

The difficult balance between transparency and competition in public procurement: Some recent trends in the case law of the European Courts and a look at the new Directives

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Abstract:

This paper stresses the negative impact that the excessive levels of transparency imposed by public procurement rules can have on competition for public contracts and, more generally, on the likelihood of cartelisation of the markets where public procurement takes place. The paper critically assesses some recent Judgments of the Court of Justice of the European Union and the General Court from this perspective and shows how the top EU Courts are still oblivious to the fact that excessive transparency may diminish the effectiveness of procurement by reducing competition. It also indicates that the case law itself has unused balancing tools that may help reduce the negative impact of excessive transparency, particularly if coupled with a reduction of the financial incentives offered to litigants that have no other claim than a 'mere' lack of compliance with full transparency. The paper concludes that a reform in the enforcement and oversight mechanisms oriented towards the setting up of a semi-opaque review system would overcome some of the deficiencies identified in the current case law from a law and economics perspective.

Keywords: Public procurement, transparency, confidentiality, good administration, duty to provide reasons, collusion, bid rigging, competition, oversight, administrative discretion, litigation.

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The difficult balance between transparency and competition in public procurement: Some recent trends in the case law of the European Courts and a look at the new Directives

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1. INTRODUCTION

One of the aspects of the interplay between competition and public procurement that is receiving increasing attention concerns the impact of the transparency created by procurement rules on effective competition for public contracts and, beyond that, on the risk of cartelisation of procurement markets.² Even if there can be some disagreement concerning the degree in which the increased transparency derived from public procurement rules facilitates collusion (or bid rigging), it seems unquestionable that reducing the costs of exchanging information and simplifying the monitoring of competitors' tendering behaviour does support successful bid rigging strategies. As has been very clearly stated, '*[a]s a general rule, the more information the [contracting authority] conveys about bidder identities, the bids submitted, and auction outcomes, the easier it is for a ring to be effective in its work of suppressing rivalry among members*'.³

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² For a more general discussion, see JJ Snider Smith, 'Competition and Transparency: What Works for Public Procurement Reform' (2008) 38 *Public Contract Law Journal* 85; and A Sanchez Graells, 'Public Procurement and Competition: Some Challenges Arising from Recent Developments in EU Public Procurement Law', in C Bovis (ed) *Research Handbook on European Public Procurement* (Cheltenham, Edward Elgar, forthcoming).

³ RC Marshall and LM Marx, *The Economics of Collusion. Cartels and Bidding Rings* (Cambridge, MA: MIT Press, 2012) 200.

Even if the European Commission was aware of some of the risks for excessive transparency and tried to include some anti-collusive devices in its 2011 proposals for new Directives on public procurement, this has not been one of the main drivers in the revision of the current rules. Moreover, in parallel to the formal revision of the EU rules contained in the current public procurement Directives, some traits of the procurement system have been the object of recent significant developments in the case law of the Court of Justice (CJEU) and the General Court (GC) of the European Union. One of such areas relates to the level of transparency that must be given to key decisions and documents in public tenders and, more specifically, to the degree of disclosure of (potentially) confidential information that is necessary to uphold the procedural rights granted to (disappointed) tenderers, particularly in view of their ability to effectively challenge award decisions.

This is an issue that generates significant competition law concerns⁴ that, in my opinion, have not been taken into proper consideration by the EU Courts—and which the revision of the current rules is not expressly aimed at correcting. Such concerns derive from the close implications that transparency has in terms of the likelihood of collusion and bid rigging. So far, the EU Courts have addressed the issue of transparency exclusively under the light of the need to prevent discriminatory practices and favouritism (or corruption, in a broad sense) and to effectively equip tenderers to raise successful challenges against procurement decisions where warranted; but the Courts have overlooked the need to balance such considerations with the prevention of collusion in public procurement procedures. As clearly indicated by the OECD,

‘Strategies to address collusion and corruption in public procurement must address a fundamental tension: while transparency of the process is considered to be indispensable to corruption prevention, excessive and unnecessary transparency in fact facilitates the

⁴ For discussion on the interrelation between transparency, competition, collusion and corruption from an economic perspective, see EA Podkolzina *et al*, ‘Information Transparency in Public Procurement: How it Works in Russian Regions’ (Higher School of Economics Research Paper No. WP BRP 01/EC/2011, 12 October 2011) <<http://ssrn.com/abstract=1998069>> accessed 5 November 2013.

formation and successful implementation of bid rigging cartels. The extent to which transparency is a desirable aspect of a procurement process therefore depends on the circumstances, and may require trade-offs between best practice approaches to avoidance of collusion and corruption' (emphasis added).⁵

Despite this clear clash of goals between anticorruption (or, more generally effective oversight) and anticollusion measures, and probably inadvertently, the case law of the EU Courts has created a set of rules on transparency that trigger competition concerns.⁶ This has already been clearly stressed:

'a number of deficiencies of the European legislation have been identified that give rise to law and economics concerns. A greater than necessary amount of information is divulged in some of the European tender procedures. [...] Relevant information regarding the selected bid, the name of the winning bidder and the reason for the rejection must be provided upon request by the tendering authority. While this is, of course, desirable from an administrative law perspective, the degree of transparency exceeds the level desirable from a law and economics perspective'.⁷

Despite such clear insights, the development of this area of EU public procurement law has been completely oblivious to the potential undesirable effects that an excessive degree of transparency carries. The legal basis for such transparency obligations ultimately rests in Article

⁵ OECD, 'Competition and Procurement: Key Findings' 19 (OECD Policy Roundtables, 2011) <<http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48315205.pdf>> 5 November 2013.

