compared to the other prices tendered.[78]

2.3.3 Award criteria

Same as under the public procurement directives from 2014, under the current rules EU institutions may award the contract to the tender with the lowest price, the lowest cost or the best price-quality ratio.[79] It is settled case-law that the contracting authority has a broad discretion as to the choice, content and implementation of the relevant award criteria, since those criteria must correspond to the nature, subject matter and specific features particular to each contract and to serve as best they can the targeted needs and objectives pursued by the contracting authority.[80] However, it is necessary that the criteria can be

[73] Already slightly before the examined period in Case T-638/11 *European Dynamics Belgium and others v EMA* [2013] ECLI-530, para 68; and in T-392/15 (fn.63), para. 91.

[74] T-570/13 (fn. 61), paras. 66-67.

[75] E.g. T-90/14 (fn. 67), para. 65; T-281/16 (fn. 42), para. 146; T-299/18 (fn. 62), para. 54 and 56.

[76] E.g. T-392/15 (fn. 63), para. 92-93; Case T-752/15 *European Dynamics Luxembourg and Evropaïki Dynamiki v Commission* [2018] ECLI-233, para. 74-75.

[77] Case T-74/15 *European Dynamics Luxembourg and Evropaïki Dynamiki v Commission* [2017] ECLI-55, para. 51.

[78] E.g. ibid., paras. 49 and 51; T-392/15 (fn. 63), para. 104.

[79] Article 167(4) of Financial Regulation 2018. Under previous rules, the award criteria were entirely aligned; thus under Financial Regulation 2012 the award criteria were "the automatic award procedure or by the best-value-for-money procedure" which corresponded to the "lowest price" or "most economically advantageous tender" in the public procurement directives from 2004.

[80] Case T-117/17 *Proximus v Council* [2019] ECLI-19, para. 48 and references therein.

applied objectively and uniformly in order to compare the tenders, and that they be clearly relevant for identifying the most economically advantageous tender.[81]

Several cases in the dataset concern the specific application of in particular qualitative award criteria, i.e. whether the contracting authority has correctly assessed the content of the tender; these claims are very specific to each case and are not considered further.[82] However, one issue should be mentioned, namely that the GC seems to find that it may be contrary to the principle of proportionality if the same deficiency leads to a withdrawal of points in respect several sub-criteria.[83]

Regarding the formulation of award criteria, the GC applies the same standard of a "reasonably well-informed tenderer exercising ordinary care" and has given detriment to the fact that the applicant – unlike other potential tenderers – had not requested clarification of the award criteria during the procedure.[84] Further, the GC pointed out that three other tenderers had been able to submit their tenders without asking for clarification of the award criteria.

Regarding weighting of award criteria, the GC has in the context of a framework agreement held that, if weighting on expected future demand it is not artificial or arbitrary, but rather intended to reflect the estimated volumes, strategic importance and interinstitutional dimension of each item.[85] The contracting authority is not required to state reasons for the weighting applied.[86]

In *Proof IT v EIGE*,[87] one of the award criteria was worth 20 point and the evaluation was reported with two decimals. The applicant claimed that sub-criteria should have been provided and that the evaluation method should have been unveiled by the contracting authority. The GC has underlined that it is not necessary for an award criterion to have sub-criteria, and that – in line with case-law from the ECJ[88] – the principle of transparency to not require the contracting authority to reveal its evaluation method.

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[81] Ibid., para. 49 and references therein.

[82] E.g. Case T-722/14 PRIMA v Commission [2016] ECLI-61; Case T-10/17 *Proof IT v EIGE* [2018] ECLI-682; Case T-450/17 *Eurosupport - Fineurop support v EIGE* [2019] ECLI-137.

[83] Case T-439/17 *Yellow Window v EIGE* [2019] ECLI-136, para. 113-116, and T-450/17 (fn. 82), para. 65-68, which both concern the same procedure.

[84] T-10/17 (fn. 82), para. 49-50.

[85] T-117/17 (fn. 80), para. 99.

[86] Ibid., para. 103.

[87] T-10/17 (fn. 82).

[88] Case C-6/15 *TNS Dimarso* [2016] ECLI-555, para. 27-28.

Thus, the contracting authority's obligations are to state the award criteria, sub-criteria, and their weighting in the tender terms.[89]

2.3.4 Evaluation method

In *Proximus v Council*,[90] a framework agreement was divided into several service packages. A tendered price for each service package was compared to the other financial tenders received for that service package. The applicant claimed that the lack of knowledge of the numerical comparator for the financial offer – as it was only established subsequent to the submission of tenders and was not disclosed to the tenderers at any point – deprived the tenderers of information useful for the preparation of tenders. This was rejected by the GC which pointed out that the applicant had not demonstrate how that piece of information could have influenced its preparation of the tender or that not having this information gave rise to a situation of 'irrational competition' for the tenderers. Further, the applicant claimed that the contracting authority should have looked at the *total price* rather than comparing *prices of service packages*, as only one contract comprising all service packages was to be awarded. The GC held that the evaluation method was chosen to respond to the specific nature of the framework contract in question and the objectives pursued, and that in the specific case, it was relevant for the contracting authority to assess the tenders at the level of each service package in order to ensure that the candidates would allocate the necessary resources to them in their tender. Thus, the GC held that considering the nature, subject matter and specific characteristics of the framework contract the contracting authority could compare the financial offers for the individual service packages rather than the total price.[91] The contracting authority had also used a price formula that inflated the magnitude of the price differences; the GC held that this did not exceed the contracting authority's discretion.[92] The judgment is also interesting because it contains several paragraphs concerning alleged risk of price manipulation vested in the evaluation model and the GC's rejection of the applicant's arguments in this regard.[93]

Generally, the GC abstains from assessing whether evaluation methods/models proposed by applicants would have been more advantageous than that applicable in the tender.[94]

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[89] T-10/17 (fn. 82), para. 49-50 and references therein.

