Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 December 2017*

(Appeal — Public services contracts — Provision of external services for programme and project management and technical consultancy in the field of information technologies — Cascade procedure — Weighting of sub-criteria within the award criteria — Principles of equal opportunity and transparency — Manifest errors of assessment — Failure to state reasons — Loss of opportunity — Non-contractual liability of the European Union — Claim for damages)

In Case C-677/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 December 2015,

European Union Intellectual Property Office (EUIPO), represented by N. Bambara, acting as Agent, and by P. Wytinck and B. Hoorelbeke, avocats,

appellant,

the other parties to the proceedings being:

European Dynamics Luxembourg SA, established in Luxembourg (Luxembourg),

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece),

European Dynamics Belgium SA, established in Brussels (Belgium),

represented by M. Sfyri, C.-N. Dede and D. Papadopoulou, dikigoroi,

applicants at first instance,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General : H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2017,

* Language of the case: English.

gives the following

Judgment

1 By its appeal, the European Union Intellectual Property Office (EUIPO) requests that the judgment of the General Court of the European Union of 7 October 2015, *European Dynamics Luxembourg and Others* v *OHIM* (T-299/11) ('the judgment under appeal'), be set aside. By that judgment, the General Court:

– annulled the decision adopted by EUIPO ('the decision at issue') in the context of open call for tenders AO/021/10, entitled 'External service provision for programme and project management and technical consultancy in the field of information technologies' ('the contract in question'), of which European Dynamics Luxembourg SA was given notification by letter of 28 March 2011, to rank its bid third in the cascade mechanism for the award of a framework contract and to rank the bids of Consortium Unisys SLU and Charles Oakes & Co. Sàrl, on the one hand, and ETIQ Consortium, on the other, first and second respectively, and

– ordered the European Union to pay compensation for the harm suffered by European Dynamics Luxembourg SA in respect of the loss of an opportunity to be awarded the framework contract as the contractor ranked first in the cascade.

Legal context

2 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1) ('the Financial Regulation'), sets out the basic rules governing the entire budgetary sphere in matters such as public procurement.

3 Under the first subparagraph of Article 100(2) of the General Financial Regulation, the contracting authority is to notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract has been awarded. The second subparagraph of Article 100(2) provides, however, that certain details need not be disclosed 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.

4 Article 149 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1), as amended by Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13), sets out the obligations for contracting authorities as regards the information to be given to candidates and tenderers pursuant to Article 100(2) of the General Financial Regulation.

5 According to Article 115(1) and (2) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), as amended by Regulation (EU) No 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21), EUIPO is a body of the European Union and has legal personality. In each of the Member States, it enjoys the most extensive legal capacity accorded to legal persons under their laws. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.

6 Article 118(3) and (4) of that regulation, which concerns non-contractual liability, provides that EUIPO is required, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its departments or by its servants in the performance of their duties. The Court of Justice of the European Communities has jurisdiction in disputes relating to compensation for such damage.

Background to the dispute, the procedure before the General Court and the judgment under appeal

7 The background to the dispute is set out in paragraphs 1 to 28 of the judgment under appeal.

8 On 6 June 2011, European Dynamics Luxembourg, Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE and European Dynamics Belgium SA (together, 'European Dynamics Luxembourg and Others'), brought an action for annulment of the decision at issue before the General Court. Having withdrawn one of their heads of claim at the hearing, they claimed that that Court should:

– annul the decision at issue in so far as it ranked the bid submitted by European Dynamics Luxembourg third in the cascade mechanism;

– annul all other related decisions of EUIPO, including those awarding the contract in question to the tenderers ranked first and second in the cascade mechanism;

– order EUIPO to pay compensation of EUR 650 000 for the harm they suffered as a result of the loss of an opportunity and the damage to their reputation and credibility, and

– order EUIPO to pay the costs.

9 In support of their application for annulment, European Dynamics Luxembourg and Others relied on three pleas in law. By the first plea, they claimed that EUIPO had infringed the first subparagraph of Article 100(2) of the General Financial Regulation and Article 149 of Regulation No 2342/2002, as well as the obligation to state reasons within the meaning of the second paragraph of Article 296 TFEU, by refusing to provide an adequate explanation or justification for the award decision. The second plea alleged 'infringement of the tender specifications', in so far as EUIPO applied, to their detriment, a new award criterion and a new weighting of award sub-criteria not included in the tender specifications. In the third plea, European Dynamics Luxembourg and Others claimed that EUIPO had made a number of manifest errors of assessment.