⁶ The situation is comparable to that of most other OECD jurisdictions, since all of them have implemented very strict transparency requirements in their public procurement systems, most likely as an anticorruption device; OECD, *Transparency in public procurement* (Government at a Glance, 2011) <http://dx.doi.org/10.1787/gov_glance-2011-47-en> accessed 24 January 2013.

⁷ SE Weishaar, *Cartels, Competition and Public Procurement. Law and Economics Approaches to Bid Rigging*, 6 New Horizons in Competition Law and Economics (Cheltenham, Edward Elgar, 2013) 103-105.

41(2)(c) of Directive 2004/18⁸—and its twin provision in Article 100(2) of the Financial Regulation⁹—which require contracting authorities to inform any tenderer who has made an admissible tender, upon their request and as quickly as possible, of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer(s). This rule is bound to be perpetuated by Article 53 the new public procurement Directive¹⁰. In their recent decisions interpreting this duty to disclose evaluation documentation to disappointed bidders in order to allow them to effectively challenge award decisions, the CJEU and the GC have reinforced very strict debriefing standards that require contracting authorities to provide substantial information concerning other tenderers' offers (notably, at least, the winning tenderer's) to all participating tenderers (below §2 and §3).

The EU Courts¹¹ have considered that this obligation is sufficiently discharged only when the contracting authority provides very detailed information about the tender evaluation process and, in particular, gives information that enables the disappointed tenderer to perform a relative comparison of its offer vis-à-vis the tender of the winning bidder—with the only limits that the contracting authority is not obliged to provide a full copy of the evaluation report,¹² nor a detailed

⁸ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Directive 2004/18) [2004] OJ L134/114.

⁹ Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (Financial Regulation) [2002] OJ L248/1.

¹⁰ The reference is to the final compromise text, bound to be adopted in December 2013. Please bear in mind that numbering can be altered in the final version of the Directives. The final compromise text is available at <<http://register.consilium.europa.eu/pdf/en/13/st11/st11745.en13.pdf>> last accessed 5 November 2013.

¹¹ Case C-629/11 P *Evropaïki Dynamiki v European Commission (ESP-ISEP)* [2012] nyr; Case T-183/10 *Sviluppo Globale GEIE v Commission* [2012] nyr.

¹² Case C-561/10 P *Evropaïki Dynamiki v European Commission (SEI-BUD/AMD/CR)* [2011] nyr at para. 25.

comparative analysis of the successful tender and of the unsuccessful tender¹³ (but, in principle, could do either of those things if the authority so wished). In particular, the CJEU has considered appropriate that the contracting authority (in that case, the European Commission) provided the disappointed tenderer with extracts of the evaluation report that

‘contained tables relating, in particular, to the technical evaluation of the tenders [...] and indicating, for each award criterion, the number of points obtained by [the disappointed tenderer] in comparison with the successful tenderer, broken down each time into sub-criteria, as well as the maximum number of points attainable per sub-criterion and the weighting of each of those sub-criteria in the overall evaluation’.¹⁴

From the Judgment (further discussed below §2.1), it is not only clear that the current practice is to debrief disappointed tenderers in full, but also that the current rules require the disclosure of certain information (of most relevance, the name of the winning bidder) that may create excessive transparency—as any tenderer is in a position to fully understand the content of the winning bid and, consequently, can take that (otherwise) confidential information into consideration in future tenders.

Moreover, contracting authorities are under significant pressure to fully discharge their debriefing obligations, in view of the preponderance that they have been given in terms of due process rights:

‘It is noteworthy in this regard that the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1) sets an obligation on the administration to justify its decisions and that this motivation is not only in general, the expression of the transparency of administrative action, but it must also allow the individual to decide, with full knowledge of the facts, if it is useful for her to apply to a court. There is therefore a close relationship between the obligation to state reasons and

¹³ Case C-235/11 P *Evropaiki Dynamiki v European Commission (CITL/CR)* [2011] nyr at paras. 50 and 51.

¹⁴ Case C-629/11 P *Evropaiki Dynamiki v European Commission (ESP-ISEP)* [2012] nyr at para. 26.

the fundamental right to effective judicial protection and the right to an effective remedy under Article 47 of the Charter of Fundamental Rights'.¹⁵

In this situation, it is not difficult to see that contracting authorities will have a dangerous incentive to disclose very detailed and precise information '*of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer(s)*'. And, consequently, there is a significant risk of strategic use of review mechanisms in order to try to obtain confidential information or business secrets from competitors. Moreover, this generates *per se* a degree of transparency that makes collusion and bid rigging extremely easy to sustain and to keep concealed thanks to the use of the contracting authority itself as a communication mechanism between colluding tenderers¹⁶.

To be sure, Article 41(3) of Directive 2004/18¹⁷ and Article 100(2) of the Financial Regulation include an exception whereby contracting authorities can decide to withhold certain information

¹⁵ Case T-183/10 *Sviluppo Globale GEIE v Commission* [2012] nyr at para. 40 (own translation from French).