[90] T-117/17 (fn. 80). Note that parts of the judgment are redacted for confidentiality reasons.

[91] Ibid., para. 60-63.

[92] Ibid., para. 71.

[93] Ibid., para. 64-88.

[94] Ibid., para. 102 and references therein.

2.4 Framework agreements – ranking of tenders in cascade mechanisms

Many of the judgments in the dataset concerns framework agreements, and generally, no specific notice is made of this in the other sections, as the applicable rules are the same.

Sometimes, framework agreements distribute contracts according to a cascade mechanism, i.e. a mechanism where the best tenderer is first asked to perform a contract, and if that tenderer is not able to fulfil the contract at that point in time, it is passed on to the second best tenderer and so forth. This implies that the ranking in the cascade is crucial for the tenderer. Thus, in the examined period, the GC has ruled on several cases brought by successful tenderers concerning their ranking in the cascade mechanism. A tenderer may seek to improve its ranking in various ways, e.g. by demonstrating that the tender of the better ranked tenderers should be rejected,[95] cf. above section 2.2, or by demonstrating the contracting authority's breach of the obligation to state reasons (procedural legality) or manifest error of assessment (substantive legality).

2.4.1 Obligation to state reasons regarding ranking in cascade mechanisms

Under the Financial Regulation 2018, the obligation to state reasons contains two main obligations for contracting authorities: they must provide reasons for the award decision to each tenderer and, upon request from unsuccessful tenderers that have not been excluded, they must provide: the name of the successful tenderer(s), and the characteristics and relative advantages of the successful tender(s),[96] the price paid or contract value, whichever is appropriate.[97] The latter part of the obligation to state reasons only apply to unsuccessful tenderers who submitted an acceptable. Thus, tenderers whose tender was rejected prior to evaluation, e.g. based on the ground for exclusion, lack of fulfilment of tender terms etc. must only be informed about the grounds for the rejection.

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[95] E.g. Case T-164/15 *European Dynamics Luxembourg and Evropaïki Dynamiki v Parliament* [2017] ECLI-906; T-556/11 (fn. 20), para. 78 – on this point the judgment was however overruled by the ECJ on appeal, cf. Case C-376/16 P *EUIPO v European Dynamics Luxembourg and others* [2018] ECLI-299, para. 36.

[96] This information was not provided with regard to some of the lots in Case T-297/09 *Evropaïki Dynamiki v AESA* [2015] ECLI-184; thus the decisions relating to the ranking of the applicant's tender for those lots were annulled.

[97] Cf. Art. 170 of Financial Regulation 2018, and point 31 of Annex I thereto. On the obligation to state reasons see above sc. **Fejl! Henvisningskilde ikke fundet.**, where comparison is also made to the obligations under the Public Procurement Directive from 2014.

In the examined cases, the GC aligns the scope of the reasons which the contracting authority must provide, and the documents which must be provided to a successful tenderer, who is not content with its ranking, to what must be offered an unsuccessful tenderer that submitted an acceptable offer.[98]

In several cases, the GC has found that the obligation to state reasons was breached by the contracting authority, e.g. because reasons for fulfilment of award criteria were lacking or were too general,[99] and has pointed out that in situations where the difference in score between the successful tenders (in the cascade mechanism) is small, the applicants' interest in obtaining a clear and understandable explanation as to the technical evaluation of their tender in order to verify the absence of error in the evaluation is particularly high.[100] In this context, the GC has also stated that it may be necessary to communicate the price of better ranked tenderers to ensure that the applicant understands its ranking.[101]

Further, the GC has held that although the contracting authority is required to state the reasons for the ranking of a tender in the cascade, it is not required to provide a detailed summary of how each detail of the tender was taken into account when the tender was evaluated.[102] However, the GC has clarified that this cannot lead to the comments sent to the applicants not showing clearly and unequivocally the reasoning of the institution, so as to enable them to know the justifications for the ranking of their offer.[103] It has also explained that it is not sufficient that the applicant may deduct or calculate information in the other tenders based on the evaluation criteria, as this would not provide the necessary certainty as to the correct application of the criteria and the accuracy of the results thus obtained.[104]

The GC has also stated that the contracting authority is not required to explain why a tender did not deserve the maximum number of points provided for by each award criterion; it suffices that the reasoning followed by the authority which adopted the measure is disclosed in a clear and unequivocal fashion.[105]

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[98] T-297/09 (fn. 102), para. 77; Case T-536/11 *European Dynamics Luxembourg and others v Commission* [2015] ECLI-476, para. 57; T-164/15 (fn. 101), para. 27; Case T-640/18 *Intercontact Budapest v CdT* [2020] ECLI-167, para. 39.

[99] T-556/11 (fn. 20), para. 254-259; T-164/15 (fn. 101), para. 44-45.

[100] Case T-691/13 *Ricoh Belgium v Council* [2015] ECLI-641, para. 63; T-164/15 (fn. 101), para. 50.

[101] E.g. Case T-667/11 *Veloss and Attimedia v Parliament* [2015], para. 60; T-164/15 (fn. 101), para. 61; T-640/18 (fn.104), para. 42.

[102] T-297/09 (fn.102), para. 86; T-536/11 (fn. 104), para. 56; Case T-299/11 *European Dynamics Luxembourg and others v OHIM* [2015] ECLI-757, para. 129; T-698/14 (fn. 65), para. 32; T-164/15 (fn.101), para. 28.

