DECISION

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

of 9 August 2024

Case number:	A-006-2019_R
Language of the case:	English
Appellant:	*Operator Gazociągów Przesyłowych Gaz-System S.A.* ("*GSA*" or "*the Appellant*")
	Represented by: D. KUCEL
Defendant:	*European Union Agency for the Cooperation of Energy Regulators* ("*ACER*" or "*the Defendant*")
	Represented by: C. ZINGLERSEN
Interveners:	in the procedure before the Board of Appeal leading to the annulled decision**:**
	PRISMA European Capacity Platform GmbH ("*PRISMA*")
	in support of the Defendant
	President of the Polish Energy Regulatory Office ("*ERO*")
	in support of the Appellant
Relaunched procedure upon:	Order of the General Court of 6 September 2023, *Gaz-System v ACER* (T-212/20, ECLI:EU:T:2023:525) - annulment of Board of Appeal Decision A-006-2019 of 7 February 2020 ("Decision A-006-2019") dismissing the appeal against ACER Decision 10/2019 - rectified by the Order of the General Court of 16 November 2023.
Board composition:	A. BIONDI (Rapporteur), A. MARIEN (Technical Rapporteur), P. EECKHOUT, K. SARDI, K. WIDEGREN, and M. PREK (Chair)

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

HAS ADOPTED THIS DECISION:

I. Facts giving rise to the decision

1. On 13 April 2018, the President of the national regulatory authority (hereinafter "NRA") of the Republic of Poland (hereinafter "ERO") informed ACER that ERO and BundesNetzAgentur (hereinafter "BNetzA"), the NRA of Germany, were not able to jointly select a single booking platform at the "Mallnow" Interconnection Point (hereinafter "the Mallnow IP") and the "GCP" Virtual Interconnection Point (hereinafter the "GCP VIP"). On 19 April 2018, BNetzA confirmed the inability to jointly select a single booking platform. Consequently, the matter was referred to ACER. By the referral, ACER became responsible to adopt a decision on the selection of a single booking platform at the Mallnow IP and the GCP VIP in accordance with Article 37(3) of Regulation (EU) 2017/459[1] and Article 8(1) of Regulation (EC) 713/2009[2].

2. Following an assessment of the award criteria, ACER adopted Decision No. 11/2018 of 16 October 2018[3] (hereinafter "ACER Decision No. 11/2018"), in which it designated GSA as the booking platform to be used at the Mallnow IP and the GCP VIP for a period no longer than three years.

3. On 14 December 2018, PRISMA filed an appeal against ACER Decision No. 11/2018.

4. On 14 February 2019, the Board of Appeal (hereinafter the "BoA") adopted Decision A-002-2018, by which it annulled ACER Decision No. 11/2018 due to an infringement of the duty to duly reason and the principle of good administration and remitted the case to ACER´s Director ("Decision A-002-2018").

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

6. On 6 August 2019, ACER adopted Decision No. 10/2019 (hereinafter the "Contested Decision")[4], in which it designated Regional Booking Platform FGSZ Ltd (hereinafter "RBP") as the booking platform to be used at the Mallnow IP and GCP VIP for a period of three years or until the time when the concerned TSOs come to an agreement on the permanent use of a booking platform, if sooner, in accordance with Article 37(3) of Regulation (EU) 2017/459 and Article 6(10)(b) of Regulation (EU) 2019/942 [5] (hereinafter the "ACER Regulation").

7. On 7 October 2019, the Appellant filed an appeal against the Contested Decision.

8. On 7 February 2020, the BoA adopted Decision A-006-2019, which dismissed the

[1] Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation, OJ L 72, 17.3.2017, p. 1–28.
[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, OJ L 211, 14.8.2009, p. 1–14.
[3] Decision No 11/2018 of the Agency for the Cooperation of Energy Regulators of 16 October 2018 establishing the capacity booking platform to be used at 'Mallnow' Interconnection Point and 'GCP' Virtual Interconnection Point.
[4] Decision No 10/2019 of the European Union Agency for the Cooperation of Energy Regulators of 6 August 2019 on the selection of a web-based booking platform to be used by TSOs for the offering of bundled gas transmission capacity at the "Mallnow" Physical Interconnection Point and "GCP" virtual interconnection point.
[5] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast), OJ L 158, 14.6.2019, p. 22–53.