¹⁶ See OECD, 'Procurement Markets' (1999) 1 *OECD Journal of Competition Law and Policy* 83, 85-87 and 92-95; BD Bernheim and MD Whinston, 'Multimarket Contact and Collusive Behavior' (1990) 21 *RAND Journal of Economics* 1; A Skrzypacz and H Hopenhayn, 'Tacit Collusion in Repeated Auctions' (2004) 114 *Journal of Economic Theory* 153; Albano GL et al 'Preventing Collusion in Public Procurement', in N Dimitri et al (eds), *Handbook of Procurement* (CUP, 2006) 347, 352-353; WE Kovacic et al, 'Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements' in N Dimitri et al (eds), *Handbook of Procurement* (CUP, 2006) 381, 402; RA Miller, 'Economy, Efficiency and Effectiveness in Government Procurement' (1975-1976) 42 *Brooklyn Law Review* 208, 215-33; and JM Kuhlman, 'Price Fixing, Non-Price Competition and "Focal Point" Pricing: A Rose by Any Other Name?' (1978) 10 *Antitrust Law and Economics Review* 75.

¹⁷ To be more precise, the applicability of Article 41(3) to Article 41(2) of Directive 2004/18 is controversial, as the literal tenor of the provision only mentions paragraph 1. However a systematic interpretation together with Article 6 of Directive 2004/18 on confidentiality would, in my opinion, support the possibility to withhold information also in the case of Article 41(2) of Directive 2004/18. In any case, in order to overcome these difficulties, Article 53(3) of the final compromise text expressly extends the exception of paragraph 3 to

where *'disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings'* (emphasis added). This should be connected to the more general provision on the treatment of confidential information contained in Article 6 of Directive 2004/18, which determines that *'in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders'*.¹⁸

As pointed out elsewhere, contracting authorities and review courts should be particularly careful in not imposing excessive disclosure when there are actual risks of strategic use of challenge procedures or the market structure is such that the increased degree of transparency could (inadvertently) facilitate or reinforce collusion.¹⁹ In my view, therefore, in the exercise of such discretion and as a mandate of the principle of competition, contracting authorities are bound to

paragraphs 1 and 2 of what currently is Article 41 of Directive 2004/18. This should be particularly welcome in view that Article 53(2) extends disclosure obligations and requires contracting authorities to inform 'any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers'. In my view, the application of Article 53(3) should leave without effect this extension of disclosure obligations in most of the cases since, on the contrary, the level of transparency would clearly be excessive in most instances and the protection of confidential information and business secrets would be severely diminished.

¹⁸ This is protection of confidential information is kept in Article 18 of the new Directive. However, it introduces some precisions that make it less clear cut: *'Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts'* (emphasis added).

¹⁹ A Sanchez Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart, 2011) 358-359.

restrict the disclosure of information given to tenderers to prevent instances of subsequent unfair competition or collusion—and, in order to do that properly, must identify and properly justify the negative effects which the withholding of the information seeks to avoid.

Along the same lines, and although there is no equivalent provision in Directive 89/665 and Directive 92/13 (both as amended by Directive 2007/66²⁰), the same restrictions to the disclosure of information should apply in bid protests and review procedures, so that contracting authorities (in the case of mandatory reviews prior to challenges, or otherwise), independent review bodies and domestic courts are bound to prevent disclosures of information that could result in restrictions or distortions of competition. In such cases, limiting the access of information to the minimum extent required to ensure the effective protection of the rights of the applicants in review procedures will require a balancing of interests by the competent authority—which, in my view, should take into due consideration the potential impact on competition of the disclosure of certain information. Such an obligation can be stressed or reinforced by general rules on the treatment of business secrets and other commercially sensitive information of general application according to Member State domestic legislation, as clearly emphasised by Article 6 of Directive 2004/18.²¹

In brief summary, this is an area where the strengthening of the rights of information (generally) and the mandatory disclosure of very detailed aspects of the winning tenders (including the name of the awardee of the public contract) needs to be counterbalanced by a careful exercise of administrative discretion by contracting authorities in order to avoid an excessive degree of transparency. In this regard, it would be desirable that both contracting authorities and review

²⁰ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31.

²¹ Which is due to become slightly more complicated in view of the introduction of references to domestic legislation concerning access to information in Article 18 of the new Directive (see above n 18).

bodies and domestic courts bore in mind the anticompetitive consequences that excessive disclosure and transparency can create. Otherwise, the effectiveness of any other measures to prevent bid rigging in public procurement may remain substantially ineffective. With this in mind, we will now turn to a closer scrutiny of some of the recent decisions adopted by the EU Courts—which clearly do not follow this path—as well as to some of their legal implications.

2. RECENT CASE LAW EXTENDING TRANSPARENCY OBLIGATIONS

2.1. Case C-629/11 P *Evropaïki Dynamiki v Commission (ESP-ISEP)*²²

In its Judgment of 4 October 2012 in case C-629/11 P *Evropaïki Dynamiki v Commission (ESP-ISEP)*, the Court of Justice issued an interesting decision on what should be considered sufficient debriefing of disappointed bidders in public procurement procedures.