[103] T-164/15 (fn. 101), para. 51.

[104] T-164/15 (fn. 101), para. 64.

[105] T-297/09 (fn. 102), para. 89.

Finally, the GC has pointed out that lack of precision in the tender documents which provides the tenderer with the opportunity to propose their own solutions, requires more elaborate reasoning from the contracting authority than in situations where this is not the case.[106]

2.4.2 Manifest error of assessment

According to settled case-law, the contracting authority has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following a public procurement procedures, and the review by the GC regarding substantive legality is limited to checking that the facts are correct and there is no manifest error of assessment or misuse of powers.[107]

In the context of ranking in the cascade mechanism, the GC has in the examined period held that the following constituted manifest errors of assessment:

- Applying a weighting of various sub-criteria within an award criterion, which is not communicated in advance to the tenderers, vitiates the contracting authority's evaluation with a manifest error of assessment in the weighting of those sub-criteria.[108] However, the GC was corrected on appeal by the ECJ, which stated that a subsequent determination of weights must, satisfy three conditions as it must not: (i) alter the criteria for the award of the contract set out in the contract documents or contract notice; (ii) contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and (iii) have been adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.[109] These criteria had not been examined by the GC and the judgment was vitiated by an error of law in this regard.

- Making negative comments about the content of the tender which did not reflect the tender terms and conditions.[110]

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[106] T-299/11 (fn.108), para. 84-85 and 88.

[107] E.g. ibid., para. 58 and references therein. See also e.g. T-481/14 *European Dynamics Luxembourg and Evropaïki Dynamiki v EIT* [2016] ECLI-498, where the contracting authority acted within this discretion, and T-640/18 (fn. 104), para. 18, where the GC declared inadmissible the applicant's claim for the Court to assess the scores given to the higher-ranking tenders.

[108] T-299/11 (fn. 108), para. 91.

[109] Case C-677/15 P *EUIPO v European Dynamics Luxembourg and others* [2017] ECLI-998, para. 33.

[110] T-299/11 (fn. 108), para. 97-102; T-556/11 (fn. 20), para. 104, 186, 193-194 and 206; the judgment was upheld.

- Making negative comment about formalities which complied with the tender terms and conditions.[111]

- Distinguish between "key" and "non-key" deliverables in the evaluation, when key deliverables were not defined I the tender terms and conditions.[112]

- Misinterpreting or disregarding the wording of the tender.[113]

2.4.3 Claims for damages by tenderers that are awarded a framework contract but not ranked first in the cascade

Many of the examined cases concerning ranking of the tender in the cascade mechanism contain a claim for damages for loss of opportunity, even though the applicant is a successful tenderer. Below, specifics on the possibility of obtaining damages related to the ranking in a cascade mechanism are addressed. For further on the GC's general case-law on damages, see sc. 2.6.

According to settled case-law of the Union Courts, an inadequate statement of reasons does not trigger the award of damages to the applicant, as the breach of the obligation to state reasons does not imply that the ranking of the successful tenderers constitutes a wrongful conduct.[114] On the other hand, substantive illegality (e.g. manifest error of assessment) may give rise to damages, if the conditions are fulfilled.[115]

In *European Dynamics Luxembourg and others v OHIM*, the GC fund that the award decision – and thus the ranking it applied – should be annulled, as it was vitiated by errors of both procedure and substance.[116] The GC found that the applicant should be awarded damages for loss of the opportunity to be ranked first in the tender. The GC amongst other issues pointed out that at the end of the proceedings before the Court, there is a significant risk that the contract at issue has already been performed in full, and the retroactive annulment of an award decision no longer provides any benefit to the unsuccessful tenderer, meaning that the loss of opportunity is irremediable. It added that the failure by the EU

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[111] T-556/11 (fn. 20), para. 115 and 144.

[112] Ibid., para. 133.

[113] Ibid., para. 157 and 164.

[114] T-297/09 (fn. 102), para. 185; T-299/11 (fn. 108), para. 142; T-556/11 (fn. 20), para. 266.

[115] T-556/11 (fn. 20), para. 268.

[116] T-299/11 (fn. 108), para. 136.

judicature to acknowledge the loss of such an opportunity and the need to grant compensation in that regard would be contrary to the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.[117] The GC also rejected the contracting authority's argument that it would not have been obliged to award the contract, and thus not liable for the loss of the applicants opportunity to be ranked first, with reference to the fact that the applicant was accepted as a potential contractor.[118] However, on appeal, the part of the judgment concerning damages was annulled. The ECJ held that the GC had failed to ascertain whether and to what extent, in the light of the facts of the case and in the absence of any errors on the part of the contracting authority, the applicant would have been ranked first and awarded the contract in question.[119] The ECJ decided to give final judgment on the matter and held that the applicant had not discharged this burden of proof.[120]

The ECJ has also in other cases overruled the GC's award of damages in the type of cases mentioned above, because the applicant had not lifted the burden of proof, indicating that this burden is heavy.[121]

2.5 Interim measures

As the GC deals as court of first instance for cases involving EU institutions, there is a significant number of cases where claimants request interim measures for their protection while the main action is pending. As such, it is no surprise to find a reasonable number of interim measures' cases related to public procurement by EU institutions in the period of analysis. This is an area where the importance of GC's case law is mostly restricted to the scope of the cases brought directly before it since in the context of the Remedies Directive interim measures, these will turn on how national laws deal with them,[122] even though there is a degree of commonality in various jurisdictions despite national courts' discretion on the matter.[123]

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[117] Ibid., para. 145.

[118] Ibid., para. 144. In T-556/11 (fn. 20), para. 270, the GC also found it implausible that the contracting authority would not award the contract, as the applicant had been ranked fourth but had the highest quality.