Appellant´s appeal against the Contested Decision as unfounded.

9. By application lodged on 17 April 2020, the Appellant applied for the annulment of Decision A-006-2019 before the General Court (also referred to as "GCEU").

10. On 6 September 2023, the GCEU issued its Order in Case T-212/20 *Gaz-System v ACER* (Order of the General Court of 6 September 2023, *Gaz-System v ACER*, T-212/20, ECLI:EU:T:2023:525), annulling Decision A-006-2019 (hereinafter "the Order of 6 September 2023").

11. By application lodged on 15 September 2023, the Appellant applied for a rectification of the Order of 6 September 2023 due to clerical mistakes.

12. On 16 November 2023, the GCEU issued its rectified Order in Case T-212/20 REC (Order of the General Court of 16 November 2023, *Gaz-System v ACER*, T-212/20 REC) (hereinafter "the Order of 16 November 2023").

II. Procedural steps relevant for the decision

13. On 19 October 2023, the Appellant sent a request to the BoA requesting information on the relaunched procedure following the Order of 6 September 2023.

14. On 11 December 2023, the BoA relaunched the appeal case under reference number A-006-2019_R.

15. On 11 December 2023, the BoA invited the Appellant and the Defendant to submit their observations, if any, by 12 January 2024 on the conclusions to be drawn from the Order of 16 November 2023.

16. On 11 and 12 January 2024 respectively, the Appellant and the Defendant submitted their observations.

17. On 13 March 2024, the BoA requested the Appellant to provide further details on the scope of its action. The Appellant submitted its reply on 27 March 2024.

III. Main observations and forms of order sought by the Parties

18. The Appellant observes that, in view of the Order of 16 November 2023, the BoA should carry out a full review of the legality of the Contested Decision, including the technical or complex assessment contained in that decision.

19. The Appellant maintains its claims and argumentation regarding the Contested Decision, expressed in the appeal proceedings in the case A-006-2019 before the BoA, which it summarizes as follows:

a) breach of the rule of law, the transparency principle and Article 41 of the Charter of Fundamental Rights of the European Union (hereinafter "CFREU") by arbitrary change of the requirements related to the quality criteria that must be met by submitted offers without giving any justification;

b) breach of the principle of transparency and Article 41 of the CFREU, by not providing the proper explanation of requirements of the case study which affected preparation of offers by capacity booking platforms;

c) breach of the principle of equal treatment, the principle of transparency and Article 4 of the CFREU, by setting requirements for case study in Task B(i) and B(ii) in an arbitrary way that favoured platforms which had not fulfilled the basic requirements at the time the offers were submitted;

d) breach of Article 296 of the Treaty on the Functioning of the European Union

(hereinafter "TFEU"), Article 41(2) (c) and Article 47 of the CFREU, and Article 14(7) of ACER Regulation, by not giving due reasons for the Contested Decision, i.e. not disclosing in Annex I, which is an integral part of the said Decision and an essential part of the justification of the choice of RBP Platform, neither overall nor particular scores awarded to each offer, and by providing an internally inconsistent reasoning for the Contested Decision;

e) breach of Article 41(1) of the CFREU and Article 14(7) of the ACER Regulation by not granting the Appellant full access to the case-file relating to the Contested Decision;

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

g) breach of Article 41 of the CFREU, the principle of good administration, the principle of transparency and the principle of non-discrimination and equal treatment by committing a manifest error of assessment during the evaluation of submitted offers, which led the Appellant, RBP and PRISMA being incorrectly scored.

20. Consequently, the Appellant upholds its requests expressed in the appeal proceedings in case A-006-2019. More specifically, the Appellant requests the BoA to annul the Contested Decision in its entirety and to remit the case to ACER.