In this case (and furthering an unsuccessful strategy to challenge adverse award decisions that, however, has made a fundamental contribution to the development of the case law in this area), *Evropaïki Dynamiki* challenged the debriefing received from the European Commission both on the grounds that it was 8 days late (although both the GC and the CJEU dismiss this procedural defect easily on the basis that the delay did not however restrict the undertaking's opportunity of asserting its rights and could not, by itself, lead to the annulment of the contested decisions) and that it was insufficient—*ie* that the Commission had not provided sufficient reasons to justify the award of the contract to another bidder. The reasoning of the CJEU in the assessment of this submission deserves some close scrutiny.

21 [...] it is apparent from the case-law that the Commission cannot be required to communicate to an unsuccessful tenderer, first, in addition to the reasons for rejecting its tender, a detailed summary of how each detail of its tender was taken into account when the tender was evaluated and, second, in the context of notification of the characteristics and relative advantages of the successful tender, a detailed comparative analysis of the successful tender and of the unsuccessful tender (see, to that effect, order of 29 November 2011 in Case C-235/11 P *Evropaïki Dynamiki v Commission*, paragraphs 50 and 51 and the case-law cited).

22 Similarly, the contracting authority is not under an obligation to provide an unsuccessful tenderer, upon written request from it, with a full copy of the evaluation report (see order of 20 September 2011 in Case C-561/10 P *Evropaïki Dynamiki v Commission*, paragraph 25).

²² Judgment of 4 October 2012 in Case C-629/11 P *Evropaïki Dynamiki v Commission (ESP-ISEP)* [2012] nyr.

23 Furthermore, it must be noted that, according to settled case-law, the statement of reasons required under the second paragraph of Article 296 TFEU must be assessed in the light of the circumstances of each case, in particular the content of the measure in question and the nature of the reasons given (see, *inter alia*, Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and judgment of 28 February 2008 in Case C-17/07 P *Neirinck v Commission*, paragraph 52).

In this first part of the reasoning, the CJEU clearly adopts a restrictive approach on the amount of information that needs to be disclosed and on the level of elaboration or processing that disappointed bidders can demand. However, the CJEU does not seem to be concerned at all with the degree of transparency or the sensitivity of the information being disclosed. It rather seems to be mainly focussed on avoiding the imposition of excessively burdensome disclosure obligations on the contracting authorities. In this regard, the rationale followed by the CJEU is closely linked to the principle of good administration and its limits (*ie* what suffices to meet the requirements of proper administrative response to a request for information), but it is completely inadvertent of the competition implications of the factual situation. This can be clearly seen in the summary of the information actually provided to the complainant in the case at hand.

24 In the present case, [...] the [debriefing] letter [...] contained the names of the tenderers selected as first contractor for each of the two lots of the call for tenders at issue.

25 In addition, [...] the Commission enclosed as annexes to that letter extracts from the two evaluation reports [...]

26 It is apparent therefrom that those extracts contained tables relating, in particular, to the technical evaluation of the tenders for both of the lots and indicating, for each award criterion, the number of points obtained by *Evropaïki Dynamiki* in comparison with the successful tenderer, broken down each time into sub-criteria, as well as the maximum number of points attainable per sub-criterion and the weighting of each of those sub-criteria in the overall evaluation. Summary tables showed, on the basis of the results of the technical and financial evaluation, the final ranking for each of the two lots.

27 It is also apparent therefrom that, according to the information communicated in the [debriefing] letter [...], Evropaiki Dynamiki's tender was ranked higher than the successful tender solely under the fourth award criterion regarding the quality of the service and the methodological proposal in the domain of Lot No 2. It was also only with regard to the fourth criterion relating to the quality of the technical offer in the domain of Lot No 1 that its tender obtained the same number of points as the successful tender. On the other hand, for all other criteria, Evropaiki Dynamiki's tender was less well ranked than that of the successful tenderer.

28 Furthermore, the comments of the evaluation committee which were also disclosed indicated, for each award criterion, the sub-criteria on the basis of which the Commission found the successful tenderer's offer or that of Evropaiki Dynamiki to be the best.

29 Finally, the method applied by the Commission for the technical evaluation of the tenders was clearly set out in the tendering specifications relating to the call for tenders at issue. [...] they specified, for each lot, the various award criteria, their respective weighting in the evaluation, that is to say in the calculation of the total score, and the minimum and maximum number of points for each criterion.

30 Accordingly, [...] in view of all the information supplied to Evropaiki Dynamiki, as well as the specifications contained in the call for tenders, including the weighting relating to the award criteria for each of the lots, Evropaiki Dynamiki had sufficient information to enable it, for each lot, to identify the characteristics and relative advantages of the best ranked tenderer's offer.

Reading the Evropaiki Dynamiki (ESP-ISEP) Judgment, one cannot but wonder how is it possible that the CJEU has not realised that EU public procurement rules impose an excessive degree of transparency in the debriefing of disappointed bidders. From the Judgment, it is not only clear that the Commission debriefed *Evropaiki Dynamiki* in full, but also that the current rules require the disclosure of certain information (of most relevance, the name of the winning bidder) that may be excessive. In that regard, the second paragraph of Article 100(2) of the Financial Regulation [or the equivalent Article 41(3) Directive 2004/18, above §1] deserve more attention from the CJEU, as regards the caveat that some information may (*rectius*, should) not be disclosed if such disclosure might prejudice fair competition between economic operators.