10 The General Court examined the second, third and first pleas in that order.

11 First of all, in connection with the second plea, the General Court held, in paragraph 48 of the judgment under appeal, that EUIPO's negative comment on the bid submitted by European Dynamics Luxembourg that the bids obtaining a higher score than it obtained under the first award criterion 'identified change management and communication as the two most essential tasks for the success of the project' showed that EUIPO had applied a weighting to the various sub-criteria within the first award criterion. In paragraph 53 of that judgment, the General Court found that, since such weighting was not provided for by the tender specifications or communicated in advance to the tenderers, EUIPO had breached, to the detriment of European Dynamics Luxembourg and Others, the principles of equal opportunity and transparency. Accordingly, in paragraph 55 of that judgment, the General Court upheld the second plea in part.

12 Next, in its examination of the third plea, the General Court considered that certain negative comments made by EUIPO concerning the assessment of the bid submitted by European Dynamics Luxembourg in respect of the first and second award criteria stemmed from a manifest error of assessment. First, it found, in paragraph 91 of the judgment under appeal, that, as the negative comment referred to in that paragraph was vitiated by a breach of the principles of equal opportunity and transparency, that conclusion itself also necessarily entailed a manifest error of assessment. Second, the General Court stated, in paragraph 102 of that judgment, that that negative comment, to the effect that European Dynamics Luxembourg had not provided any 'examples of deliverables', also stemmed from a manifest error of assessment as there was no support for it in the tender specifications. As a consequence, it upheld the third plea as regards the complaints directed against those negative comments and dismissed the plea as to the remainder.

13 Moreover, also in connection with the examination of the third plea, the General Court found, in paragraphs 86, 89 and 95 of the judgment under appeal, that various other comments made by EUIPO in relation to the evaluation of the bid submitted by European Dynamics Luxembourg concerning the first award criterion were vitiated by a failure to state reasons within the meaning of the second paragraph of Article 296 TFEU, read in conjunction with Article 100(2) of the Financial Regulation, so that the General Court was unable to verify whether manifest errors of assessment had been made in connection with those comments.

14 Lastly, at the end of the examination of the first plea, after its reference in paragraph 134 of the judgment under appeal to the assessments for which it considered that insufficient reasons had been provided at the end of the examination of the third plea, the General Court held, in paragraph 135 of that judgment, that the contested decision contained several instances of failure to state reasons.

15 In those circumstances, the General Court concluded, in paragraph 136 of the judgment under appeal, that it was necessary to annul the decision at issue in its entirety.

16 In support of their claim for damages, European Dynamics Luxembourg and Others, as stated in paragraph 137 of the judgment under appeal, claimed compensation for the loss of opportunity to be awarded the contract in question as the successful tenderer ranked first and for the non-material damage suffered as a result of injury to their reputation and credibility.

17 The General Court found that the conditions were fulfilled for the European Union to incur non–contractual liability under the second paragraph of Article 340 TFEU, as the substantive unlawful conduct which it had established was likely to have affected the opportunity available to European Dynamics Luxembourg to have its bid ranked in first or second position in the cascade mechanism.

18 However, the General Court did not consider it necessary to determine whether there was any harm to the reputation and credibility of European Dynamics Luxembourg and Others, on the ground that the annulment of the award decision was, in principle, sufficient to make good the damage caused by such harm. As a consequence, it upheld the claim for damages in part and invited the parties to reach an agreement as to the amount of compensation to be paid.

Procedure before the Court and forms of order sought

19 By its appeal, EUIPO claims that the Court should:

– set aside the judgment under appeal and dismiss the application for annulment of the decision at issue and the claim for damages submitted at first instance;

– in the alternative, set aside the judgment under appeal and refer the case back to the General Court;

– in the further alternative, set aside the judgment under appeal in so far as it orders the European Union to pay compensation for the harm suffered by European Dynamics Luxembourg and Others, and

– order European Dynamics Luxembourg and Others to pay the costs of the proceedings.

20 European Dynamics Luxembourg and Others contend that the Court should:

– dismiss the appeal; and

– order EUIPO to pay the costs of the proceedings at both instances.

The appeal

21 EUIPO puts forward four grounds in support of its appeal, alleging: (i) an error of law in the application of the principles of equal opportunity and transparency, and failure to state reasons; (ii) errors of law in that the General Court annulled the decision at issue on the basis of manifest errors of assessment; (iii) breach of Article 100(2) of the General Financial Regulation, read in conjunction with the second paragraph of Article 296 TFEU; and (iv) an error of law and failure to state reasons in that the judgment under appeal upheld European Dynamics Luxembourg and Others' claim for damages.

