

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

14 February 2019

(Application for annulment – ACER Decision No. 11/2018 – Access to file)

Case number	A-002-2018
Language of the case	English
Appellant	PRISMA European Capacity Platform GmbH ('PRISMA') Represented by: CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern mbB
Defendant	Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER') Represented by: Daldewolf s.c.r.l
Interveners	President of Energy Regulatory Office, Poland Represented by: Malgorzata Kozak, Director (On behalf of Defendant); Operator Gazociągów Systemowych GAZ-SYSTEM S.A Represented by: Piotr Kus, Deputy Director and Adam Bryszewski, Director (On behalf of Defendant)

Application for Revision or annulment of Decision of the Agency for the Cooperation of Energy Regulators No. 11/2018 of 16 October 2018 on establishing the capacity booking platform to be used at “Mallnow” Interconnection Point and “GCP” Virtual Interconnection Point (‘Decision No. 11/2018’ or ‘Contested Decision’)), and for access to the respective file

THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairman), Yvonne Fredriksson (Rapporteur), Viorel Alicus, Milto Aslanoglou, Jean-Yves Ollier, Dominique Woitrin (Members).

Registrar: Andras Szalay

gives the following

Decision

1. Background

Legal background

1. Regulation (EU) 2017/459¹ establishes rules for capacity allocation mechanisms in gas transmission systems, including the establishment of capacity booking platforms.
2. Under Article 37(1) of Regulation (EU) 2017/459, transmission system operators are to apply this Regulation by offering capacity by means of one or a limited number

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

of joint web-based booking platforms, to be operated by themselves or via an agreed party.

3. Under Article 37(3) of Regulation (EU) 2017/459, transmission system operators shall reach a contractual agreement to use a single booking platform to offer capacity on the two sides of their respective interconnection points or virtual interconnection points. If no agreement is reached by the transmission system operators within that period, the matter shall be referred immediately by the transmission system operators to the respective national regulatory authorities. The national regulatory authorities shall then, within a period of a further six months from the date of referral, jointly select the single booking platform for a period not longer than three years. If the national regulatory authorities are not able to jointly select a single booking platform within six months from the date of referral, Article 8(1) of the Regulation (EC) No 713/2009² shall apply. According to that article, the Agency shall decide on the booking platform to be used, for a period not longer than three years, at the specific interconnection point or virtual interconnection point.
4. Under Article 8(1) of Regulation (EC) No 713/2009, in a situation such as the one foreseen in Article 37(3) of Regulation (EU) 2017/459, the Agency shall, when preparing its decision, consult the national regulatory authorities and the transmission system operators ('TSO') concerned and shall be informed of the proposals and observations of all the transmission system operators concerned.

Facts giving rise to the dispute

5. On 13 April 2018, Prezes Urzędu Regulacji Energetyki ('URE'), national regulatory authority ('NRA') of the Republic of Poland informed the Agency that URE and BundesNetzAgentur ('BNetzA'), NRA of the Federal Republic of Germany, were not able to jointly select a single booking platform. BNetzA confirmed the same facts on 19 April 2018, thus the matter was referred to the Agency on 19 April 2018. Therefore, under the provisions of Article 37(3) of the CAM NC and Article 8(1) of

² Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, as revised by Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013.

Regulation (EC) No 713/2009, the Agency became responsible to adopt a decision concerning the selection of the single booking platform at the ‘Mallnow’ Interconnection Point (‘IP’) and the ‘GCP’ Virtual Interconnection Point (‘VIP’) by the referral.

6. After the concerned NRAs and TSOs were consulted on 18 May 2018, a public consultation was launched on 5 June 2018, a public workshop was held on 19 June 2018, and on 19 July 2018 the Agency requested offers from capacity booking platform operators.
7. The Agency received three offers: one from Operator Gazociągów Systemowych GAZ-SYSTEM S.A (‘GSA’), one from FGSZ Natural Gas Transmission Closed Company Limited Regional Booking Platform (‘RBP’) and that of the Appellant. After assessment, the Agency concluded that all booking platforms complied with the relevant EU legal requirements³ as well as with national requirements.
8. The Agency assessed the award criteria: the price offered and the fulfilment of the quality criteria, and awarded 82 points to GSA, 80 points to PRISMA and 70 points to RBP. Therefore, the Agency declared in the Contested Decision that the booking platform to be used, for a period no longer than three years, at the ‘Mallnow’ IP and the ‘GCP’ VIP, in accordance with Article 37(3) of Commission Regulation (EU) 2017/459 and Article 8(1) of Regulation (EC) No 713/2009, shall be GSA.

Procedure

9. On 14 December 2018, PRISMA European Capacity Platform GmbH (‘Appellant’ or ‘PRISMA’) filed an appeal with the Registry of the Board of Appeal.
10. The Appellant requested the suspension of the application of Decision No. 11/2018 in its appeal. On 20 December 2018, the Defendant made observations to the application for suspension.

³ REMIT obligations, the compliance verification resorts under the competence of the NRAs and does not fall within scope of the Agency’s supervisory authority. Concerning the platforms in question none of the concerned NRAs has yet reported non-compliance with this obligation.

11. On 17 December 2018, the announcement of appeal was published in the website of the Agency.
12. On 28 December 2018, the Registry communicated the composition of the Board of Appeal to the Parties.
13. On 28 December 2018, the Board of Appeal launched a non-appealable order on the request for submission in which the BoA dismissed the request in the absence of fulfilment of the urgency criterion.
14. By the deadline of 7 January 2019, eight entities⁴ filed their requests to leave to intervene with the Registry. On 21 January 2019, by its respective decisions, the Board of Appeal granted to right to intervene to Energy Regulatory Office (Poland) and to GAZ-SYSTEM SA and dismissed the other six applications. The Registrar provided accordingly the interveners with access to the non-confidential documents of the case.
15. By the request of the Defendant, on the account of the closure of the Agency during the end-of-year season, the Chairman of the Board of Appeal granted an extension of three days to submit the Defence. On 10 January 2019, the Defence was lodged.
16. In the cover sheet of the Defence, the Defendant claimed confidentiality for certain annexes of the submission. With a submission received on 14 January 2019, the Defendant clarified its confidentiality claim. On 18 January 2019, the Chairman of the Board of Appeal decided to grant confidentiality as claimed.
17. On 18 January 2019, as a procedural measure, the Chairman invited the Defendant to address the questions raised. On 23 January 2019, the Defendant provided the Board of Appeal with additional information related to the queries.
18. On 23 January 2019, the Appellant filed its Reply to the Defence with the Registry.

⁴ Grupa Azoty Pulawy SA, Konfederacja Lewiatan, Association of Energy Traders, PKN Orlen, GAZ-SYSTEM SA, Energy Regulatory Office (Poland), Polskie Gornictwo Naftowe i Gazownictwo SA, Grupa Azoty SA.

19. On 25 January 2019, an Intervener (GAZ-SYSTEM SA) lodged its supplementary submission.
20. On 1 February 2019 the Defendant submitted its Rejoinder to the Registry.
21. On 4 February 2019, upon the decision of the Chairman of the Board of Appeal, the Registrar notified the Parties of the date of closure of written procedure, which was 6 February 2019.
22. As an exceptional procedural measure, the Chairman of the Board of Appeal gave permission to GSA (Intervener) to reply to the Appellant's second submission which became accessible to the Intervener after filing its supplementary submission. This extraordinary submission of the Intervener was received on 6 February 2019.
23. On 6 February 2019, the Appellant submitted an additional document (labelled as 'surrejoinder') to the Registry. The Registrar refused, with regard to the Rules of Procedure of the Board of Appeal which do not foresee such submission as well as taking into account the right to defence, to make this submission a part of the case file. Therefore, the submission was not serviced to the other Party or to the members of the Board of Appeal.
24. On 6 February 2019, the Appellant requested an oral hearing. By the invitation of the Registrar, on 11 February 2019, the Appellant specified the items regarding to which the hearing was requested. The clarification provided was forwarded to the Defendant on the same day.
25. On 12 February 2019, the Board of Appeal held the oral hearing by teleconference. The summary minutes of the hearing were sent to the Parties on 13 February 2019.