[119] C-677/15 P (fn.115), para. 88.

[120] Ibid., para. 101-102.

[121] E.g. C-376/16 P (fn. 101), paras. 95-96.

[122] On these see,Steen Treumer, (2011) 'Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues', in Treumer and Lichere (eds) "Enforcement of the EU Public Procurement Rules' 20 and 53.

[123] Roberto Caranta, (2011) 'Many Different Paths, but Are They All Leading to Effectiveness?', in Treumer and Lichere (eds) "Enforcement of the EU Public Procurement Rules' 63-67.

Virtually every single case highlighted that interim measures are possible under Articles 256(1), 278 and 279 TFEU and 156(4) of the General Court Rules of Procedure, but are to be considered exceptional, particularly those that depend on the suspension of operation of an act do the presumption of legality of acts from EU institutions.[124] In consequence, claimants start in a weak position vis a vis their claims and in no cases were they able to get relief or even discharging the requirements.[125] As such it is no surprise that during the period assessed there was no successful example of interim relief being granted and that the GC has taken a fairly draconian view on the requirements for such relief.

The bulk of cases dealing with interim measures discussed urgency as a requirement and how it could be met, with the analysis of the requirements ending at that moment. In some the GC dealt also with *fumus boni juris* in those situations where the GC decided to go further in its analysis instead of stopping at the first failed hurdle.

2.5.1 Urgency

The GC holds the view that the urgency requirement implies certainty that the claimant will suffer irreparable harm if the challenged decision is not set aside. Since the interim measures action depends on the principal action which will settle the case, the relief is to be interim and temporary, that is to last until such final decision is forthcoming.[126]

In face of the above, it is no surprise that the GC considers irreparable losses in this context to be those which, at a first level, would certainly happen before the main action concludes.[127] At a second level, financial losses are considered to be grave and irreparable only if they affect the survivability of the claimant between the time of this interim relief decision and the decision in the main action.[128] As such, not every financial damage is worth of interim relief, but only those of a catastrophic nature.

In addition, the connection with the main action and its final decision implies a significant a degree of certainty of not only the damage itself but also of the consequence of the lack of an interim remedy in the near future. And even then, this is balanced by the view that tendering is prone to the normal vagaries

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[124] Order T-131/16 R *Belgium v Commission* [2016], para. 12-13.

[125] References to some such cases?

[126] Order T-117/17 R *Proximus v Council* [2017] ECLI-600, para. 22.

[127] Order T-796/19 R *HB v Commission* [2020] ECLI-82, para. 45, citing Order C-517/15 P-R *AGC Glass Europe e.a. v Commission* [2016] ECLI-21, para. 27.

[128] Order T-383/14 R *Europower v Commission* [2015] ECLI-190, para. 67.

and risk of any business activity, including thus unsuccessful bids[129] and that a prior difficult financial position which could be tipped over to bankruptcy by failure to secure a specific contract would not clear the hurdle for the urgency requirement.

Furthermore, the GC has also taken a view that assessing the survivability of the claimant requires not only knowing the financial position of the claimant, but also that of the group of which it is part.[130] This appears to consubstantiate a piercing of the corporate veil by assessing the survivability requirement not based on the data pertaining to the claimant only, but of the whole group it belongs to.

As for the importance of public contracts for the turnover (and eventually the survivability of the claimant) the GC has considered, rightly, that bidding for contracts by definition entails a degree of uncertainty and as such it cannot be taken for granted and able to generate the urgency needed for to clear the threshold for interim relief.[131]

2.5.2 Fumus boni juris

Regarding *fumus boni juris*, the jurisprudence of the GC in the period analysed was fairly consistent and reliant upon Art 156(4) of the Rules of Procedure. First, in the recognition it must exist for interim measures to be conceded and then with an emphasis on the wide discretion of the GC to assess it.[132] In addition, although the Court recognizes the relative strength of a *fumus boni juris* is connected with urgency it remains a separate requirement for the granting of interim measures and that both need to be discharged by the claimant. The latter is evidenced by the Court's refusal in following in full the jurisprudence of *Vanbreda*[133] where the ECJ accepted that the systemic effect of settled case-law which made it almost impossible for a tenderer to demonstrate irreparable harm from a rejection would violate the right to effective interim judicial protection guaranteed by Art 47 of the Charter of Fundamental Rights of the European Union. *Vanbreda* effectively ensured that even in situations of purely financial harm, a serious enough *fumus boni juris* should lead to the application of Art 47 of the Charter and as such, interim relief being granted. In any event, the view of the GC is that it is for claimant to argue (and

[129] Order T-652/19 R *Elevolution v Commision* [2020] ECLI-263, para. 49.

[130] T-796/19 R (fn. 127), para. 58-62

[131] Ibid., para. 63-65.

[132] As per Order T-734/18 R *Sumitomo/Tenka v Commission* [2019] ECLI-314, para.18, Order C-110/12 P(R) *Akhras v Council* [2012] ECLI-507, para. 23 and Order T-849/19 R *Leonardo v Frontex* [2020] ECLI-154, para. 11-13.

[133] Order C-35/15 P(R) *Commission v Vanbreda* [2015] ECLI-275, para. 30 and 57. *Vanbreda*, however was followed by the GC outside of public procurement in the period, namely in T-131/16 R (fn. 124), para. 41.

prove) such systemic effect of the settled case law which would affect its right to an effective interim judicial protection as guaranteed by the Charter.[134]

The Court restricted the application of *Vanbreda* as well to the pre-contractual phase, ensuring that interim relief such as suspensory effect could not be granted after the contract had been signed.[135] Even though, the Court considered that the contract signature cut off should not be applied mechanistically, since the claimant might only have gained access to crucial information after the end of the standstill period,[136] the fact of the matter is that this remains an exceptional.