A. The first plea in law

1. Arguments of the parties

22 EUIPO submits that the General Court erred in law by considering that the alleged introduction of new weighting factors in respect of the first award criterion led to a breach of the principles of equal opportunity and transparency. It argues that the General Court was incorrect to find that the decision at issue infringed those principles in that the evaluation of the bid submitted by European Dynamics Luxembourg was carried out, under the first award criterion, using factors for weighting sub-criteria within that award criterion which were not apparent from the tender specifications and were not disclosed to the tenderers. According to EUIPO, the assessment in paragraph 53 of the judgment under appeal, which establishes an 'automatic causal link' between the introduction of those weighting factors and the breach of those principles, is based on a misinterpretation of the Court's case-law and, moreover, is not supported by sufficient reasoning. In particular, EUIPO refers in that regard to the judgment of 24 November 2005, *ATI EAC and Viaggi di Maio and Others* (C-331/04, EU:C:2005:718).

23 According to European Dynamics Luxembourg and Others, as EUIPO did not argue before the General Court that weighting factors not included in the tender specifications had no effect on the preparation of the bids, such an argument — which criticises that court for failing to verify whether the introduction of those factors adversely affected the rights of European Dynamics Luxembourg and Others and was raised for the first time in the present appeal — is new and, therefore, inadmissible.

24 Maintaining that that ground of appeal is, in any event, unfounded, European Dynamics Luxembourg and Others claim, in essence, that the General Court correctly applied the case-law of the Court of Justice relied on by EUIPO, in so far as, even though it did not cite it, it found that the introduction of those weighting factors without prior notification caused them harm.

25 Lastly, European Dynamics Luxembourg and Others consider that sufficient reasons were given, to the requisite legal standard, in the judgment under appeal as the General Court was unable to carry out a complete examination precisely because the comments made by EUIPO were vague and the decision at issue does not contain plausible arguments or sound reasoning.

2. Findings of the Court

26 The plea of inadmissibility raised by European Dynamics Luxembourg and Others must be rejected at the outset.

27 Indeed, EUIPO is entitled to lodge an appeal containing pleas arising from the judgment under appeal itself which seek to criticise its merits.

28 By its arguments, which, European Dynamics Luxembourg and Others allege are inadmissible, EUIPO criticises as a matter of law the merits of the solution adopted by the General Court (see, to that effect, the judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission*, C-176/06 P, not published, EU:C:2007:730, paragraph 17).

29 With regard to the substantive examination of the first ground of appeal, EUIPO claims, in essence in that ground, that the General Court misapplied the case-law of the Court of Justice cited in paragraph 48 of the judgment under appeal and was incorrect to find, in paragraph 53 of that judgment, that EUIPO had unlawfully introduced weighting factors for sub-criteria within the first award criterion.

30 It is clear that the judgment under appeal is vitiated by an error of law in that regard.

31 Admittedly, the principle that procurement procedures must ensure equal treatment and be transparent means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (judgments of 18 October 2001, *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 43, and of 18 November 2010, *Commission* v *Ireland*, C-226/09, EU:C:2010:697, paragraph 59 and the case-law cited).

32 Accordingly, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention (judgment of 24 January 2008, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraph 38).

33 Nevertheless, it is possible for a contracting authority to determine, after expiry of the time-limit for submitting tenders, weighting factors for sub-criteria which correspond in essence to the criteria previously brought to the tenderers' attention. That subsequent determination must, however, satisfy three conditions, namely, 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 (see, to that effect, judgments of 24 November 2005, *ATI EAC and Viaggi di Maio and Others*, C-331/04, EU:C:2005:718, paragraph 32; of 21 July 2011, *Evropaïki Dynamiki* v *EMSA*, C-252/10 P, not published, EU:C:2011:512, paragraphs 32 and 33; and 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 26).

34 In the present case, the disputed findings concern the introduction of weighting given to sub-criteria within one of the award criteria, which was not provided for in the tendering specifications or disclosed in advance to the tenderers, which EUIPO does not dispute. Thus, in the light of the foregoing, the General Court was not in a position to reach a valid finding that there had been a breach of the principles of equal opportunity and transparency without first examining whether it had been pleaded and established that those three conditions had not been met.

35 As the General Court failed to verify, before declaring the second complaint of the second plea in the action at first instance well founded, whether those three conditions, established by the case-law of the Court of Justice, were met in the present case, the first ground of appeal must be upheld, without there being any need to examine the merits of EUIPO's argument that the General Court failed to have due

regard for its duty to state reasons when it found that the introduction of factors for the assessment of the sub-criteria in question gave rise to a breach of the principles of equal opportunity and transparency.

36 As the conclusion in paragraph 53 of the judgment under appeal is vitiated by an error of law, it follows that it must be found, as the Advocate General observed in point 49 of his Opinion, that the judgment under appeal is also vitiated by another error in law, in that, by upholding the ninth complaint in the first part of the third plea in law at first instance, the General Court concluded there had been a manifest error of assessment in relation to the first award criterion in question. If it is not possible to rely on that conclusion, paragraphs 91 and 96 of that judgment are deprived of all reason. Such inadequate reasoning is a matter of public policy, which must be raised by the EU judicature of its own motion (see, to that effect, judgment of 11 April 2013, *Mindo* v *Commission*, C-652/11 P, EU:C:2013:229, paragraph 30 and the case-law cited).