Main arguments of the Parties

26. The Appellant argues that the Agency: (i) failed to adequately disclose the method of evaluation, insofar as it did not reveal how it would assess the degree of fulfilment of each criterion, and determined the scale of points only after the tenderers submitted their offers; (ii) failed to allocate weighting to sub-sub-criteria; (iii) failed to provide evaluation benchmarks for several sub-sub-criteria; (iv) failed to correctly implement the weighting rules, by choosing a scale of points that did not lead to the weighting of the price criterion and quality criteria as announced in the Agency's offer letter; (v) failed to correctly award points to GSA, thereby discriminating the Appellant, because GSA did not provide sufficient evidence or gave only evidence of a level inferior to that of the Appellant; (vi) failed to correctly award points to the Appellant, because it did not consider all the documentation submitted by the Appellant; (vii) discriminated against the Appellant, in Article 5 of the Decision, by not imposing therein conditions and obligations on GSA in relation to implementation of a governance structure; and (viii) violated the right to inspect the Agency's files, by not disclosing the quality criteria scores of the tenderers and the assessment of each of the quality criteria for each tenderer.
27. The Defendant argues that the Agency fully and duly complied with its obligations under EU Law and correctly assessed the three offers.

II. Admissibility

Admissibility of the appeal

Ratione temporis

28. Article 19(2) of Regulation (EC) 713/2009 provides that “[t]he appeal, together with the statement of grounds, shall be filed in writing at the Agency within two months of the day of notification of the decision to the person concerned, or, in the absence thereof, within two months of the day on which the Agency published its decision.”
29. The appeal was submitted on 14 December 2018, challenging ACER Decision No. 11/2018, which was serviced to the Appellant on 16 October 2018.

30. The appeal was received by the Registry in writing, by e-mail, and it contained the statement of grounds.
31. Therefore, the appeal is admissible *ratione temporis*.

Ratione materiae

32. Article 19(1) of Regulation (EC) 713/2009 reads that decisions referred to in Article 7, 8 and 9 of this Regulation may be appealed before the Board of Appeal.
33. The Contested Decision was issued, among others, on the basis of Article 8(1) of Regulation (EC) 713/2009, which fact is explicitly mentioned in its introductory part.
34. Therefore, since the appeal fulfils the criterion of Article 19(1) of Regulation (EC) 713/2009, the appeal is admissible *ratione materiae*.

Ratione personae

35. Article 19(1) of Regulation (EC) 713/2009 provides that “*any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.*”
36. The Appellant is not an addressee of the Decision but, being one of tenderers in the proceeding which resulted in the contested Decision, is directly and individually concerned thereby. The admissibility of the appeal was not contested by the Defendant.

37. The appeal is therefore admissible *ratione personae*.

III. Merits

Remedies sought by the Appellant

38. The Appellant requested the Board of Appeal to revise Decision No. 11/2018 or, subsidiarily, to annul this Decision and remit the case to the competent body of the Agency.
39. The Appellant further requested that the Board of Appeal grants the Appellant right to inspect the Defendant's file related to the Contested Decision with respect to the following information: the quality criteria scores of the participating tenderers, *in eventu*, the quality criteria scores of only PRISMA, and, the assessment of each of the quality criteria related to the participating tenderers' offers, *in eventu*, the assessment of each of the quality criteria related to PRISMA's offer.

Pleas and arguments of the Parties

The rules applicable to the Agency's Decision when acting under Articles 8(1) of Regulation (EC) No 713/2009 and 37(3) of Regulation (EU) 2017/459

40. The Board of Appeal considers it appropriate to briefly analyse, in the first place, the law applicable to the Agency's Decision in the matter at hand.
41. The Appellant claims⁵ that ACER should have complied with the principles deriving from Recital (1) of Directive 2014/24/EU⁶, of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. It argues that, although this Directive is not directly applicable to the current case, these principles constitute

⁵ para 31 of the Appeal

⁶ Directive 2014/24/EU, of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

core principles of the Treaty on the Functioning of the European Union (“TFEU”) and, therefore, had to be complied with. The Appeal goes on to quote, at several instances, provisions of Directive 2014/24/EU and case-law relating to EU Public Procurement Law.

42. In its Defence, ACER argues that Directive 2014/24/EU is not applicable, since the object of the contract does not fall within its scope of application. Additionally, it argues that Directive 2014/25/EU⁷ would also not have been applicable, given that these Directives are addressed to the Member States, and their public entities and authorities, and not to the EU’s administration bodies.
43. The Agency further argues that the procurement rules applicable to an EU body with legal personality are to be found in Regulation (EU, Euratom) 2018/1046⁸. Nonetheless, since ACER is not going to be a party in the contract awarded to the capacity booking platform operator, nor is the contract going to be financed by the EU’s budget, ACER believes that the case at hand is not subject to Regulation (EU, Euratom) 2018/1046 either, being subject only to the requirements established in EU law, including the Third Energy Package and the EU general principles of non-discrimination and equal treatment, transparency and proportionality.
44. This issue may be key to the outcome of the Appeal, since the precise requirements and principles that govern the procedure in question vary depending on the applicability of the Directives on public procurement, of Regulation (EU, Euratom) 2018/1046, or merely of EU general legal principles.
45. In order to address this issue, the starting point must be the subjective scope of application of each of the legal acts in question. To begin with, both the Appellant

⁷ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

⁸ Regulation (EU, Euratom) No. 2018/1046 of the European Parliament and of the Council, of 18 July 2018, on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014, and Decision No. 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012.

and the Defendant agree that Directive 2014/24/EU is not applicable to ACER⁹. Therefore, there is no need to examine this point in further detail.

46. As for Directive 2014/25/EU, its subjective scope of application is defined in Articles 3 and 4, namely through the concepts of “contracting authorities” and “contracting entities”, which refer, respectively, to “*the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law*”¹⁰ and to the entities that “*are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14*”, or “*when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 8 to 14, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State*”¹¹.
47. Accordingly, Directive 2014/25/EU is applicable only to Member States and their public bodies and authorities (or other entities analogous thereto). It does not apply to procurement procedures organized by the Union’s institutions, bodies or agencies.
48. Concerning Regulation (EU, Euratom) 2018/1046, the delineation of its scope includes the concept of “public contract”, described as “*a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 174 and 178, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services [...]*”¹²
49. As pointed out by ACER in its Defence¹³, the public contracts that fall within the scope of application of Regulation (EU, Euratom) 2018/1046 are those that comply with the following two conditions:

⁹ para. 31 of the Appeal and para. 15 of the Defence

¹⁰ Article 3(1)

¹¹ Article 4(1)

¹² Article 2(51), underlining added

¹³ para 22

- a) the contract is concluded by a contracting authority as defined in Articles 70 and 71, via Article 174 of Regulation (EU, Euratom) 2018/1046. These are the “*bodies which are set up under the TFEU and the Euratom Treaty and which have legal personality and receive contributions charged to the budget*” (Article 70(1)) and the “*bodies having legal personality that are set up by a basic act and entrusted with the implementation of a public-private partnership shall adopt their own financial rules*”¹⁴;
- b) the contract is financed totally or partially by EU budget.
50. These conditions are not present in the current case, given that ACER is not a contracting authority concluding a contract –the Agency will not be a party to a contract–, and that the services in question are not to be financed, even partially, by the EU budget. Hence, this case falls outside the scope of application of Regulation (EU, Euratom) 2018/1046.
51. The procedure to be followed by the Agency to designate a capacity booking platform operator does not constitute a procurement procedure. ACER is not seeking to select a contractor to provide a service. Rather, it is exercising its regulatory competences to issue a decision, so as to meet the obligations set out in Article 37 of Regulation (EU) 2017/459.
52. This being said, both the Appellant and the Defendant agree that, regardless of the fact that the procurement Directives and Regulation are not applicable to the current case, ACER must comply with the fundamental rules of the TFEU and the general principles of EU law. This includes the free movement of goods (Article 34 TFEU), the right of establishment (Article 49 TFEU), freedom to provide services (Article 56 TFEU), the Charter of Fundamental Rights of the EU, and the principles of non-discrimination and equal treatment (Articles 8 and 10 TFEU), transparency (Article 15 TFEU) and proportionality (Article 69 and 276 TFEU, as well as Protocol No. 2 TFEU)¹⁵.