2.6 Damages

As for damages, the GC has followed the prevailing CJEU view on the criteria for damages to be awarded, making them depend on the unlawfulness of the alleged conduct, the actual damage suffered and the existence of a causal link between them. These three requirements are cumulative and need to be discharged in full by the claimant for damages to be awarded.
As with interim measures, the degree of harmonization imposed by the Remedies Directive is quite limited,[137] therefore this particular section is mostly relevant as a glimpse of how the GC handles the issue of damages itself and not necessarily how it shapes the overall discussion on the topic.

2.6.1 Unlawfulness

For unlawfulness, the GC has applied the test of a sufficiently serious breach of a rule to confer rights on individuals as per the settled case law.[138] This can constitute manifest disregard by the institution of the limits to its discretion or violation of equal treatment for example.[139] In general, when checking that the three requirements had been met, the GC did not dwell on the unlawfulness since it is the first condition needed to be met in an action for damages. Instead, its decisions were focused on the verification of the two other requirements, apart from situations whereby the unlawfulness did not affect the outcome of

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[134] T-796/19 R (fn. 127), para. 73-75.

[135] Order T-690/16 R *Enrico Colombo and Corinti Giacomo v Commission* [2017] ECLI-370, T-117/17 R (fn. 126), para. 30, Order T-578/19 R *Sophia v European Parliament* [2019] ECLI-583, para. 24 and T-849/19 R (fn. 132), para. 19.

[136] T-578/19 R (fn. 135), para. 27-35.

[137] Roberto Caranta, (2011) 'Many Different Paths, but Are They All Leading to Effectiveness?', in Treumer and Lichere (eds) "Enforcement of the EU Public Procurement Rules' 70

[138] Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECLI-361, para. 42-43 and joined cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECLI-476, para. 173.

[139] Case T-199/14 *Vanbreda* [2015] ECLI-820.

the tender, for example due to the contracting authority giving inadequate reasons.[140] It is arguable that at least in some cases of verification of the causal link[141] it would have made more sense to focus instead on unlawfulness.

2.6.2 Actual damage

For the actual damage, there must be a 'real and certain' loss being up for the claimant to prove the damage alleged.[142] The GC has been consistent in considering that no uncertain or hypothetical loss is covered within this concept and has rejected compensation in situations which would depend on probabilities such as in *Eurosupport v EIGE*.[143] However, in *Vanbreda* it defined an actual damage of loss of opportunity in fairly hypothetical terms of 90% chance of the contract being awarded to the claimant.[144] It would seem that in what concerns loss of opportunity that the Court is willing to bend the definition of actual damage to include a chance below 100% of a future fact occurring. This same view of the probability of winning the contract was present as well in both *Valkaris* judgments[145] which are posterior to *Vanbreda*.

2.6.3 Causal link

As for the causal link, the GC requires a direct link of cause and effect between the unlawful act and the damage suffered, again being up for the claimant to prove such claim. Taken together with the demanding test for the actual damage suffered, this makes for a tight scope for redress and it can be evidenced by the decisions in *Evropaiki Dynamiki v Frontex*[146] and *Yellow Window v EIGE*[147] where the inadequate reasoning of a decision by the contracting authority was not enough to establish a causal link between the unlawful conduct and the alleged damage. Interestingly the GC treated the inappropriate reasoning as an issue of causality and not one of a serious enough breach of EU law, effectively accepting that in

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[140] T-667/11 (fn.101).

[141] E.g. T-554/10 (fn. 50).

[142] As per Case C-481/07 *SeLEX Sistemi Integrati v Commission* [2009] ECLI-461, para. 36 and Case T-88/09 Idromacchine and Others v Commission [2011] ECLI-641, para. 25.

[143] T-450/17 (fn. 82).

[144] T-199/14 (fn.139), para. 200.

[145]Case T-292/15 *Vakakis Kai Synergates v Commission* [2018] ECLI-103 and Case T-292/15 *Vakakis Kai Synergates v Commission* [2019] ECLI-84.

[146] T-554/10 (fn. 50).

[147] T-439/17 (fn. 83).

theory the violation of adequate reasoning of a decision is indeed a serious enough breach for the purposes of assessing liability.

2.6.4 Specific damages claims

2.6.4.1 Loss of profit

The GC is yet to concede damages for loss of profit and in the case that it came closest to[148] it considered that there is no actual damage from an award arising from an unlawful conduct of the contracting authority. The GC held that since the Commission retains a wide discretion when awarding contracts, even if the claimant was the only surviving tenderer at the end of the procedure, there is no certainty that the contract would actually be entered into. As such, because there is no obligation to conclude a contract, the loss of profit or loss of revenue from a contract illegally awarded is hypothetical and does not meet the actual damage test set up above.

It is fair to say that the Court's view depends on the actual margin of discretion available to the contracting authority to end a procedure at any given moment without awarding the contract. In consequence, in those jurisdictions where such discretion is constrained at the end of the procedure, perhaps due to general principles such as good administration, good faith or legitimate expectations the answer would be different.

2.6.4.2 Loss of opportunity

For loss of opportunity, the actual damage test used by the GC also makes it impossible for claimants to obtain redress for opportunities missed out on other tenders, that is in other procurement procedures the economic operator could have bid for instead of the actual procedure it challenged. Once more, these will be considered as hypothetical and do not meet the actual damage requirements. In this traditional sense, loss of opportunity is conceived in the context of an opportunity cost vis-a-vis the counterfactual of hypothetical procedures not entered into by the claimant.