B. Second ground of appeal and second part of the third ground of appeal

37 It is appropriate to address the second ground of appeal and the second part of the third ground of appeal raised by EUIPO together.

1. Arguments of the parties

38 By its second ground of appeal, EUIPO maintains that the General Court erred in law by deciding, in paragraph 136 of the judgment under appeal, read in conjunction with paragraph 121 thereof, that the alleged manifest errors of assessment found in paragraphs 91, 95, 96 and 97 to 103 of that judgment justified the annulment of the decision at issue. It submits that it is apparent from the General Court's own case-law that it is for the applicant to demonstrate that a manifest error of assessment has had an effect on the final outcome of the tender procedure, which is a matter the General Court should therefore have considered. EUIPO argues that, while that case-law relates to failure to state reasons, it also applies to manifest errors of assessment.

39 Accordingly, the General Court should have considered whether or not the manifest errors of assessment as regards the first and second award criteria in the evaluation of the bid submitted by European Dynamics Luxembourg significantly affected the outcome of the procurement procedure for the contract in question and, therefore, whether it was necessary to annul the decision at issue. However, according to EUIPO, the General Court omitted to examine whether, but for those errors of assessment, that bid might have been ranked first or second in the cascade mechanism. Accordingly, by taking the view that the alleged errors of assessment provided sufficient grounds for annulling the decision at issue, the General Court erred in law.

40 As regards the manifest error of assessment in relation to the second award criterion, established in paragraph 103 of the judgment under appeal, EUIPO claims, in essence, that the General Court did not verify whether that error had an effect on the outcome of the decision at issue by examining whether the evaluation of the award criteria not vitiated by an error of law was of itself sufficient to justify the ranking given to European Dynamics Luxembourg's tender.

41 By the second part of its third ground of appeal, EUIPO claims, in essence, that the General Court erred in annulling the decision at issue without determining whether the instances of failure to state reasons which it had found were sufficient, in themselves or in combination with the manifest errors of assessment which it also established, to affect the outcome of that decision.

42 In order to substantiate its second ground of appeal and the second part of its third ground of appeal, EUIPO refers to two judgments of the General Court.

43 First, EUIPO claims that, where the General Court finds that an award decision is vitiated by an inadequate statement of reasons, that decision may be annulled on that ground only if the other elements of the decision, which are not vitiated by such irregularity, do not provide sufficient justification for annulment (judgment of 10 April 2014, *Evropaïki Dynamiki* v *Commissio*n, T-340/09, not published, EU:T:2014:208, paragraphs 115 and 116). According to EUIPO, the approach adopted in that judgment should be applied by analogy where the General Court finds there has been a manifest error of assessment vitiating an award decision.

44 Second, EUIPO contends that, where the score given to a tender under a given award criterion is based on several negative comments, including one or more which are vitiated by a manifest error of assessment, that score and the evaluation on which it is based are not vitiated by such an error if the score is also based on comments which are free of manifest errors of assessment (judgment of 26 September 2014, *Evropaïki Dynamiki* v *Commissio*n, T-498/11, not published, EU:T:2014:831, paragraphs 196 et 197).

45 According to EUIPO, in the present case the score given under the first award criterion and that awarded under the second criterion were based not just on one but on a number of negative and positive comments which were considered by the General Court to be free of manifest errors of assessment or which, not being at issue in the action, were not examined. EUIPO considers that the General Court should, therefore, have ascertained whether those other comments were, in themselves, sufficient to justify the score given by the contracting authority in respect of the award criterion in question.

46 By the second part of its third ground of appeal, EUIPO submits that the General Court erred in law by annulling the decision at issue without determining whether the instances of failure to state reasons found in paragraphs 86, 89, 95, 134 and 135 of that judgment were sufficient, in themselves or in conjunction with the manifest errors of assessment which it also established, to actually affect the final outcome of the tender procedure.

47 European Dynamics Luxembourg and Others contend that EUIPO's second plea in law and the second part of its third plea in law are unfounded.

2. Findings of the Court

48 With regard to the second ground of appeal, it should be noted, at the outset, that there is no need to examine the effects of a manifest error of assessment concerning the first award criterion as it is clear from the examination of the first ground of appeal that the General Court should not have found that there was such an error.