¹⁴ Article 71(1)

¹⁵ See, by analogy (limited by the fact that this case concerned public procurement), Case T-461/08 *Evropaiki Dynamiki v. EIB* EU:T:2011:494, para 88.

53. Moreover, the case-law of the European Courts clearly sets out that transparency and equal treatment obligations upon contracting authorities stem from the very principles of equal treatment and transparency that are reflected in the directives and regulations governing these procurement or selection procedures (as it is very clearly worded in Case T-461/08 *Evropaïki Dynamiki v EIB*, EU:T:2011:494, para 89). As a result, the Courts have applied these principles consistently to contracting authorities, even in cases where neither the procurement directives nor the financial regulation were applicable.¹⁶
54. Any administrative action is bound by the general principles of EU law, irrespective of whether it is bound by any directive or regulation¹⁷. Hence, irrespective of the application of secondary EU law, ACER is bound by the principles of equal treatment and non-discrimination, transparency and good administration, even more so when it is substituting TSOs and NRAs in the management of a public tender procedure. The Board notes that these general principles of EU law have been codified by the Charter of Fundamental Rights¹⁸, which with the entry into force of the Lisbon Treaty acquired the same legal status as the Treaties.
55. In Case C-91/08 *Wall*¹⁹, the Court stated that since Articles 43 and 49 of the EC Treaty are specific applications of the general prohibition of discrimination on grounds of nationality laid down in Article 12 EC, there was no need to refer to Article 12 EC²⁰ and held that, even though service concession contracts were not governed by any of the directives on public procurement, the public authorities concluding them were bound to comply with the fundamental rights of the EU Treaty, including Articles 43 and 49 EC Treaty, and with the consequent obligation of transparency²¹. In Case C-92/00 *HI*²², the Court held that, even though

¹⁶ e.g. Case C-226/09 *European Commission vs Ireland*, EU:C:2010:697

¹⁷ European Parliament, Directorate General for Internal Policies, Policy Department C “Citizens’ Rights and Constitutional Affairs, “The General Principles of EU Administrative Procedural Law In-depth Analysis upon request by the JURI Committee”, PE 519.224 EN, 2015: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA\(2015\)519224_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA(2015)519224_EN.pdf)

¹⁸ Articles 20, 21 and 41 of the Charter

¹⁹ EU:C:2010:182

²⁰ *Ibid.* para 32

²¹ *Ibid.* para 33

²² EU:C:2002:379, para 47

Directive 92/50 did not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities were nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality, in particular referring also to Case C-324/98 *Telaustria and Telefonadress*.²³

56. By analogy, in the present case, the directives on public procurement and financial regulation are specific applications of the general principles of equal treatment and transparency and ACER is bound to comply with those general principles of EU law. To hold that ACER is not required to respect the general principles of EU law would amount to granting it discretion beyond the confines of the law, and allowing it to adopt decisions in breach of the rule of law.
57. Similarly, the Court ruled in Case C-507/03 *Commission v Ireland*²⁴ that “*it is common ground, however, that the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty (..)*”. Finally, in Case C-226/09 *European Commission vs Ireland*²⁵, the Court did not question the application of the principle of equal treatment and consequent obligation of transparency when the Directives are not applicable, but interpreted the scope of these principles and held that Ireland had correctly applied them:

“44 *It follows that Ireland, which had granted potential tenderers access to appropriate information concerning the contract at issue prior to the closing date for the submission of tenders, did not infringe the principle of equal treatment or the consequent obligation of transparency by attributing weightings to the award criteria without granting the tenderers access to those weightings before the closing date for the submission of tenders. (...)*

48 *Moreover, the relative weighting of the award criteria communicated to the members of the evaluation committee in the form of a matrix would not have*

²³ EU:C:2000:669, para 60

²⁴ EU:C:2007:67626, para 26

²⁵ EU:C:2010:697

provided potential tenderers, had they been aware of that weighting at the time the bids were prepared, with information which could have had a significant effect on that preparation and did not constitute an alteration of those criteria (see, to that effect, ATI EAC and Viaggi di Maio and Others, paragraph 32).

49 It should be added that there is no evidence in the present action, as presented before the Court, that the relative weighting of the award criteria was fixed after the envelopes containing the tenders submitted were opened.”

58. It stands to reason that, if these obligations derive from these general principles, they must also apply in a context such as the present, where the Agency acts under its regulatory powers, rather than as a contracting authority. As it is adopted under the powers granted to the Agency by Article 37(3) of Regulation (EU) 2017/459, Decision No. 11/2018 also had to comply with the relevant rules and principles of this Regulation, and, more broadly, of the EU legal framework applicable to ACER and to gas transmission systems.
59. In conclusion, in this case, the Agency’s Decision, and the procedure leading up to its adoption was subject neither to the Procurement Directives, nor to the EU budgetary Regulation. However, the Treaty and the general principles of EU law do apply. Thus, it is not a matter of dispute that, when issuing the Contested Decision, the Agency was required to comply with the principles of non-discrimination and equal treatment, transparency and proportionality.
60. By analogy with public procurement procedures, the principle of transparency requires that, when acting under Article 37(3) of Regulation (EU) 2017/459, the possibility of favouritism or arbitrariness by the Agency is excluded. This implies that all the conditions and detailed rules for the selection be drawn up in a clear, precise and unequivocal manner beforehand, and made available in a timely fashion, so as to enable all reasonably well-informed candidates exercising ordinary care to understand their exact significance and to interpret them in the same manner, and to enable the Agency to verify whether in fact the submissions meet the criteria.²⁶

²⁶ See, by analogy, Case T-10/17 *Proof IT v EIGE* EU:T:2018:682, paras 36-37 (and case-law quoted therein).

61. When acting in accordance with Article 37(3) of Regulation (EU) 2017/459, the Agency is called on to exercise regulatory functions which, in some cases, entail analysis of significantly complex and technical matters. This tends to be the case, namely, in what concerns the choice of award criteria, weightings, sub-criteria and evaluation methodology, as well in the assessment of how these criteria are met, in light of the documents and information submitted to it.

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

62. According to settled case-law of the Court of Justice of the European Union²⁷ (“CJEU”), when complex economic and technical issues are involved, the appraisal of the facts is subject to more limited review upon appeal.
63. The Board of Appeal considers, in line with its position in Cases A-001-2017 (consolidated) and A-001-2018, that, in the limited timeframe it is given to decide on the appeal of the Contested Decision, considering the principle of procedural economy, and with regard to the complex economic and technical issues involved, it is not able to, and should not, carry out its own complete assessment of each of the complex issues raised. Instead, it must limit itself to decide whether the Defendant made a manifest error of assessment. As explained above, the Board of Appeal considers that the Agency should be granted a certain margin of discretion when adopting the Decision provided for in Article 37(3) of Regulation (EU) 2017/459.
64. This is similar to the standard of judicial review of public procurement procedures. It is settled case-law that, *“for the purpose of examining whether the evaluation of the applicant’s tender is vitiated by manifest errors of assessment, (...) the contracting authority has broad discretion with regard to the factors to be taken into account when an invitation to tender is launched and that the review by the Court*

²⁷ Case C-12/03 P *Commission v Tetra Laval* EU:C:2005:87, para. 39; Case T-201/04 *Microsoft v Commission* EU:T:2007:289, para. 89; Case T-301/04 *Clearstream v Commission* EU:T:2009:317, para. 95; Case T-398/07 *Spain v Commission* EU:T:2012:173, para. 62; Case C-452/10 *BNP Paribas v Commission* EU:C:2012:366, para. 103; Case T-29/10 *Netherlands et al v Commission* EU:T:2012:98, para. 103; Case T-68/89 *Società Italiana Vetro v Commission* EU:T:1992:38, para. 160

*must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers*²⁸.

First plea – Failure to disclose method of evaluation.