However, first in *Vanbreda*[149] and then in *European Dynamics Luxembourg and Others v EUIPO*[150] *Valkaris v Commission*, the Court adopted a different concept of loss of opportunity, that is the loss of opportunity in the actual procedure challenged and affected by the unlawful behaviour of the contracting

[148] T-292/15 [2018] (fn. 145), para. 164-167 and 187.

[149] T-199/14 (fn. 139), para. 195-199.

[150] T-556/11 (fn. 20).

authority. The GC's view in these is based on an analogy from the ECJ case *Agraz and others v Commission*[151] which was about production aid for vegetables and where the Commission also benefited from a margin of wide discretion. In this case the ECJ concluded that such discretion by the Commission for defining the production aid amounts did not automatically lead to the damage to be uncertain.[152]

If in *European Dynamics Luxembourg and Others v EUIPO*, the loss of opportunity made sense since the object of the dispute was to join a framework agreement with multiple participants, in both *Vanbreda* and *Valkaris* the Court accepted a narrowly defined loss of opportunity which maps out directly to the contract being awarded.

In *Valkaris* the GC distinguished this loss of opportunity from loss of profit, since the former contains the compensation for the loss of opportunity to conclude the contract and not the contract itself as in the latter.[153] The loss of opportunity was considered by the GC to be actual and certain, despite its own admission that the Commission retained the discretion to terminate the procedure. This appears to be a very contorted view of the facts to provide a reasonable redress to the claimant without going against the settled case law of not providing compensation for lost profits. In effect, the GC is splitting hairs between loss of opportunity and loss of profit and that is evident when one analyses the quantum of the compensation which is to be based on the net profit expected.[154] In addition, it can be argued that the analogy from *Agraz* to the damage occurring from procurement procedure is stretched at best. These are not really analogous situations since in *Agraz* the production aid is an end in itself whereas in procurement the vitiated award decision is a step towards a contractual agreement between the parties and one which may not happen at all due to the Commission's discretion.

Further to the above, the view of the GC is puzzling since it assumes the contracting authority would have carried on with the procedure and awarded the contract to the claimant had the vitiating factor not occurred. This logic is in evidence in *Vakakis*: *"the fact remains that those situations of abandonment of the procurement or cancellation of the procedure did not actually materialize"*.[155] In other words, the GC considers the opportunity to be awarded the contract to be worth of redress, but not the loss of profit of the contract itself. Therefore, it underpins an "actual and certain" damage on a hypothetical behaviour by the contracting authority, effectively reducing its wide discretion to end a procedure to zero in this exercise.

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[151] Case C-243/05 P *Agraz and others v Commission* [2006] ECLI-708.

[152] Ibid, para. 30 and 41.

[153] T-292/15 [2018] (fn. 145), para. 188.

[154] Ibid., para. 219; T-292/15 [2019] (fn. 145), para. 24.

[155] T-292/15 [2018] (fn. 145), para. 189.

The GC also held that *"the applicant definitively lost an opportunity to be awarded the contract"*[156] and if that is the case, then the logical conclusion of this argument is that the loss is actually of the contract itself since only the contract would put the claimant in a position of having an interest worth protecting. In other words, the contract *is* the opportunity and in consequence, it is the profit of the contract that warrants protection.

The counter argument to the view above might be that awarding damages for loss of profit would entail interpreting the nature of the contracting authority's liability as contractual instead of non-contractual which is the accepted view regarding unlawful conduct during a public procurement procedure.

2.6.4.3 Costs and expenses incurred with participation

As for the costs and expenses incurred with the participation in a public procurement procedure, the GC's overall view remains that these are not recoverable since they are part of the regular business risk any economic operator must shoulder itself, as per *Succhi di Frutta*.[157] However, in *Vakakis*[158] the GC considered the implications on the principles of legal certainty and protection of legitimate expectations without really elaborating why such principles had to be treated differently from the existing case law. It does, however, explain that the unlawful conduct led directly to the damage in the form of the costs and expenses incurred, and as such it warranted redress.[159] What the court did not do was to tie this compensation for costs and expenses to the existence of a loss of opportunity and therefore made them freestanding, thus directly at odds with *Succhi di Frutta*.

Even as freestanding damages, the compensation for costs and expenses seems odd in a case where the GC has decided to award damages for loss of opportunity. This is so because the quantum for the loss of opportunity will include those costs, as the GC itself then accepted in the subsequent judgment of the same case.[160]

In conclusion, the GC has followed the settled case law and consistently applied the traditional test for non-contractual liability of an unlawful and serious enough breach, an actual and certain damage and a causal link between the first two. In consequence, loss of profit arising from a contract wrongly tendered

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[156] Ibid., para. 191.

[157] Case C-497/06 P *CAS Suchi di Frutta v Commission* [2009] ECLI-273, para. 79.

[158] T-292/15 [2018] (fn. 145), para. 194-198.

[159] Ibid., para. 198.

[160] T-292/15 [2019] (fn. 145), para. 53.

remains a bridge too far for claimants. However, the GC has been developing a new approach regarding loss of opportunity narrowly defining it as the loss of the opportunity for the specific contract challenged by the claimant. In this context, the GC found that this loss of opportunity constitutes an actual and certain damage able to generate non-contractual liability for the contracting authority. In addition, when considering the quantum of the compensation for this damage the GC takes into account the probability that the contract would be awarded and the expected net profit of the claimant in that scenario. This seems a convoluted attempt to sidestep the settled case law on not awarding loss of profit arising from a contract unlawfully tendered.