2.2. Case T-183/10 *Sviluppo Globale GEIE v Commission*²³

In the almost simultaneous Judgment of 10 October 2012 in case T-183/10 *Sviluppo Globale GEIE v Commission*, the GC issued another decision concerned with the extent of the duty to provide reasons to disappointed tenderers on the basis of Article 100(2) of the Financial Regulation. Interestingly, as briefly mentioned (above §1), the GC expressly highlights the link between the duty to give reasons and the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union.

In the case at hand, the disappointed tenderer received a debriefing letter from the European Commission where the reasons for its non-invitation to present a full bid in a restricted procedure were limited to indicate 'failure to comply with the criteria listed in point 23.1.a)' of the call for expressions of interest. According to those requirements, potential tenderers had to justify that, at the time of tendering, they would have completed at least two international projects worth €3.5mn or more, in areas covered by the object of the future contract (ie technical services to support central and local government in Syria).

The disappointed tenderer considered that the mere indication of a 'generic' or 'unspecific' failure to comply with point 23.1.a) of the call for expressions of interest fell short from the duty to give reasons incumbent upon the contracting authority and violated its procedural rights. On the contrary, the European Commission took the view that, given the objective nature of the criteria included in point 23.1.a) of the call, the disappointed tenderer should have been able to understand the reasons behind the decision not to shortlist her for the presentation of a full bid by a simple comparison of its tender with the contractual object.

The GC disagreed with the position of the Commission and found that:

²³ Judgment of 10 October 2012 in Case T-183/10 *Sviluppo Globale GEIE v Commission* [2012] nyr.

27 [...] despite the information contained in [debriefing] letters, and taking into account the relevant case law [Evropaiki Dynamiki/OEDT, T-63/06 at para 112, and Evropaiki Dynamiki/Commission, T-300/07 at para 50] the applicant has not received a response from the Commission showing in a clear and unequivocal fashion the reasoning followed in the adoption of the contested decision. [...]

30 [...] the Commission has not made a formal comparison of the projects described by the applicant in its expression of interest against the benchmark of the three criteria set out in paragraph 21.3.a) of the contract notice. In particular, it did not explain which of these three criteria was not satisfied by the projects [submitted by the applicant]. In these circumstances, the applicant was not able to know if the reason for the rejection of her expression of interest in the procurement in question concerned the minimum number of projects implemented, their budget, their completion in a timely manner or the areas in which they were executed. [...]

35 It should be recalled in this connection that when, as in this case, a European institution has a wide discretion, the guarantees conferred by the [Union] legal order in administrative procedures is of an even more fundamental relevance. Those guarantees include, in particular, the duty of the competent institution to state sufficient reasons for its decisions (Technische Universität München, C-269/90 at para 14; Le Canne v Commission, T-241/00 at paras 53 and 54, and Evropaiki Dynamiki v Commission, T-300/07 at para 45). [...]

40 In light of the foregoing, it must be held that the applicant properly submits that, to the extent that the Commission has not developed further the reasons why her candidacy did not meet the technical selection criteria set in the contract notice, it has not received in a clear and unequivocal fashion the reasoning of the Commission, which would have allowed her to know the reasons for the decision not to be included in the shortlist of the contract at issue. Moreover, she could not sue without knowing what those reasons are (own translation from French).

As can be appreciated and just like the CJEU, the GC also follows a ‘good administration rationale’ and then complements this analysis by underlining the relevance of the motivation provided by the European institutions (in general, by the contracting bodies) for the purposes of judicial review and considers that the scant justification provided by a mere reference to some unfulfilled criteria required by the tender documents falls short from ensuring effective judicial

review (at paras 41 to 46). In view of all those shortcomings in the motivation provided by the Commission, the GC annuls the decision not to invite the applicant to the submission of a full bid in the relevant procurement process.

In my personal view, the Commission was right to assume that a reference to a specific set of objective criteria clearly indicated in the tender documents should provide the disappointed tenderer with sufficient information to, eventually, challenge the decision. Consequently, I consider that this Judgment generates a significant risk of hypertrophy of bid protest mechanisms in cases where contracting authorities use short or not overly detailed explanations in their debriefing correspondence. This can simply open a very dangerous door to strategic litigation and to an excessive broadening of 'fair trial' guarantees in an area where the financial drivers of tendering companies can generate perverse incentives to challenge.

At the very least, the decision of the GC in *Sviluppo Globale* will increase the red tape and administration costs of the public procurement system, since contracting authorities will have a powerful incentive to be extremely cautious in the level of detail they provide in debriefing letters and meetings and, in case of doubt, they may feel that the safer position is to err on the side of providing excessive rather than insufficient information. Nonetheless, and as stressed in relation to case C-629/11 P (above §2.1), contracting authorities and review courts should be particularly careful in not imposing excessive disclosure when there are actual risks of strategic use of challenge procedures or the market structure is such that the increased degree of transparency could (inadvertently) facilitate or reinforce collusion. In my view, recent case law suggests that such a finer balance between transparency and competition concerns may be beginning to emerge, but the issue is far from being considered in a systematic and sufficiently detailed manner.