65. The Appellant argues, in essence, that the Agency should have reasonably informed PRISMA of its evaluation method, in a timely fashion, so as to allow tenderers to be reasonably informed of how their proposals would be assessed and draft their proposals accordingly²⁹.
66. It must be clarified, from the outset, that, in this plea, the Appellant is only challenging the absence of timely communication of the “*evaluation method*”. The Appeal describes this “method” as relating to how “*the performance of each tenderer was assessed against each aspect and, as a result, assigned a score from one to three points*”, “*how [the Agency] would implement the evaluation process of the offers for each of the criteria*”, “*how [the Agency] would assess the respective degree of fulfilment of each of the criteria*”, absence of indication of a “*benchmark*”, absence of clarification of what it would take for a tenderer to be awarded 0, 1, 2 or 3 points in each criterion, etc.³⁰
67. Thus, in this context, the Appellant is not challenging the absence of timely communication of criteria or sub-criteria and their respective weighting, but only of the methodology which would be used in assessing how those criteria were met. Indeed, any tendering procedure – and this procedure also – implies, in this regard, three main phases which must be distinguished:
- 1st) Determination of criteria to be assessed and respective weighting;
 - 2nd) Determination of methodology to assess each criterion and to assign points within the respective weighting of each criterion;

²⁸ Case T-10/17 *Proof IT v EIGE* EU:T:2018:682, para 38 (and case-law quoted therein); Case T-481/14 *European Dynamics v EIT* EU:T:2016:498, para 61.

²⁹ paras 33-36 of the Appeal

³⁰ paras 34-36 of the Appeal

3rd) Assessment of proposals (practical application of methodology to assign points within each criterion to each tenderer).

68. As noted above, the First Plea relates only to the absence of timely communication of the results of the second phase.
69. A consistent body of case-law of the CJEU clarifies disclosure obligations by public authorities in procurement procedures and selection processes. This case law mainly concerns cases involving public procurement procedures or contracts financed by EU budget. However, the European Courts have stressed throughout this body of case law that the disclosure obligations stem from the very principles of equal treatment and transparency (reflected in the Directives and Regulations governing these procurement or selection procedures) which are also applicable in this case.
70. As the CJEU explained in its early cases, the principle of equal treatment lies at the heart of the public procurement Directives³¹ and tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being answered³². This principle of equal treatment entails an obligation of transparency³³. As said by the General Court in Cases T-514/09 *BPost NV*³⁴ and T-10/17 *Proof IT SIA*³⁵, the principle of transparency is corollary to the principle of equal treatment, because it essentially intends to preclude any risk of favouritism or arbitrariness on the part of the contracting authority and allows for a verification of the correct application of the principle of equal treatment.³⁶
71. As noted above, even though ACER's selection by virtue of Articles 8(1) of Regulation (EC) No 713/2009 and 37(3) of Regulation (EU) 2017/459 amounts to a

³¹ Case C-513/99 *Concordia Bus Finland*, EU:C:2002:495, para 81

³² Case C-19/00 *SIAC Construction* EU:C:2001:553, para 34; Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc* EU:C:2005:718, paras 22 and 23

³³ Case C-275/98 *Unitron Scandinavlaand and 3-S* EU:C:1999:567, para 31; Case C-19/00 *SIAC Construction* EU:C:2001:553, para 41; Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc* EU:C:2005:718, para 24; Case C-532/06 *Lianakis* EU:C:2008:40, para 34

³⁴ EU:T:2011:689

³⁵ EU:T:2018:682

³⁶ see also Cases C-92/00 *HI* EU:C:2002:379, para 45, and C-470/99 *Universale-Bau and Others* EU:C:2002:746, para 91

sui generis regulatory procedure, the general EU principles of equal treatment and transparency are fully applicable to ACER. Hence, the above-mentioned case-law of the European Courts may be applied hereto.

72. This case law states that contracting authorities have to disclose the award criteria and their weighting to the tenderers before the time-limit to submit the offers³⁷. As regards the sub-criteria and their weightings, the case law establishes that they also have to be disclosed by the contracting authority to the tenderers before the time-limit to submit the offers, but that they may not be disclosed in the tender specifications, but at a later stage, if (i) they do not alter the award criteria and weighting, do not affect the tenderers' preparation of their offers, and do not discriminate against any of the tenderers³⁸; and (ii) they are determined before the opening of the tenders³⁹. As set out by the CJEU in Case C-532/06 *Lianakis*, this judgment does not contradict its earlier judgment in Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc*⁴⁰. In other words, the award criteria and their weightings may be refined (by sub-criteria, sub-sub-criteria and their respective weightings) to the extent that those new elements are interpreted in the same way throughout the procedure⁴¹. Any determination of any refinement of the award criteria after the opening of the tenders would need to be exhaustively justified and should in any case not alter the award criteria, not affect the tenderers' preparation of their offers and not discriminate against any of the tenderers.
73. It should be highlighted, however, that this disclosure obligation prior to the time-limit to submit the offers does not extend to the evaluation method itself (the above-mentioned second phase). As clarified by the Court, "*there is no obligation on the*

³⁷ Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc* EU:C:2005:718, para 32; Case C-532/06 *Lianakis* EU:C:2008:40, paras 41-44; Case T-481/14 *European Dynamics Luxembourg SA vs EIT* EU:T:2016:498, para 41; Case T-514/09 *BPost NV* EU:T:2011:689, paras 60-62

³⁸ Case C-532/06 *Lianakis* EU:C:2008:40, paras 42-44; Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, para 26; Case T-481/14 *European Dynamics Luxembourg SA vs ETI* EU:T:2016:498, para 41; Case C-226/09 *European Commission vs Ireland* EU:C:2010:697, para 48

³⁹ Case C-532/06 *Lianakis* EU:C:2008:40, paras 42 and 44; Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, paras 24 and 25; Case T-514/09 *BPost NV* EU:T:2011:689, para 86; Case T-10/17 *Proof IT SIA* EU:T:2018:682, para 52; Case C-226/09 *European Commission vs Ireland* EU:C:2010:697, paras 49 and 60

⁴⁰ para 41

⁴¹ Case C-19/00 *SIAC Construction* EU:C:2001:553, para 43; Case T-481/14 *European Dynamics Luxembourg SA vs EIT* EU:T:2016:498, para 40; Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, para 23; Case C-226/09 *European Commission vs Ireland* EU:C:2010:697, para 59

contracting authority to bring to the attention of potential tenderers, by publication in the contract notice or in the tender specifications, the method of evaluation applied by the contracting authority in order to specifically evaluate and rank the tenders in the light of the contract award criteria and of their relative weighting that are established in advance in the documentation relating to the contract in question”⁴². Contracting authorities enjoy leeway as regards the evaluation method.⁴³ The CJEU held that “*an evaluation committee must be able to have some leeway in carrying out its task and thus it may, without amending the award criteria set out in the tender specifications or the contract notice, structure its own work or examining and analysing the submitted tenders*”.⁴⁴ That leeway is also justified by practical considerations: “*The contracting authority must be able to adapt the method of evaluation that it will apply in order to assess and rank the tenders in accordance with the circumstances*”.⁴⁵ Accordingly, the evaluation committee may, without amending the contract award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders.⁴⁶

74. However, any subsequent refinement in the evaluation method should, similarly, not alter the award criteria and weighting, not affect the tenderers’ preparation of their offers and not discriminate any of the tenderers.⁴⁷
75. The Court has also said that the evaluation method “*cannot, in principle, be determined after the opening of the tenders by the contracting authority*”.⁴⁸ It must be noted, however, that this issue does not appear, as such, in the other pronouncements of the Court on this issue. In this specific case, the statement is made, specifically, in the context of explaining that there are situations in which it may be legitimate to determine the method after the opening of the tenders. The

⁴² Case T-10/17 *Proof IT SIA* EU:T:2018:682, para 51; Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, paras 27-28; Case T-514/09 *BPost NV* EU:T:2011:689, para 86

⁴³ Case C-252/10 P *Evropaiki Dynamiki v EMSA* EU:C:2012:789, para 35; Case T-10/17 *Proof IT SIA* EU:T:2018:682, paras 53-54 and 120

⁴⁴ Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, para 29

⁴⁵ *Ibid.*, para 30

⁴⁶ Case T-10/17 *Proof IT SIA* EU:T:2018:682, para 120

⁴⁷ Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, para 32; Case T-481/14 *European Dynamics Luxembourg SA vs EIT* EU:T:2016:498, para 46

⁴⁸ Case C-6/15 *TNS Dimarso NV* EU:C:2016:555, para 31

Court was not addressing a situation in any way similar to the facts of the present case. And those words were preceded by the clarification that the reason for this principle is to “*avoid any risk of favouritism*”. In other words, it is a safeguard against the possibility of an infringement of the principle of equal treatment.