49 With regard to the alleged failure on the part of the General Court to take account of the effects on the validity of the award decision of the inadequacies in the reasoning for that decision and of the manifest error of assessment concerning the second award criterion, found in paragraph 103 of the judgment under appeal, it should be noted that inadequate reasoning or a manifest error of assessment concerning an award criterion do not justify the annulment of an award decision where it contains other elements which, in themselves, provide sufficient legal justification for the decision.

50 In such a situation, the grounds alleging such irregularities are ineffective (see, by analogy, judgments of 12 July 2001, *Commission and Fr*ance v *TF1*, C-302/99 P and C-308/99 P, EU:C:2001:408, paragraph 27, and of 26 April 2007, *Alcon* v *OHIM*, C-412/05 P, EU:C:2007:252, paragraph 41).

51 It should be noted in that regard that, by its second ground of appeal and the second part of its third ground of appeal, EUIPO simply claims that the General Court did not apply its own case-law correctly and that the irregularities which it found did not affect the outcome of the decision at issue.

52 In particular, EUIPO does not explain how or establish that, in the present case, the decision at issue could not have been more favourable to European Dynamics Luxembourg even in the absence of the various irregularities established by the General Court.

53 In those circumstances, EUIPO is not entitled to criticise the General Court for failing to examine whether the error of assessment relating to the second award criterion and the inadequacies which it found in the reasoning for the decision at issue might have had an effect on the operative part of that decision.

54 As a consequence, EUIPO's second ground of appeal and the second part of its third ground of appeal must be rejected.

C. The first and second parts of the third ground of appeal

1. First part of the third ground of appeal

Arguments of the parties

55 The appellant claims, in the first part of the third ground of appeal, that the General Court misconstrued the scope of the obligation to state reasons incumbent on the contracting authority under Article 100(2) of the Financial Regulation. By examining separately each of the comments of the evaluation committee without, at the same time, looking at the broader context of the evaluation of those comments, the General Court imposed a stricter obligation to state reasons than that imposed by the Court in paragraph 21 of the judgment of 4 October 2012, *Evropaïki Dynamiki* v *Commission* (C-629/11 P, not published, EU:C:2012:617), the judgment cited in paragraph 129 of the judgment under appeal. According to that case-law, the contracting authority is not required to provide an unsuccessful tenderer with a detailed summary of how each detail of its tender was taken into account or a detailed comparative analysis of that tender and the successful tender.

56 European Dynamics Luxembourg and Others contend that the first part of the third ground of appeal is unfounded.

(a) *Findings of the Court*

57 As regards the first part of the third ground of appeal, it is necessary to examine whether, by the grounds set out in paragraphs 81 to 86, 87 to 89 and 90 to 95 respectively of the judgment under appeal, the General Court imposed stricter requirements than those laid down by the judgment of 4 October 2012, *Evropaïki Dynamiki* v *Commission* (C-629/11 P, not published, EU:C:2012:617).

58 In paragraphs 20 to 22 of that judgment, the General Court pointed out, in essence, that, according to the first subparagraph of Article 100(2) of the Financial Regulation, the contracting authority is required to notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and to notify all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded. However, the contracting authority 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, secondly, in the notification of the characteristics and relative advantages of the successful tender, a detailed comparative analysis of the successful tender and of the unsuccessful tender. Similarly, the contracting authority is not under an obligation to provide an unsuccessful tenderer, upon written request by it, with a full copy of the evaluation report.

59 Furthermore, the requirements to be satisfied by the statement of reasons under the second paragraph of Article 296 TFEU depend on the circumstances of each case, in particular the content of the measure in question and the nature of the reasons given. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, to that effect, judgment of 12 September 2017, *Anagnostakis* v *Commission*, C-589/15 P, EU:C:2017:663, paragraph 29 and the case-law cited).

60 First of all, there is clearly no need to examine EUIPO's criticism of the reasons given in paragraphs 90 to 95 of the judgment under appeal, concerning the examination of the ninth complaint in the first part of the third plea in law at first instance.

61 Indeed, it was found, in paragraph 36 above, that paragraphs 48 to 55 of the judgment under appeal are vitiated by an error of law and that, if they cannot be based on those paragraphs, paragraphs 91 and 96 of the judgment are devoid of any foundation. As a consequence, it was held in paragraph 36 above that the judgment under appeal is vitiated by an error of law in that the General Court upheld the ninth complaint in the first part of the third plea in law at first instance, having found there had been a manifest error of assessment in relation to the first award criterion in question.

62 Next, as regards the considerations set out in paragraphs 81 to 86 of the judgment under appeal, it should be noted that, by the sixth complaint in the first part of the third plea in law at first instance, European Dynamics Luxembourg and Others contested EUIPO's assessment that there was no need for a programme manager, a senior project manager and a project manager for each project.