2.3. Joined Cases T-339/10 and T-532/10 *Cosepuri v European Food Safety Authority (EFSA)*²⁴

In its Judgment of 29 January 2013 in Joined Cases T-339/10 and T-532/10 *Cosepuri v EFSA*, the General Court ruled again on the topical issue of the protection of confidentiality and business secrets in tender evaluation—and, in general trends, showed a more balanced approach than in previous Judgments concerned with transparency at debriefing stage (above §2.1 and §2.2). However, in my opinion, the case law in this area still falls short from guaranteeing a proper balance between transparency and protection of business secrets and continues to promote excessive disclosure.

In the case at hand, *Cosepuri* challenged the EFSA's evaluation procedure on the basis of the confidential treatment of financial assessments. The GC took no issue with the degree of confidentiality imposed by EFSA, but on a series of grounds that still seem (partially) inadequate:

32 First, the applicant calls into question the fact that Part II.8.2 of the tender specifications provided that the tender evaluation procedure was to be confidential. It should be noted in that regard that the applicant has the right to challenge, as an incidental plea, the lawfulness of the specifications in the present action (see, to that effect, Case T-495/04 *Belfass v Council* [2008] ECR II-781, paragraph 44). [...]

33 Article 89(1) of the Financial Regulation provides that all public contracts financed in whole or in part by the budget are to comply, inter alia, with the principle of transparency. In the present case, it must be noted that Part II.8.2 of the specifications, which provides that the procedure for the evaluation of the tenders is to be conducted in secret, satisfies the requirement of preserving the confidentiality of the tenders and the need to avoid, in principle, contact between the contracting authority and the tenderers (see, on this point, Article 99 of the Financial Regulation and Article 148 of the Implementing Rules). The principle of transparency, referred to in Article 89(1) of the Financial Regulation, which is invoked by the applicant, must be reconciled with those requirements. Accordingly, there is

²⁴ Judgment of 29 January 2013 in Joined Cases T-339/10 and T-532/10 *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)* [2013] nyr.

no basis on which it can be concluded that Part II.8 of the specifications is vitiated by unlawfulness.

34 Second, the applicant challenges the fact that it was not able to ascertain the price proposed by the successful tenderer. In particular, the applicant states that EFSA ensured that it would not be possible for any subsequent verification to be carried out by redacting from the evaluation report the price offered by the successful tenderer. In that regard, without there being any need to rule in the present case on whether the price proposed by the successful tenderer formed part of the information which the contracting authority should have communicated to the unsuccessful tenderers (sic), it is clear from the evidence submitted that the applicant was in a position to ascertain the price in question. It is apparent from Section 2.4 of the evaluation committee report that the applicant and the successful tenderer offered the same price in respect of points 2 to 7 of the financial bid, both obtaining the maximum score of 15 points. The price offered by the successful tenderer in respect of points 2 to 7 of the financial bid is therefore abundantly clear from the evaluation committee report (!!). Moreover, with regard to point 1 of the financial bid, the evaluation committee report indicated the price offered by the applicant and the mark obtained. Although it does not expressly refer to the price offered by the successful tenderer, that report specifies the mark obtained by it. Taking account of those factors, it was possible to calculate, without any difficulty, the price proposed by the successful tenderer (!!) in respect of point 1 of the financial bid, as submitted by EFSA in connection with the second plea. Furthermore, the Court has been able to verify, by way of the measure of inquiry adopted at the hearing (see paragraph 16 above), that the price mentioned by EFSA in its written pleadings was in fact the price proposed by the successful tenderer. In view of all the foregoing considerations, the Court considers that, even if EFSA had erred by failing to indicate expressly to the applicant the price proposed by the successful tenderer, such an error would have had no effect on the lawfulness of EFSA's decision to reject the applicant's tender and award the contract at issue to another tenderer whose bid was considered to be better, since the applicant was in a position to ascertain that price. The applicant's arguments in that regard must therefore be rejected.

35 Third, with regard to the principle of sound administration relied on by the applicant, according to case-law, guarantees afforded by the European Union legal order in administrative proceedings include, in particular, the principle of sound administration, which entails the duty on the part of the competent institution to examine carefully and

impartially all the relevant aspects of the individual case (see the judgment of 15 September 2011 in Case T-407/07 CMB and Christof v Commission, not published in the ECR, paragraph 182 and the case-law cited). In the present case, the arguments put forward by the applicant in the first plea, which essentially consist in criticising the fact that it was not granted access to the financial bid of the successful tenderer, do not demonstrate that EFSA failed to examine carefully and impartially all the relevant aspects of the case. In the absence of more detailed evidence, the applicant's arguments in that regard must be rejected (emphasis added).

In my view, paragraphs 33 and 35 of the *Cosepuri* Judgment must be most welcome, as they set a more balanced framework for the assessment of the obligation to disclose confidential information and business secrets under the principles of transparency and good administration. On the contrary, paragraph 34 deserves a clear rejection, given that the GC keeps a very formalistic approach to the protection of confidential information and takes no issue with the fact that such sensitive information as price can be disclosed indirectly, and considers that that does not infringe either the rights of the 'disclosed' undertaking to protection of its business secrets, nor the procedural rights of the disappointed bidder that is granted indirect access to that information.