76. In the present case, ACER disclosed the following before the time-limit to submit the offers:
- a) the 2 award criteria (price and quality) and their weighting (respectively 40% and 60%);
 - b) the 3 sub-criteria regarding quality (IT security, governance and user-friendliness) and their weighting (resp. 24%, 18% and 18%);
 - c) the 4 sub-sub-criteria regarding sub-criterion IT security: peak service load; data back-up and security; measures for data security and confidentiality, preservation of data; and secure platform access for network users;
 - d) the 2 sub-sub-criteria regarding sub-criterion governance: user input in platform development; and continuing development;
 - e) the 3 sub-sub-criteria regarding sub-criterion user-friendliness: graphical user interface of the platform; helpdesk availability (outside business hours); and helpdesk availability in English; and
 - f) illustrative examples for each of the 9 sub-sub-criteria.
77. ACER accordingly went beyond its strict disclosure obligations, in accordance with the above-mentioned case law, to the extent that it communicated in a timely fashion the sub-criteria and their respective weighting, and also further specified these into sub-sub-criteria.
78. ACER did not disclose the 9 sub-sub-criteria’s weightings prior to the time-limit to submit the offers. According to the above-mentioned case law, this non-disclosure is not contrary to the principle of equal treatment and transparency to the extent that (i) these weightings do not alter the award criteria and award criteria’s weighting, do not affect the tenderers’ preparation of their offers and do not discriminate against any of the tenderers and (ii) these weightings were internally determined by ACER’s evaluation committee before the opening of the submitted offers.

79. From ACER's file, it is clear that the weighting for each of the sub-sub-criteria amounted to 6 points, except for user input in platform development and continuing development, which each amounted to 9 points. These figures are achieved by dividing the points awarded to each criteria equally by the number of its sub-sub-criteria, eliminating any potential surprise effect from the awarding of greater weight to one sub-sub-criteria over others.
80. In what concerns the first phase, therefore, the Defendant fully complied with its obligations arising from the principles of transparency and equality, as specified in the above-mentioned case law.
81. In fact, the First Plea focuses exclusively on the second phase: the determination of the evaluation method. The Appellant challenges the "*failure to disclose the method of evaluation*" and the determination of the "*scale of points after the tenderers submitted their offers*"⁴⁹.
82. It was already noted above, that, according to the case law, the Agency was under no obligation to disclose to the undertakings the evaluation method prior to the time-limit to submit the offers. The determination of the evaluation method at a later stage would only infringe the principles of equal treatment and transparency if they: (i) altered the award criteria and weighting; (ii) affected the tenderers' preparation of their offers; (iii) discriminated any of the tenderers; or (iv) in principle, were determined after the opening of the offers.
83. In the First Plea, the Appellant addresses specifically the application of the scale of up to 3 points, which refers only to the quality criteria, mentioning specifically para. 50 of the Decision and discussing issues which only make sense for the quality criteria. The Appellant does not challenge the determination of the method used to assess the price (a conclusion reinforced by the fact that the remainder of the Appeal also does not tackle the assessment of the price).
84. It is not a matter of dispute between the Parties that the evaluation method actually used by the Agency for the quality criteria was the one described in para 50 of the

⁴⁹ as summarized in para 32 of the Appeal

Decision: *“For each sub-category, a number of aspects were considered. The performance of each booking platform was assessed against each aspect and, as a result, assigned a score from one to three points (with the performance meeting the highest standards assigned the highest number of points)”*.

85. According to the Agency, it used a *“neutral”* method, which consisted in assigning the same amount of points to each sub-sub-category (0 to 3), following the method *“originally built during the BARINGA study”*⁵⁰. *In the BARINGA study, the method consisted in granting 1 point as soon as a capacity booking platform complied with a criterion, 1 point if a criterion was documented, 1 point if BARINGA could test the criterion, 1 point if it was available in a live environment”*. The Agency adds that it revised this method, to take into account that it *“did not intend to engage in on-site inspections/tests and that the platforms have been live and active for three or more years”*. Ultimately, the method used by the Agency was the following: *“the point 0 would have been given if the offer did not meet at all the quality level; the point 1 if the quality was met but was not very well illustrated in the offer; the point 2 if the quality was met and sufficiently documented in the offer; the point 3 if the quality was met and very well documented on the functionality or quality control processes. The points were, later, converted to correspond to the weighting of the sub-sub-criterion”*⁵¹.
86. A reference to the BARINGA study was made at the public workshop of 19 June 2018, where ACER set out that *“most of the criteria come from the BARINGA study. BARINGA has already evaluated the booking platforms in 2015”*⁵². In addition, it was clear that *“bare statements and unsubstantiated claims”* would be *“regarded as insufficient”*, i.e. scoring *“0”*⁵³. ACER also explained that booking platforms *“would need to include proof that they meet the requirements, such as a full BARINGA score on a criteria or ISO certifications”* to be awarded a score⁵⁴.

⁵⁰ Annex 5 of the Defence

⁵¹ para 106 of the Defence

⁵² Annex 4 of the Defence: Minutes of the public workshop, p. 1

⁵³ *Ibid.* p. 3

⁵⁴ *Ibid.* p. 3

87. There is no direct correspondence between the method determined by the Agency and the method described in the BARINGA study⁵⁵. Nor was the Agency's adaptation of the BARINGA report method the only possible and necessary one. Thus, the mere fact of referring to the BARINGA study is insufficient to clearly determine the method of evaluation which would be used in this case by the Agency.
88. Beyond the documents mentioned above, the Agency did not provide the Board of Appeal with any internal document which showed the adoption of the method described in para 106 of the Defence. There is, thus, no document in the file of these proceedings which proves that this was the method adopted, nor that allows determining the moment when it was adopted. There is also no document showing when the submitted offers were opened.
89. Specifically asked by the Board of Appeal to provide clarifications in this regard, the Agency, by letter of 23 January 2019⁵⁶, noted, in this regard: *"As far as the rating scale method is concerned, the members of the case-team have discussed the method to be used to assess the offers in light of the criteria before these offers were submitted. However, these discussions have not been formalized in a proper document"*. It added that *"in line with the usual practice in administrative proceedings, the case-team's analysis of the file is recorded directly in a draft decision"*, and that this draft, with the proposed evaluation, was then *"discussed in various rounds with the Team Leader, the Head of Department and the Director before being finalised"*.
90. In the light of these facts the Board of Appeal must determine if the requisites mentioned above in para 82 are met.

⁵⁵ The Study reads as follows: *"The scoring of criteria uses a 0 to 4 range (4 being the highest) for core and associated requirements, platforms are awarded one point for documentation, one point for live availability of the function, one point for this criteria having been met through demonstration during the study via a demo or testing, and one point for fulfilment of the CAM NC requirements"* (BARINGA study, p. 7). In addition, it stated that *"for enabling IT and user friendless requirements, platforms are awarded one point for live availability of any relevant function, one point for fulfilment of the criteria at a base level, one point for platform specific considerations of the criteria, and one point for a sufficiently mature implementation of functionality to meet the criteria."* (BARINGA Study, p. 7). As regards scoring calculation, it expressly set out that *"the weighted score is calculated by multiplying the unweighted score by the weighting/importance of the criteria"* (BARINGA Study, p.7).