63 At the end of the examination of that complaint, the General Court concluded, in paragraphs 85 and 86 of the judgment under appeal, that there was a failure to provide reasons on that point, for the purposes of the second paragraph of Article 296 TFEU, read in conjunction with Article 100(2) of the General Financial Regulation, in view of the lack of precision in the tender specifications and the brief and vague nature of the judgment of the evaluation committee, which made it impossible to verify whether the criticism advanced by EUIPO regarding the inclusion of a senior project manager and also a project manager in the tender submitted by European Dynamics Luxembourg was plausible.

64 EUIPO does not explain how the General Court, in arriving at that conclusion, applied a stricter test than that imposed in the case-law cited in paragraphs 57 to 59 above.

65 Lastly, in the reasoning set out in paragraphs 87 to 89 of the judgment under appeal in connection with the examination of the eighth complaint in the first part of the third plea in law at first instance, the General Court stated, in paragraph 88 of that judgment, that the final comment of the evaluation committee that 'the whole offer is very operational instead of strategic and focuses on a different kind of project manager [from what] [EUIPO] envisages', was incomprehensible, and, in particular, that the statement that EUIPO envisaged a 'different kind of project manager' was a vague and, therefore, unverifiable, form of criticism.

66 It is sufficient to note in that regard that EUIPO does not dispute that it merely put forward one argument in that regard, only at first instance before the General Court, as is apparent from paragraph 88 of the judgment under appeal.

67 Moreover, nor does EUIPO dispute the findings made by the General Court concerning the lack of sufficiently clear and precise criteria in the tender specifications and the terse and vague nature of the evaluation committee's judgments.

68 It has not therefore been established before this Court that the General Court erred in law.

69 As the Advocate General observed in points 77 and 78 of his Opinion, the arguments put forward in the appeal do not call into question the fact that the General Court assessed the contested comments in those complaints both separately and in the overall context of the evaluation of the bid concerned, or the fact that that court did not require EUIPO to provide a detailed summary of how each detail of that bid had been taken into account or a detailed comparative analysis of that bid and the bids that were ranked higher.

70 In those circumstances, the first part of the third ground of appeal must be rejected as unfounded.

2. Third part of the third ground of appeal

Arguments of the parties

71 By the third part of its third ground of appeal, EUIPO maintains that the judgment under appeal contains a contradiction in so far as, on the one hand, in the examination of the third plea in the action for annulment, the General Court did not find, in paragraphs 112 to 115 and 121 of that judgment, any manifest error of assessment or inadequate reasoning vitiating the evaluation of European Dynamics Luxembourg's bid under the fourth award criterion and, on the other hand, at the conclusion of the examination of the first plea, the General Court stated, in paragraphs 134 and 135 of that judgment, that it was unable to carry out an examination of the substantive legality of the decision at issue as regards that evaluation, with the result that that decision was vitiated by a manifest error of assessment.

72 European Dynamics Luxembourg and Others maintain that the third part of the third ground of appeal is unfounded.

(a) Findings of the Court

73 Admittedly, the General Court mentioned the fourth award criterion in the first sentence of paragraph 134 of the judgment under appeal, even though it concluded, in paragraphs 112 to 115 and 121 of that judgment, that EUIPO had not made any error of assessment in that connection.

74 However, paragraphs 134 and 135 of the judgment under appeal contain only a conclusion based on paragraphs 81 to 86, 87 to 89 and 90 to 95 of the judgment, which concern the examination of the complaints relating to the first award criterion.

75 Accordingly, EUIPO's complaint concerning the General Court's reasoning in paragraphs 112 to 115 and 121 of the judgment under appeal on the one hand, and paragraphs 134 and 135 of that judgment on the other hand, have no bearing on the operative part of the judgment, with the result that the third part of the third ground of appeal must be rejected as ineffective.

76 It follows that the first and third parts of the third ground of appeal must be rejected.

D. The fourth ground of appeal

Arguments of the parties

77 By the first part of its fourth ground of appeal, EUIPO submits that one of the conditions for the European Union to incur non-contractual liability is not met in the present case because the finding that the decision at issue is vitiated by irregularities is based on errors of law made by the General Court. The General Court was therefore incorrect to find that the non-contractual liability of the European Union had been incurred.

78 In the alternative, EUIPO argues that, in the event of the Court setting aside the judgment under appeal only in so far as the General Court found a breach of the principles of equal opportunity and transparency, the Court should set aside that judgment also in so far as compensation for the damage allegedly suffered by European Dynamics Luxembourg and Others is concerned. First, as is apparent from paragraphs 142 and 143 of the judgment under appeal, there is no causal link between the instances of failure to state reasons established by the General Court and the damage alleged. Secondly, since the General Court did not examine the impact of the manifest errors of assessment established in paragraphs 91 and 102 of that judgment on the final outcome of the tendering procedure, it failed to state adequate reasons for the finding in paragraph 144 of the judgment that there was a causal link between those errors and that damage.