I think that the GC should have taken a stronger position and clearly confirmed that both direct and indirect disclosure of price elements and financial evaluations can (*rectius*, must) be restricted or excluded on grounds of protection of confidentiality. Otherwise, the incentives continue to push contracting authorities for an excessive degree of transparency in public procurement settings. Such a limitation of the information required to be disclosed may be achievable in view of one of the most recent Judgments in this area of EU public procurement law, which picks up and furthers some of the considerations that the CJEU had made on the non-absolute character of disclosure obligations, and which we will now briefly assess.

3. RECENT CASE LAW POINTING AT POTENTIAL LIMITATIONS OF TRANSPARENCY

The GC's Judgment in case T-9/10 *Evropaiki Dynamiki v Commission (Microsoft SharePoint)*²⁵ was a new addition to this seemingly never-ending saga of cases where the Greek IT company challenges procurement award decision on the two-fold basis of failure to state reasons and presence of manifest errors of assessment. This Judgment basically reiterates the position of the EU Courts on the duty to state reasons but, interestingly, includes an obiter paragraph that is not always expressly mentioned in the growing case law in this area of EU public procurement.

In my opinion, paragraph 26 of this latest *Evropaiki Dynamiki* Judgment deserves emphasis, as the GC picks up on paragraph 23 of the also recent CJEU Judgment in C-629/11 P *Evropaiki Dynamiki* (above §2.1) and furthers its content, stressing that

It should also be borne in mind that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and case-law cited, and Case T-465/04 *Evropaiki Dynamiki v Commission*, paragraph 49) (emphasis added).

This offers the basis for a far more restricted disclosure of information to unsuccessful candidates and disappointed bidders than usually provided by contracting authorities, and could (*rectius*, should) be used as the basis to rationalise this area of the law—where contracting authorities are indeed under significant pressure to provide excessive information during debriefing and bid protest procedures. In fact, in the case at hand,

²⁵ Judgment of 21 February 2013 in case T-9/10 *Evropaiki Dynamiki v Commission (Microsoft SharePoint)* [2013] nyr.

the Commission considers that it provided a statement of reasons exceeding that laid down in Article 100(2) of [the Financial Regulation] by informing the applicant of the reasons why its tender had been rejected as well as providing the scores obtained by the tenderers at the award stage, even though the applicant had not passed the selection phase (T-9/10 at para. 24, emphasis added).

Situations of excessive disclosure such as this one should be avoided, given the negative impacts that excessive transparency can generate in terms of potential collusion and access to confidential information and business secrets of competitors (above §1). Therefore, once again, it seems desirable to clarify and rationalise this area of EU public procurement law. However, the actual will of the European Courts to do so can be doubted as, in the two most recent Judgments in this area of the law (another two chapters in the *Evropaïki Dynamiki saga*)²⁶, the GC has limited itself to a repetition of the main elements of the case already discussed (above §2).

4. CASE LAW ON THE LIMITED EFFECTS OF LACK OF COMPLIANCE WITH (FULL) TRANSPARENCY

Finally, it is also interesting to stress that, according to a recent Judgment, the consequences of the breaches of transparency obligations may be more limited than initially thought and, consequently, there may be a diminishing set of (financial) incentives for disappointed bidders to continue litigating on this basis—which could compensate for some of the perceived excesses in the design of transparency obligations.

Indeed, in its Judgment of 6 June 2013 in case T-668/11 *VIP Car v Parliament II*,²⁷ the GC addressed the issue whether non-compliance with the duties of transparency and motivation by a

²⁶ Judgment of 15 October 2013 in Case T-474/10 *Evropaïki Dynamiki v Commission (DIGIT)* [2013] nyr 71-80 and Judgment of 15 October 2013 in Case T-457/10 *Evropaïki Dynamiki v Commission (DIGIT)* [2013] nyr 83-92.

²⁷ Judgment of 6 June 2013 in case T-668/11 *VIP Car Solutions v Parliament II* [2013] nyr.

contracting authority can generate a right for disappointed bidders to claim damages and, more specifically, whether they would be entitled to claim loss of profit compensation.

In this clear Judgment, the GC does not exclude that possibility as a matter of principle, but it sets a very clear line of analysis of the causality required between the lack of motivation or failure to disclose certain information and the damages claimed by disappointed bidders—which makes this type of claims very difficult to succeed. In the Judgment, the GC stressed that:

In this regard, it should be noted that it is true that the Court held that the [contested] decision should be annulled on the grounds, first, that the Parliament had violated the obligation to disclose the price proposed by the successful bidder and, secondly, that the decision was vitiated by an inadequate statement of reasons. However, it is clear that the non-disclosure of the price and the lack of motivation do not establish that the award of the contract to another tenderer was a fault, or that there is a causal link between this fact and the loss claimed by the applicant (see, to that effect, the Judgment of 25 February 2003, *Renco / Council T-4/01*, Rec. p. II-171, paragraph 89, and of 20 October 2011, *Alfaster Benelux / Council T-57/09*, not published in the ECR, paragraph 49). Indeed, there is nothing to suggest that the Parliament should award the contract in question to the applicant if the original decision had been sufficiently motivated or if the Parliament had disclosed the price of the successful bidder. It follows that the claim for compensation for the alleged damage suffered as a result of the first decision must be rejected as unfounded in so far as it is based on inadequate reasoning of that decision and the non-disclosure of the price proposed by the winning bidder (own translation from French and emphasis added).