⁵⁶ On the procedure: see para. 17 of this Decision

91. Before doing so, it is convenient to exclude an argument raised by the Agency, who argued that it is settled case law that competitors who do not request clarifications from the contracting authority before submitting their offer, having been given the opportunity to do so, must be deemed to have implicitly admitted that no additional information was required. According to the Agency, PRISMA “*never requested a clarification of the award criteria*” or of the evaluation method⁵⁷. However, even if the case-law were to be interpreted as the Agency suggests, in the present case, PRISMA did ask, in its comments of 16 July 2018 to ACER’s draft offer letter⁵⁸, for clarifications, namely, on the referential base and the scale that ACER would use to evaluate the quality criteria. ACER did not formally respond to this request in its reply of 19 July 2018, but invited PRISMA to contact the Agency. It is clear that the Agency did not have an obligation, at that moment, to already have decided upon the evaluation method, much less was it required to disclose it, and so cannot be faulted for not providing additional information in that regard. On the other hand, PRISMA can also not be faulted for failing to try to obtain additional information, since it did do so.
92. Regarding the first of the requisites mentioned in para 82, the scoring on a 0 to 3 scale, then transformed into 6/9 depending on the respective criterion, and the requirements established to be awarded points, did not alter the quality criterion, or its global weighting of 60% of the offer; nor did it alter the 3 sub-criteria, or their respective weighting of 24%, 18% and 18%. Hence, ACER did not infringe the principle of equal treatment and transparency in this regard.
93. Regarding the second requisite, the application of the above described method was not capable of affecting PRISMA’s preparation of the offer. The use of a 0 to 3 scale is not liable to have an impact on the content of the offer, nor are the requirements established to be awarded points, as it is wholly expectable that any reasonably diligent tenderer would understand, on the basis of the offer letter, the public workshop of June 2018 and replies to requests for information submitted to the Agency, that its proposal should show that each of the criteria was met, illustrating this fact appropriately and documenting it as extensively as required to be

⁵⁷ paras 98 and 101-102 of the Defence

⁵⁸ Annex 12 of the Defence

persuasive, namely in what concerns functionality and quality control. It should be added that PRISMA did not explain, in its Application, in what way knowledge of the details of the method used by the Agency would (or could) have led it to prepare its offer differently.

94. Regarding the third requisite, the evaluation method, as described by the Agency in para 106 of the Defence, does not, in itself, discriminate between the tenderers. The scoring choices incorporated in the method are highly foreseeable by the tenderers (non-surprising), and they are objective, they are not constructed in such a way that could lead to the benefiting of one tenderer over another.
95. This being said, the preceding analysis of the first three requisites is based on the assumption that the method of evaluation used by the Agency was the one it described in para 106 of its Defence. Regrettably, however, the file of these proceedings does not include documents that allow the Board of Appeal to consider it proven that the Agency did in fact adopt that method. Nor are there documents relating to the justification of the scores awarded to each criterion which – although, according to the case law, do not have to be divulged in such detail to the tenderers – could have allowed the Board of Appeal to conclude that this was the method used.
96. The absence of any such documents means that the Board of Appeal would have to take the Agency exclusively on its word, *ex post facto*, that this was the method it applied. Such an approach would be incompatible with the objective of review of legality inherent in the present proceedings. The ultimate goal of the present discussion is to assess whether the principle of equality was complied with, or whether the Agency adopted an evaluation method which could, somehow, be discriminatory. Without being able to verify the method adopted by the Agency, it is not possible to reach a conclusion in this regard.
97. Equally, in what concerns the fourth requisite, it is also not possible for the Board of Appeal to verify whether the evaluation method which the Defendant claims to have followed- of which no evidence was produced, as set out above and further discussed in the Fifth and the Sixth Pleas - was determined before or after the opening of the offers. It should be noted, however, that this is not an absolute requirement, but rather a principle which knows exceptions. The Board of Appeal considers that the case

law shows that this is not meant to be an absolute, formalistic barrier, but rather a way of ensuring that the method is not distorted after seeing the content of the offers, so as to favour one or some of them. In a context where the method that ACER claims to have followed⁵⁹ is, by its very content and nature, incapable of favouring any of the tenderers, the Agency could not be faulted for infringing the principles of transparency and equality, simply because it adopted this method after opening the offers.

98. The method described in para 106 of the Defence, by its very content and nature, would have been incapable of favouring any of the tenderers. It follows that the definition of this specific method after the opening of the proposals – if there were evidence that indeed this method had been adopted – would not, in itself, have been capable of leading to an infringement of the principle of equal treatment. Unfortunately, there is no evidence, in the case file, that this method was adopted and followed. It would infringe the rule of law for the Board of Appeal to assume that this method was indeed followed, rather than a different method which could very well have infringed the principle of equality.
99. The Agency should therefore rectify the tendering procedure to ensure its compliance with its duty to respect the principles of due reasoning of decisions and of good administration. In doing so, the Agency is free to decide the best course of action. It can either choose to reiterate the entire tendering procedure from its very beginning, asking for new offers by the tenderers. However, in the absence of flaws in the first step of the procedure prior to the evaluation by the Agency and assuming that the Agency continues to adopt the same evaluation method, there is nothing to prevent the Agency from continuing this procedure from this second step, rectifying the procedural shortcomings, as the absence of evidence of the evaluation method (which need not be made available to candidates beforehand) or of the justification of the scoring has no impact on the candidates' drafting of their proposals, which have already been submitted to the Agency.

⁵⁹ para 106 of the Defence

100. Finally, the Agency argued that the Appellant has not proven that the Agency committed a manifest error of assessment in what concerns the method of evaluation.⁶⁰ But, in the circumstances of the present case, it was impossible for PRISMA to meet that burden of proof. As it is impossible for the Board of Appeal to assess whether the method was discriminatory or not, given that it was not possible to determine the evaluation method actually used (or the justification of the individual scores for each criterion).
101. As discussed above, if the Agency indeed used the evaluation method it described in para 106 of the Decision, the Board of Appeal would see no grounds for a finding of an infringement of the principles of transparency and equality. Given the documents produced before the Board of Appeal, it cannot be determined which evaluation method was used. Accordingly, as far as the evaluation method is concerned, the Agency must be found to have infringed its duty to duly reason its Decision, and to duly document the procedure leading up to it, in breach of the principle of good administration.
102. It follows that the First Plea must be upheld on the grounds of an infringement of the duty of due reasoning and of the principle of good administration, in what concerns the absence of a predetermined method of evaluation of the offers.

Second plea – Failure to allocate weighting to sub-sub-criteria

103. The Appellant argues, in essence, that the Agency should have reasonably informed PRISMA of the weighting allocated to the sub-sub-criteria both in the Offer Letter and in its Contested Decision⁶¹.
104. In the first place, the Board stresses that the Agency was not obliged to disclose the weightings before the deadline to present the offers, as per the consistent body of

⁶⁰ para 102 of the Defence

⁶¹ paras 37-39 of the Appeal

case law of the European Courts quoted in the First Plea, which is applicable by analogy to this case as well. In light of said case law, the Agency could have disclosed the weightings after the deadline for the submission of the offers provided that any decision regarding such weighting (i) did not alter the award criteria and weighting, did not affect the tenderers' preparation of their offers and did not discriminate any of the tenderers and (ii) had been determined before the opening of the offers. It has been clearly set out in the First Plea that these requisites were met.

105. To this end, as noted in the Defence⁶², the 9 sub-sub-criteria were weighted equally, none of them had more relative importance than the rest, owing to the fact that the offer letter had not specified otherwise, to prevent an alteration of the award criteria by giving each sub-sub-criterion a specific weight. Hence the plea according to which ACER failed to allocate weighting to 9 sub-sub-criteria is unfounded.
106. Regarding the obligations of disclosure in the Contested Decision, the Board of Appeal refers to what has been set out in the First Plea.
107. It follows that the Second Plea is unfounded.

Third plea – Failure to provide evaluation benchmarks for several sub-sub-criteria.

108. The Appellant argues, in essence, that the Agency should have reasonably informed PRISMA of a benchmark for each of the criteria in both the Offer Letter and in its Contested Decision.⁶³
109. From the consistent case law of the European Courts referred to in the First Plea, it is clear that ACER is under no obligation to disclose its evaluation method and

⁶² para 110 thereof

⁶³ paras 40-51 of the Appeal

enjoys leeway in this respect. This also applies to the evaluation benchmarks for several sub-sub-criteria.

110. Moreover, it needs to be highlighted that ACER enjoys a broad discretion in the choice, content, implementation and evaluation of the award criteria. That power allows a contracting authority to select the scoring system it uses⁶⁴.
111. Regarding the obligations of disclosure in the Contested Decision, the Board of Appeal refers to what has been set out in the Second Plea.
112. It follows that the Third Plea is unfounded.