79 In the second part of the fourth ground of appeal, EUIPO claims that the judgment under appeal is vitiated by a failure to state reasons in that it contains a contradiction between, on the one hand, the grounds set out in paragraphs 144, 146 and 150 of that judgment and, on the other hand, paragraph 2 of the operative part of the judgment. Whilst those grounds identify the damage suffered by European Dynamics Luxembourg as the loss of an opportunity to be ranked in first or second position under the cascade mechanism, the operative part orders the European Union to pay compensation for the harm suffered as a result of the loss of an opportunity to be awarded the framework contract as the contractor ranked first.

80 In the third part of its fourth ground of appeal, EUIPO contends that paragraph 2 of the operative part of the judgment under appeal contains a clerical error in that it orders the European Union, not EUIPO, to pay compensation for the harm suffered by European Dynamics Luxembourg. However, under Article 115 and Article 118(3) of Regulation No 207/2009, that order should have been made against EUIPO.

81 European Dynamics Luxembourg and Others submit, first, that the judgment under appeal establishes to the requisite legal standard that the conditions for the European Union to incur non-contractual liability are met. Next, those parties maintain that there is no contradiction between paragraphs 144, 146 and 150 of the judgment under the appeal and the second paragraph of its operative part because, for the purpose of assessing compensation for the harm it suffered as a result of the loss of an opportunity, account must be taken of the whole range of possibilities that such a loss of opportunity may encompass, including the opportunity for European Dynamics Luxembourg to be the contractor ranked first in the cascade mechanism. Lastly, the reference to the European Union in paragraph 2 of the operative part of the judgment under appeal is not incorrect, in so far as it has overall liability for unlawful conduct on the part of its institutions and bodies.

1. Findings of the Court

82 It is appropriate to examine, in the first place, the argument put forward by EUIPO in the alternative in the first part of its fourth ground of appeal.

83 By its argument, EUIPO maintains, in essence, that the judgment under appeal did not demonstrate or give reasons to support the contention that there was a causal link between the manifest errors of assessment found by the General Court in relation to the second award criterion and the harm suffered by European Dynamics Luxembourg as a result of the loss of an opportunity.

84 The Court finds that that argument is well founded in the circumstances of the case.

85 First, as established in paragraph 36 above, paragraphs 53, 91 and 96 of the judgment under appeal are vitiated by an error of law. Accordingly, the General Court should not have found that a breach of the principles of equal opportunity and transparency and a manifest error of assessment concerning the first award criterion rendered the decision at issue unlawful.

86 Second, the General Court found, in paragraph 143 of the judgment under appeal, that a causal link could not be said to exist between the instances of failure to state reasons which it had established and the harm invoked by European Dynamics Luxembourg and Others.

87 Accordingly, in order for the European Union to incur liability, there would have to be a causal link between the only substantive irregularity vitiating the evaluation of the bid submitted by European Dynamics Luxembourg, found in paragraph 102 of the judgment under appeal, and the loss of opportunity in question.

88 However, in the judgment under appeal, the General Court did not establish, to the requisite legal standard, that there was such a causal link. In particular, the General Court 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 EUIPO, European Dynamics Luxembourg would have been ranked first and awarded the contract in question.

89 It follows that, as one of the conditions to be met in order for the European Union to incur non-contractual liability has not been satisfied in the present case, the General Court should not have granted the damages claim of European Dynamics Luxembourg and Others.

90 The first part of EUIPO's fourth ground of appeal is therefore well founded.

91 Given that the first part of the fourth ground of appeal is well founded, there is no need to examine the second and third parts.

The partial setting aside of the judgment under appeal

92 It follows from all the above considerations that the judgment under appeal is vitiated by an error of law in paragraphs 53, 91 and 96, in so far as the General Court upheld the second complaint in the second plea in law at first instance, concerning the first award criterion, and the ninth complaint in the first part of the third plea in law at first instance, also concerning that award criterion.

93 As is apparent from paragraph 136 of the judgment under appeal, the General Court justified the annulment of the decision at issue in paragraph 1 of the operative part of the judgment on the basis of all the irregularities it found, which vitiated the evaluation of the bid in question under the first and second award criteria. Nonetheless, even though the General Court's findings in paragraphs 53, 91 and 96 of the judgment under appeal cannot serve as justification for the annulment of the decision at issue, the irregularities found by the General Court in paragraphs 86, 89, 95, 102 and 135 of the judgment provide sufficient justification, as the Advocate General observed in point 111 of his Opinion, for the General Court's annulment of that decision. It follows that paragraph 1 of the operative part of the judgment under appeal should not be annulled.