3. CASES CONCERNING COMMISSION DECISIONS WITH LEGAL BASIS IN THE PUBLIC PROCUREMENT DIRECTIVES

In the examined period, only one case of this type has been identified; *Österreichische Post v Commission*.[161] The case concerns an unsuccessful application from the Austrian universal postal service provider (USP) for exemption from the duty to apply the Utilities Directive to its procurement. The possibility for exemption is found in Article 30 of the Utilities Directive from 2004,[162] which applied to the factual circumstances of the case, and now in Articles 34-35 of the Utilities Directive from 2014. To obtain exemption, the Austrian USP had applied to the Commission. The applicant must provide the documentation listed in the Commission's Decision implementing the exemption,[163] to demonstrate that the relevant activities are directly exposed to competition on markets to which access is not restricted. The Commission is obliged to take a Decision within three months; however, the timeframe may be extended to six months if duly justified. If the Decision is not adopted timely, the exemption applies. This puts pressure on the Commission, and in *Österreichische Post v Commission* the GC repeatedly referred to this pressure, as well as to the limited powers of investigation awarded to the Commission in the Utilities Directive, stating that the necessary consequence of these factors is that the Commission has to rely on documentation provided by the applicant.[164]

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[161] Case T-463/14 *Österreichische Post v Commission* [2016] ECLI-243.

[162] Directive 2004/17/EC [2004] O.J. L134/1.

[163] Cf. Commission Decision 2005/15/EC of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2005 L 7/7 now replaced by Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, OJ 2016 L 275/39 (Commission Decision 2016/1804).

[164] T-463/14 (fn. 161), para. 41, 50, 75, 125, 134, 142, 204.

Thus, the burden of proof is on the applicant, and *Österreichische Post v Commission* illustrates that this burden is not necessary straight forward to lift. There are two criteria which must be fulfilled. First, the applicant must show that is directly exposed to competition and, second, this exposure must be on markets to which access is not restricted. Regarding the first criterion, a complicating factor is that the assessment regarding exemption from the Utilities Directive is *sui generis*, although the provision stipulates that the assessment of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, and the wording of parts of the provision is identical to certain competition law concepts.[165] These factors had let the Austrian USP to focus on traditional competition law analysis in its documentation, and this was not convincing to the Commission. Regarding the second criterion, it is fulfilled if the Member State has implemented EU rules for the relevant sector[166]; as Austria had implemented the Postal Directive,[167] fulfilment of this criterion was not disputed.

The GC conducted a thorough assessment and fully supported the Commission's position on all central issues, notably that electronic and paper mail are not substitutes, and are thus not part of the same relevant market.[168] It held in particular that since the use of electronic mail in some situation is mandatory under EU law, it cannot be substituted by paper mail, but the GC also emphasised that only paper mail is covered by the universal service in the Postal Directive.

Exemption from the Utilities Directive may be granted partially, and the application concerned several core postal service products. The applicant only managed to convince the GC that the Commission's Decision should be annulled with regards to one product: addressed business letters at international level (B2X). For this product, the GC found that it could be deducted from the documentation that the Austrian USP had a small market share (the exact number is confidential in the public version of the judgment), and thus was directly exposed to competition in this market.

Although several decisions have been made by the Commission concerning exemption from the Utilities Directive, this is the first judgment on the subject. The judgment seems to be relevant for future assessments of exemptions from the Utilities Directive, as the material conditions for exempting an

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[165] E.g. Art. 30(2) of the Utilities Directive from 2004 and Art. 34(2) of the Utilities Directive from 2014 use a wording close to the wording of the Commission notice on the definition of relevant market for the purposes of Community competition law [1997] O.J. C372/5.

[166] Cf. Art. 30(3) of the Utilities Directive from 2004; Art. 34(3) of the Utilities Directive from 2014.

[167] Art. 3 of Directive 97/67/EC [1998] O.J. L15/14 as amended most recently by Directive 2008/6/EC [2008] O.J. L52/3.

[168] T-463/14 (fn. 161), para. 45-75.

activity from the provisions the Utilities Directive from 2004 are substantially the same as under the Utilities Directive from 2014.[169]

4. CASES CONCERNING COMMISSION DECISIONS UNDER STATE AID LAW

In the examined period, ten cases were identified that related to the interface between public procurement law and State aid law. The main bulk of these concern the assessment of if (and to some extent how) a tender procedure can be used to minimise the amount of State aid granted. Broadly stated, the cases could be categorised into three categories. First, cases where the State act as vendor, being assumed that the conduct of an open tender procedure leads to the result that no State aid is granted to the buyer.[170] Second, cases where the State buys the provision of public services, i.e. a classical public procurement situation, and a tender procedure – from a State aid perspective – ensures that the public service provider (the economic operator) is not overcompensated. Third, cases related to the categorisation of activities as economic or non-economic which is central for the applicability of State aid law. Whereas, in many cases, the activity of conducting public procurement will be a non-economic activity,[171] the GC had the opportunity to examine whether certain inhouse activities related to the implementation of the obligation to digitalise public procurement procedures in the Public Procurement Directive from 2014 were economic or non-economic and thus whether State aid could be granted to the activities. Since the first category does not really constitute public procurement, our focus for this section will be on the remaining two.

4.1 The State buys provision of public services

Imposing of public service obligations, e.g. by way of a public service contract, is subject to State aid rules, if compensation is provided to cover the cost of the obligations. In *Altmark*[172], the CJEU created a link between public procurement law and State aid law by referring to public procurement procedures as a mechanism to assess whether the compensation for the delivery of a public service involves State aid or not.[173] The CJEU stated four cumulative conditions[174] that must be fulfilled in order for a public service compensation not to involve State aid. First, the public service to be performed by the undertaking must be clearly defined. Second, the calculation of the compensation should be objective and transparent and

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[169] Recital 3 of Commission Decision 2016/1804 (fn. 163).