Fourth plea – Failure to correctly implement weighting rules.

113. In its Fourth Plea, the Appellant argues that the Agency infringed the procedural rules it imposed on itself, to the extent it indicated it would use certain weighting rules, allotting 40 percent of total points to the price criterion and 60 percent to the quality criteria, but its Decision used a scale of points which, in practice, did not respect this weighting⁶⁵.
114. This argument is predicated on the assumption that the Agency assigned to each criterion and sub-criterion a potential score range of 1 to 3 points. According to the Appellant, the absence of a possible score of zero points meant it was impossible to respect the weighting rules, since even if inadequate or insufficient information were submitted, a minimum score of 1 would be awarded. In what concerns the quality criteria, this would mean, according to the Appellant, that a minimum score of 20 points would necessarily be obtained⁶⁶.

⁶⁴ Case T-556/11 *European Dynamics vs EUIPO* EU:T:2016:248, para 215; Case T-457/07 *Evropaiki Dynamiki v EIB* EU:T:2012:671, paras 138 and 193; Case T-481/14 *European Dynamics Luxembourg SA vs ETI* EU:T:2016:498, paras 61 and 62

⁶⁵ paras 52 -61 of the Appeal

⁶⁶ paras. 53-58 of the Appeal

115. The file, the Decision itself ⁶⁷and the Agency’s letter to the Appellant of 10 December 2018⁶⁸ confirm that, when assessing the quality criteria, the Agency, in fact, awarded every sub-criterion of all three undertakings at least 1 point. But this does not mean that the minimum possible score was 1, or that the Agency used a scale of 1 to 3, instead of 0 to 3. It only means that none of the submissions was assessed as meriting a zero in any of the criteria.
116. The Appellant argues that a score of zero was not possible because, if such a score existed, GSA would have been awarded zero: (i) in the sub-sub-criterion “continuing development”, in the sub-category “governance”; (ii) in the sub-sub-criterion “helpdesk availability (outside business hours)”⁶⁹.
117. It is clear that this criticism goes to the adequacy of the assessment of the proposals and their scoring –which is discussed under the fifth and sixth pleas–, not to the possible range of scoring adopted and implemented by the Agency.
118. Para 50 of the Decision cannot be read to mean that a score of zero was impossible, because, when referring to the score of one to three points, it specifically presented this as the score assigned to each booking platform “*as a result*” of the assessment of each aspect. This means it was referring to the outcome of the assessment, and not to the theoretical scoring possibilities. As already detailed under the First Plea, the Agency did indeed adopt a scale of 0 to 3, which was communicated in a timely fashion.
119. In view of the above, the Board of Appeal finds that the Agency did not apply a potential score range of one to three points, but of zero to three points. Accordingly, the Agency did not infringe the procedural rules it imposed on itself, in this regard, as alleged by the Appellant.
120. It follows that the Fourth Plea is unfounded.

⁶⁷ para. 50 of the Contested Decision

⁶⁸ Annex 28 of the Defence

⁶⁹ para. 59 of the Appeal

Fifth plea – Failure to correctly award points to GSA, thereby discriminating PRISMA

121. In its Fifth Plea, the Appellant argues that the Agency incorrectly awarded points to GSA and thereby discriminated the Appellant, specifically by failing to award GSA zero points where it submitted insufficient evidence, and by incorrectly awarding GSA points where the level of evidence submitted was inferior to that of the Appellant⁷⁰.
122. This Plea relates to the ‘third phase’ referred to above in para 67, wherein the proposals are assessed in light of the established criteria, according to their weighting, following a given methodology.
123. This Plea is not about disclosure obligations. But it should be noted that, in accordance with the CJEU case law, based on the principles of equal treatment and transparency, there is no obligation for ACER to provide a detailed summary of how each detail of a tender was taken into account during the evaluation or a detailed comparative analysis of the successful tender and of the unsuccessful tender⁷¹. The same case-law states that there is no obligation upon the contracting authority to provide an unsuccessful tenderer with a fully copy of the evaluation report.
124. In accordance with this case law, the Defendant only needed to provide the grounds or reasons for rejecting the unsuccessful offer, which it did in the Contested Decision. Moreover, this statement of reasons varies according to the circumstances of each case⁷². Even though the individual scores were kept confidential, the Contested Decision provided a general clarification of the performance of each of the tenderers as regards each of the award sub-criteria and sub-sub-criteria in its paras 50-60, as well as a table with each tenderer’s total score in para 61. The case

⁷⁰ paras 32 and 62 to 103 of the Appeal

⁷¹ Case C-629/11 P *Evropaiki Dynamiki v Commission* EU:C:2012:617, paras 21-22; Case C-376/16 P *EUIPO vs European Dynamics Luxembourg SA and Others* EU:C:2018:299 paras 57-61; Case T-514/09 *BPost NV* EU:T:2011:689, paras 116-118

⁷² Case C-629/11 P *Evropaiki Dynamiki v Commission* EU:C:2012:617, para 23; Case C-376/16 P *EUIPO vs European Dynamics Luxembourg SA and Others* EU:C:2018:299, para 59

law does not require a specific weighting to be attached to every negative or positive comment in the evaluation⁷³.

125. As noted in paras 62 to 64 of this Decision, the Board of Appeal must limit itself, in this matter, to decide whether the Defendant made a manifest error of assessment.
126. However, as concluded above in the First Plea, on the basis of the documents produced before the Board of Appeal, it cannot be determined which evaluation method was effectively used by the Agency. To the extent that this Plea involves arguments which depend on the evaluation method used by the Agency, that conclusion, in itself, makes it impossible to effectively review if the Agency made a manifest error of assessment in applying its evaluation method.
127. In the absence of a proven evaluation method, together with the absence of internal Agency documents produced before the Board of Appeal, providing a more detailed justification of the assessment of each criteria (which might be use to deduce the evaluation method), the Board of Appeal is not able to determine if the Agency's Decision, in what concerns the issues challenged by the Applicant, includes manifest errors of assessment.
128. Accordingly, given the absence of a proven predetermined evaluation method, in what concerns the Plea that the Agency failed to correctly award points to GSA, thereby discriminating PRISMA, the Agency must be found to have infringed its duty to duly reason its Decision, and to duly document the procedure leading up to it, in breach of the principle of good administration.

Sixth plea – Failure to correctly award points to PRISMA

129. In its Sixth Plea, the Appellant argues that the Agency incorrectly awarded points to PRISMA, to the extent that the Appellant should have been awarded a higher amount of points for its offer, particularly with regard to sub-sub-criteria “continuing

⁷³ Case C-376/16 P *EUIPO vs European Dynamics Luxembourg SA and Others* EU:C:2018:299, para 63

development”, within sub-criterion “governance”, since not all documentation submitted with its offer was properly considered⁷⁴.

130. The Board of Appeal reiterates its statements in relation to the Fifth Plea.
131. By the same line of reasoning, given the absence of a proven predetermined evaluation method, in what concerns the Plea that the Agency failed to correctly award points to PRISMA, the Agency must be found to have infringed its duty to duly reason its Decision, and to duly document the procedure leading up to it, in breach of the principle of good administration.

Seventh plea – Discrimination of PRISMA by not imposing on GSA obligations relating to governance structure

132. The Seventh Plea of the Appeal claims that Article 5 of the Contested Decision discriminates against the other contenders and especially PRISMA. Article 5 of the Contested Decision contains a recommendation to GSA to improve its governance structure in a way “*that ensures that GSA would not act unduly in the interest of Gaz-System if a conflict were to arise between Gaz-System and the other TSO users of the GSA booking platform*”.
133. In this sense, the Appellant argues that the Defendant did not take into account the fact that the implementation of a new governance structure (to comply with the recommendation) would provoke an increase of the price initially offered by GSA, which, had it been evaluated accordingly, would have changed the result of the designation procedure.
134. In addition, even if the Appellant titles the plea “Discrimination of the Appellant by Article 5 of the Contested Decision”, as a consequence of this recommendation the Appellant brings forward concerns with regard the handling of commercial sensitive information. In this regard, the Appellant argues that a mere recommendation does

⁷⁴ paras 32 and 104 to 115 of the Appeal

not suffice to ensure that GSA complies with the obligations on commercially sensitive information established in Directive 2009/73/EC⁷⁵.