94 On the other hand, it is necessary to annul paragraph 2 of the operative part of the judgment under appeal, ordering the European Union to pay compensation for the harm suffered by European Dynamics Luxembourg as a result of its loss of an opportunity to be awarded the contract in question as the contractor ranked first in the cascade, as the first part of the fourth ground of appeal has been declared well founded.

95 In view of that annulment of paragraph 2 of the operative part of the judgment under appeal, paragraphs 4 and 5 of the operative part, concerning the amount of compensation, must also be annulled.

96 In those circumstances, paragraph 6 of the operative part of the judgment under appeal, relating to costs, must also be annulled.

The action before the General Court

97 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may give final judgment in the matter where the state of the proceedings so permits.

98 That is the case here. It is therefore necessary to examine the damages claim submitted by European Dynamics Luxembourg and Others at first instance, seeking compensation for the harm it allegedly suffered as a result of the loss of an opportunity to be awarded the framework contract as the contractor ranked first in the cascade.

99 In that regard, it is the Court's settled case-law that in order for EUIPO to incur non-contractual liability, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct alleged and the damage pleaded (see, to that effect, judgment of 10 July 2014, *Nikolaou* v *Court of Auditors*, C-220/13 P, EU:C:2014:2057, paragraph 52 and the case-law cited). In order for the non-contractual liability of the European Union to be capable of being established, according to case-law, there must be actual damage which flows sufficiently directly from the unlawful conduct of the institutions (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 61 and the case-law cited).

100 In all circumstances, according to the Court's established case-law, it is the party seeking to establish the European Union's non-contractual liability which must adduce conclusive proof as to the existence and extent of the damage it alleges and as to the existence of a sufficiently direct causal nexus between the conduct of the institution concerned and the damage alleged (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 62 and the case-law cited).

101 In that regard, it is abundantly clear from a reading of the application lodged before the General Court that that application does not meet the requirements laid down by that case-law. European Dynamics Luxembourg and Others have claimed, inter alia, compensation for the estimated gross profit which European Dynamics Luxembourg could have obtained if it had been awarded the contract in question, while at the same time simply alleging that there was a 'definitive' refusal to award it the contract in question. Nevertheless, European Dynamics Luxembourg and Others have failed to establish by evidence whether, and to what extent, in the circumstances of the case and in the absence of any errors on the part of EUIPO, European Dynamics Luxembourg would have been ranked first and awarded the contract in question. They have therefore failed to establish that it suffered actual harm and a causal link between the alleged unlawful conduct and the harm claimed.

102 In any event, such a claim for damages cannot be based on EUIPO's unlawful conduct in connection with the evaluation of the second award criterion, found in paragraph 102 of the judgment under appeal. Even if European Dynamics Luxembourg's bid had been awarded all the points available in respect of the second award criterion, it would not have been ranked higher. Indeed, even if its bid had obtained the maximum score possible under the second award criterion, its final score would have been lower than the final scores of the bids ranked first and second.

103 Accordingly, the damages claim of European Dynamics Luxembourg and Others is rejected.

Costs

104 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

105 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to Article 138(3) of those rules, the parties are to bear their own costs where each party succeeds on some and fails on other heads.

106 As EUIPO's appeal has been partially successful and partially dismissed, EUIPO and European Dynamics Luxembourg and Others are to be ordered to bear their own costs in relation to the present appeal.

107 With regard to the costs of the proceedings at first instance, as the appeal has been partially successful and partially dismissed, European Dynamics Luxembourg and Others and EUIPO are to be ordered to bear their own costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 7 October 2015, *European Dynamics Luxembourg and Others* v *OHIM* (T-299/11, EU:T:2015:757), in so far as:**

   – **in paragraph 2 of the operative part, it orders the European Union to pay compensation for the harm suffered by European Dynamics Luxembourg SA as a result of the loss of an opportunity to be awarded the framework contract as the contractor ranked first in the cascade, and**

   – **in paragraphs 4 and 5 of the operative part, it orders the parties to inform the General Court of the amount of compensation arrived at by agreement or, in the absence of an agreement, to transmit to the General Court a statement of their views with supporting figures.**

2. **Dismisses the appeal as to the remainder.**

3. **Rejects the damages claim submitted by European Dynamics Luxembourg SA, Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE and European Dynamics Belgium SA in Case T-299/11.**

4. **Orders the European Union Intellectual Property Office (EUIPO), European Dynamics Luxembourg SA, Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE and European Dynamics Belgium SA to bear their own costs in relation to the appeal proceedings and the proceedings at first instance.**

von Danwitz Vajda Juhász

Jürimäe Lycourgos

Delivered in open court in Luxembourg on 20 December 2017.

A. Calot Escobar
Registrar

T. von Danwitz
President of the Fourth Chamber