In view of this analysis of strict causality, which I consider appropriate, it seems clear that disappointed bidders that succeed in challenging public procurement decisions exclusively on the grounds of lack of compliance with transparency obligations and the duty to provide reasons are likely to only be entitled to claim legal costs and any other expenses related to the challenge of the award procedure. This should be welcome, despite the fact that it may reduce the incentives for disappointed bidders to challenge procedurally incorrect public procurement decisions because, unless they can prove that there has been a material (in terms of substantive) breach and that, but

for that illegality they should have been awarded the contract, it is very unlikely that they can obtain any compensation for their efforts.

This may (marginally?) diminish the effectiveness of challenge procedures (at least where no material rule has been breached), but an excessively generous rule that awarded damages exclusively due to 'mere' procedural shortcomings would generate a perverse incentive towards excessive litigation. This may justify the need for stronger mechanisms of public oversight, as it seems clear that the incentives for disappointed bidders to act 'in the public interest' have been delimited in a proper, but narrow, manner—which, as mentioned, could compensate for some of the perceived excesses in the design of transparency obligations.

5. CONCLUSION

Despite the increasing attention put on the anticompetitive effects of excessive transparency in tender procedures can generate (or, at least, facilitate), the current process of reform of the EU Directives on public procurement is bound to perpetuate the problems and issues raised by law and economics scholars. By not changing the applicable rules in the new public procurement Directives, the case law of the European Courts and its excesses will remain fully applicable.

As this article has stressed, the approach derived from the principles of transparency and good administration in procurement management has resulted in excessive disclosure of sensitive commercial information prone to facilitate collusion. The EU Courts have failed to grasp the implications of such an excessive degree of disclosure of commercially sensitive information and the provisions on the protection of confidentiality and the withholding of strategically valuable information have been largely ignored so far.

Even if there are some indications that the case law also includes a potential carve out from these transparency requirements by means of a balancing test between the duty to motivate administrative decisions and the actual (legitimate) interests of the parties requesting the sensitive

information, this area of the law is still not sufficiently clear and more rationalisation and effective guidance would be necessary.

Some of these excesses may be counterbalanced by the low(er)ing financial incentives given to disappointed bidders willing to challenge procurement decisions exclusively on the basis of formal non-compliance with (full) disclosure requirements (*ie* where there is no concurrent breach of substantive obligations). However, in my view, the general picture still shows an excessive degree of transparency resulting from public procurement rules and, consequently, there is still need for further reform.

What is also somewhat troubling and dismaying is that these shortcomings are basically inherent to the public (or administrative) law nature of public procurement and the general principles that govern this area of the law. Therefore, incremental changes and adjustments in the existing enforcement mechanisms may prove insufficient to overcome the transparency excesses this paper has stressed. More importantly, such excessive transparency results in social losses, both in terms of direct administrative costs (red tape) but, more importantly, in terms of reduced competition for public contracts and increased risks of cartelisation of markets where the public buyer is active (with the further additional costs derived from an increased need of oversight and enforcement of competition, anti-collusion rules in these markets).

With all this in the background, one of my proposals to try to change this situation would be to redesign the institutional framework for public procurement review procedures. In my view, the best approach to do so is to fully integrate public procurement within the sphere of activities of competition authorities (as is the case in some EU countries already). On the one hand, this would ensure a more expedient and consistent enforcement against bid riggers and would allow them to take advantage of the expertise these authorities already have on the fight against cartels in this and other areas of economic activity. On the other hand, it would promote a system of effective oversight of the activities of contracting authorities in this important field of the economy. Such

subjection of contracting authorities to the oversight of competition authorities may add a significant check on their activities (together with any pre-existing audit or other type of budgetary or legal compliance control of public procurement) and could allow for a significant redesign of bid protest mechanisms—allowing, for instance, for a major reduction of the information disclosed publicly and the creation of (semi)opaque review mechanisms whereby disappointed tenderers could prompt the intervention of the competition authority without, however, having direct access to the information in the public procurement file. In turn, this could be subjected to new forms of judicial review before specialised courts—in a setting where, still, disclosure of information remained significantly restricted in order to minimise transparency in these markets.

Obviously, the reform of the oversight and bid protest system and the involvement of competition authorities would be no panacea to all sources of competition distortions in public procurement. There would still be need for training and professionalization of officials and civil servants entrusted with public procurement responsibilities, who would remain the principal agents in the implementation of all recommendations to keep public procurement procompetitive and who would be in charge of exercising sound administrative discretion on a daily basis. Therefore, additional efforts in terms of professionalization and training should also be undertaken. The same applies to judges involved in the review of public procurement cases, particularly in intermediate review courts, which would benefit from training and sensitization regarding the competition implications of public procurement activities.

In my view, indeed, the most significant area where further reforms are needed concerns the enforcement structure of public procurement (and competition) law, both at the administrative and judicial level. If those changes are implemented, they will have an immediate positive effect on the improvement of day to day decisions due to a better informed and guided exercise of administrative discretion. Then, it will be easier to correct any (other) specific rigidities or competition distortive rules in the public procurement Directives or in national legislations.