135. The Agency denies every claim made by the Appellant in its Defence. Firstly, in regard with the increase of the price, ACER argues that any modification of GSA's offer, including increasing its price, constitutes a violation of Article 3 of the Contested Decision, since GSA would no longer comply with the requirements on which basis it was selected as capacity booking platform operator. Consequently, GSA's offer is binding for the three-year period of the contract.
136. Secondly, ACER claims that GSA complies with all requirements set out in the regulation on handling of commercially sensitive information or otherwise. Nonetheless, as the low score on governance awarded to GSA evidenced, the governance structure had room for improvement, which is the point of the recommendation.
137. Before diving into the Appellant's and the Defendant's claims, we must stress that this is a procedure of a special nature, and, as ACER has pointed out in its Defence⁷⁶, the assessment to select the capacity booking platform operator has relevant regulatory consequences on the natural gas market, not limited to the awarding of a contract or the selection of a contractor to provide a service.
138. As a preliminary issue, it should be highlighted that there is no obligation to unbundle booking platforms.
139. Any discrimination that were to derive from the use of GSA by the Polish TSO Gazociagow Systemowych GAZ-System SA would in any event affect the other TSOs and, hence, not be capable of affecting a booking platform such as PRISMA.
140. Regarding the price increase that PRISMA suggests that would entail the implementation of a new governance structure by GSA, the Board agrees with the Defendant. The Contested Decision highlights that ACER had duly informed and

⁷⁵ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

⁷⁶ para 154

reminded the contenders that the offer would be binding during the whole duration of the contract (three years) when explaining the assessment procedure⁷⁷. Indeed, para 35 of the Contested Decision reads as follows: “*The Agency requested that the offers from the booking platforms be binding to the benefit of the concerned TSOs until the conclusion of the service contract between the involved TSOs and the chosen booking platform. The commitments stemming from the offer cannot be changed unless such a modification of the offer is required jointly by the concerned TSOs*”.

141. Accordingly, once GSA was designated as the capacity booking platform operator of “Mallnow” IP and “GCP” VIP, ACER reminded GSA that the requirements on the basis of which it had been selected must be complied with at all times during the whole duration of the three-year contract⁷⁸.
142. As a result, any increase of the price offered initially by GSA would lead to a breach of GSA’s obligation to continue to meet all requirements that led to its designation, and to a violation of Article 3 of the Contested Decision.
143. Furthermore, para 35 of the Contested Decision explicitly states that the only way to introduce modifications to the offers made by the contenders would be at the express joint request of the involved TSOs, excluding all other causes for modification of contracts during its term.
144. Thus, were GSA to increase its prices, it would no longer comply with the requirements set out in its binding offer and the Contested Decision, not being able, either, to amend the contract during its whole term, unless by the joint requirement of the TSOs involved.
145. In second place, the Appellant claims that a simple recommendation may not be enough to ensure that the handling of commercially sensitive information by GSA will comply with EU’s legal requirements and, in particular, with article 16 of Directive 2009/73/EC and Article 101 of TFEU⁷⁹. At this point it must be reminded

⁷⁷ Section 6.2 of the Contested Decision

⁷⁸ Article 3 of the Contested Decision

⁷⁹ paras 120, 121 and 122 of the Appeal

that this regulation contains legal obligations addressed to the TSOs, who are responsible for its compliance. It lies, then, on Polish TSO Operator Gazociągów Systemowych GAZ SYSTEM, S.A. (“Gaz-System”), to adopt the corresponding measures to comply with said obligation.

146. On the basis of the foregoing, the recommendation to GSA to improve its governance structure responds more to over cautiousness from ACER than to having found GSA lacking in that aspect. In this sense, the Defendant claims that GSA, while fully complying with the regulation and ensuring the safe handling of commercially sensitive information, scored low on the sub-criterion “governance” and therefore there is margin for improvement, which is expected to be achieved by the recommendation.
147. On the other hand, if there was an eventual breach of the obligations to be fulfilled by GSA or Gaz-System, of whom GSA ultimately depends at the decision-making level, the regulation has foreseen the corresponding reaction mechanisms, established in Article 41 of Directive 2009/73/EC, which will be implemented if the need ever arose, and that, in any case, fall outside ACER’s action scope.
148. That being said, even if the foregoing was not enough to comply with the obligations and requirements set in the Regulation, a recommendation is all the Agency could have issued. ACER’s competences are regulated in Regulation (EC) No 713/2009 and include the power to issue opinions or recommendations and individual decisions concerning the specific cases foreseen in its Articles 7, 8 and 9. Nowhere in this Regulation is it established that ACER may issue an individual binding decision on the governance structure of the TSOs.
149. Finally, it should be observed that the Minutes of the Meeting of the Board of Regulators of 15 October 2018⁸⁰ indicate that the representation of the Polish NRA (URE) confirmed that it will use all its regulatory powers to enforce the governance rules on GSA and avoid discrimination against other TSOs using GSA’s platform⁸¹.

⁸⁰ Annex 21 of the Defence

⁸¹ p. 9 of the Minutes

150. Based on the above, the Appellant's allegations must be dismissed on the following grounds:
- (i) GSA is bound by the offer made to ACER, as referred to explicitly in para 35 and Article 3 of the Contested Decision. In the event of an increase in the prices offered by GSA, it will no longer match the requirements set by ACER and will violate the Contested Decision.
 - (ii) The key of this issue does not lie on whether or not ACER can ensure that GSA will comply with the regulation in force on the handling of commercially sensitive information. The obligation to ensure that the necessary measures are implemented to comply with their legal obligations fall onto each TSO by virtue of Directive 2009/73/EC. That said, ACER has proceeded with over cautiousness by issuing such recommendation, given that GSA's governance structure could be improved strengthening the measures undertaken by the TSO to that effect, as evidenced by the low score it received when evaluated. Moreover, in case of an eventual infringement of the obligations to which GSA or Gaz-System are subject, the regulation has foreseen its own reaction mechanisms that will be used when and how is needed. However, said mechanisms are not for ACER to implement.
 - (iii) ACER's competences and duties comprise the issuing of binding individual decisions only in the cases described in Articles 7, 8 and 9 of Regulation (EC) 713/2009, which do not include a decision obliging an operator to change its governance structure.
151. It follows that the Seventh Plea is unfounded.

Eighth plea – Violation of right of access to information

152. In the Eighth plea, the Appellant referred to Article 41(1) of the Charter of the Fundamental Rights of the European Union ('CFR')⁸², according to which every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions. This right includes, *inter alia*, the right of every

⁸² OJ C364, 18.12.2000, p.1

person to have access to his or her file. According to the Appellant, the right to access cannot be limited in the present case by reference of confidentiality or professional and business secrecy.

153. The Defendant referred to the limitations for access stipulated by Article 41(2) CFR. The Defendant stated that the Appellant received sufficient information during the proceeding as well as it referred to its letter dated 31 October 2018⁸³, in which PRISMA was informed that the Appellant was willing to grant the access to the requested documents.
154. The Appellant contested these statements in its Reply.
155. It follows from the decision of the Board of Appeal on the first request of the Appellant, that certain procedural steps⁸⁴ must be reiterated. These new procedural elements render moot the question whether the Defendant should be ordered to grant right to inspect the files related to the original proceedings which led to the Contested Decision.

⁸³ Annex 23 of the Defence

⁸⁴ See para 99 of this Decision

DECISION

On those grounds,

THE BOARD OF APPEAL

Annuls the Decision. The case is remitted to the Director of the Agency.

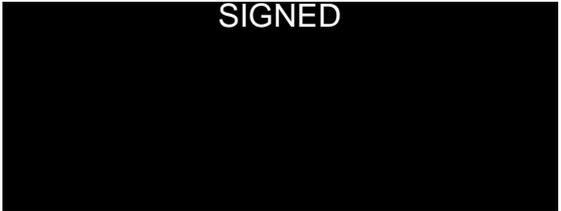
This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 20 of Regulation (EC) 713/2009 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.



SIGNED

Andris Piebalgs

Chairman of the Board of Appeal



SIGNED

Andras Szalay

Registrar of the Board of Appeal