[170] For example, cases such as T-233/11 and T-262/11 *Ellinikos Chrysos* [2015] ECLI-948, which was partially upheld by the ECJ in the appeal, cf. C-100/16 P *Ellinikos Chrysos v Commission* [2017] ECLI-194.

[171] T-319/99 *Fenin v Commission* [2003] ECLI-50 as upheld on appeal, cf. C-205/03 P *FENIN v Commission* [2006] ECLI-453.

[172] C-280/00 *Altmark* [2003] ECLI-415.

[173] E Szyszczak 'Altmark Assessed' in E Szyszczak (ed.) *Research Handbook on European State Aid Law* (Edward Elgar 2011) 294f.

[174] C-280/00 (fn. 172), para. 89–93.

must be laid down in advance. Third, the CJEU laid down a restriction against overcompensation for the service provided. Fourth, either a procurement procedure or a benchmarking exercise; the latter is relevant in situations where no tender has been conducted, e.g. below threshold contracts or where specific exemptions from the public procurement directives apply. From a public procurement perspective, the fourth *Altmark* condition is the most interesting, since it points to the use of a tender procedure as one way of ensuring that the compensation paid by public authorities does not involve State aid.

In the examined period, the GC ruled on the application of the *Altmark* conditions in four cases.[175] Overall, the GC seemed to allow Member States a wide margin of discretion in defining a given service as a Service of General Economic Interest (which legitimises the imposing of public service obligations, cf. Article 106 TFEU)[176], but Member States still have to demonstrate the fulfilment of the requirements associated with this definition.

In one case, no tender procedure had been conducted and, therefore, the GC had to assess whether an advantage had been granted to the recipient. While recognising that a wide discretion exists for the definition of what is a 'well run and adequately provided' undertaking (the benchmark stipulated in *Altmark*), it considered that a benchmarking exercise has to be conducted as otherwise it would render inoperative the fourth *Altmark* condition.[177]

Furthermore, the GC provides some guidance on the two alternatives of the fourth *Altmark* criterion mentioned above. In all cases analysed, the GC expressed the view that it is up to the Member State to set the level of compensation for the public service provider, but not to overcompensate for the service *ie* by paying above the market price. As can be inferred, the conduct of a tender[178] would provide evidence of such market price but in its absence an ex-ante benchmarking study would be acceptable.[179]
In two of the cases, the GC found that the measure in question did not constitute a public service and hence, did not fulfil the first *Altmark* criterion.[180] However, in both cases the GC went on to examine the

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[175] T-674/11 *TV2/Danmark v Commission* [2015] ECLI-684, as partially annulled by C-656/15 *Commission v TV2/Danmark* [2017] ECLI-836 and by C-657/15 P *Viasat Broadcasting UK / TV2/Danmark* [2017] ECLI-837, the appeal brought by TV2/Danmark was dismissed, cf. C-649/15 P *TV2/Danmark v Commission* [2017] ECLI-835; T-125/12 *Viasat Broadcasting UK v Commission* [2015] ECLI-687, as upheld on appeal, cf. C-660/15 *Viasat Broadcasting UK v Commission* [2017] ECLI-178; T-454/13 *SNCM v Commission* ECLI-134; and, T-462/13 *Comunidad Autonoma del Pais Vasco and Itelazpi v Commission* [2015] ECLI-902 as upheld on appeal, cf. C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission* [2017] ECLI-999.

[176] E.g ibid T-462/13, para. 50.

[177] T-674/11 (fn. 175), para. 114-120.

[178] T-462/13 (fn. 175), para. 113 read in conjunction with para. 108.

[179] Ibid. para. 124.

[180] T-462/13 (fn 175) and T-454/13 (fn 175).

fourth *Altmark* criterion, concluding it had not been met[181] which is interesting, since the GC was not obliged to do so as the *Altmark* conditions are cumulative.

As mentioned, a State transaction that is conducted in accordance with market conditions is likely not to involve State aid. In situations where the State procures of services through the conduct of a public procurement procedure, the CJEU seems to have developed a two-step test requiring 1) that the procurement represents a genuine need for the authority and 2) that the purchase is made through an open, transparent and non-discriminatory tender procedure.[182] If these two conditions are fulfilled there seem to be a presumption that no advantage is conferred on the provider chosen for the contract. This approach was confirmed by the GC in the period of assessment in two cases.[183]

4.2 Are activities relating to the implementation of the public procurement directive economic or non-economic activities?

The GC had the opportunity to rule on the subject of the state carrying out (or not) economic activities in one case, concerning the development of a procurement platform by the Netherlands.[184] The GC took the view that the State carries out non-economic activities when they comply with their obligations under the procurement directives, i.e. facilitating the required means for fulfilling the obligation to conduct electronic public procurement procedures. Thus, according to the GC, the activities of a contracting authority that is connected to the fulfilment of obligations under the procurement directives (and, possibly other EU law obligations) are to be considered as activities connected with the exercise of public powers not subject to State aid rules. This decision was then upheld in full by the CJEU.[185]

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[181] T-462/13 (fn 175) para. 88 and T-454/13 (fn 175) para. 262.

[182] See e.g. T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission* [1999] ECLI-12 and T-116/01 and T-118/01 *P&O European Ferries* [2003] ECLI-217, as upheld on appeal, cf. C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) v Commission* [2006] ECLI-356.

[183] T-138/15 *Aanbestedingskalender v Commission* [2017] ECLI-675, and T-607/17 *Volotea v Commission* [2020] ECLI-180.

[184] T-138/15 (fn. 183).

[185] C-687/17 P *Aanbestedingskalender v Commission* [2019] ECLI-932.