21. In response to the BoA request for further observations, in a letter dated 27 March 2024, the Applicant confirmed its interest in pursuing the relaunch appeal case, in view of the impact of the Contested Decision, in particular the financial impact.

22. The Defendant observes that, in its Order of 16 November 2023, the GCEU does not find that the Contested Decision is unlawful. The Defendant considers that the error of law found by the GCEU does not affect the merits and legality of the Contested Decision. Consequently, the Defendant maintains its defence and its request for confidentiality in case A-006-2019.

23. The Defendant also observes that the Contested Decision selected a booking platform for a period of three years and that, given that this period elapsed on 5 November 2022, the Contested Decision exhausted all its effects.

24. Finally, the Defendant observes that the specific process which was the subject of the Contested Decision is no longer in existence, that the Appellant voluntarily maintained the use of the platform selected by ACER, i.e. the RBP Platform, beyond the duration of the Contested Decision and that, therefore, there is no further interest in the proceeding.

IV. Assessment of the relaunched appeal case

Preliminary Observations

25. Article 266 of the TFEU provides that "*[T]he institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union*".

26. Article 29 of the ACER Regulation provides that "*(…) ACER shall take the necessary measures to comply with the judgments of the Court of Justice*".

27. In Article 29, the BoA Rules of Organisation and Procedure[6] further specify the procedural steps to be taken in cases referred back to the BoA.

28. As the GCEU held in its Order of 16 November 2023, the BoA powers need to be exercised in accordance with the parameters established by the Court of Justice of the European Union (hereinafter the "CJEU") in the *Aquind* judgment (judgment of the Court of 9 March 2023, *ACER v Aquind,* C-46/21 P, EU:C:2023:182, paragraph 72).

29. In that case, the Court held that the BoA is required to conduct a full review of decisions adopted by ACER. Thus, in the review carried out by the BoA the technical or complex assessments contained in a decision of ACER, which was challenged before it, could not be restricted to the limited review of a manifest error of assessment.[7]

30. The recent decisional practice of the BoA reiterates that the BoA's duty is to carry out a full review of ACER decisions.[8]

31. As the recent practice of the BoA highlights, the BoA needs to exercise its duties and prerogatives "*in a manner which ensures respect for the principle of procedural economy, that is, the need to conclude proceedings swiftly so as to create legal certainty, while at the same time guaranteeing the effective protection of the rights of the parties and compliance with the panoply of the right to good administration"*.[9]

32. In examining the parties' pleas and arguments, as well as observations on the consequences of the annulment of the BoA decision by the General Court, the BoA is under the obligation to proceed to a full review of the legality of the Contested Decision, including the review of technical or complex assessments contained in that decision, in accordance with the GCEU´s Order of 16 November 2023.

33. Such a review will comprise also re-examining the Contested Decision in light of the pleas and arguments of the parties as submitted to it in the procedure leading to adoption of the annulled decision. The parties did not bring any new pleas or arguments in the relaunched procedure.

34. It should be noted that the maximum three-year term for which the booking platform was selected, subject of Decision A-006-2019, expired on 5 November 2022, prior to the GCEU´s Order of 16 November 2023.

35. The BoA observes, finally, that after the expiration of the maximum three-year term foreseen in the Contested Decision, the concerned TSOs, including the Appellant, freely and voluntarily decided to maintain the use of the booking platform of RBP at the Mallnow IP and the GCP VIP, i.e. the same booking platform that had been designated by ACER in the Contested Decision. This is confirmed albeit justified on several grounds by the Appellant in its response to the BoA´s written questions in the letter of 27 March 2024.

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

36. By its first plea, the Appellant argues that ACER infringed Article 2 of the Treaty on European Union (hereinafter "TEU") as regards the rule of law and principle of legal certainty, Article 15 of the TFEU as regards the principle of transparency, and Article 41 of the CFREU as regards the right to good administration, due to what is submitted to

[6] Rules of Procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators as amended by Decision No 01/2023 of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators of 22 November 2023.
[7] *Aquind* cit. at paragraph 28, paragraph 72.
[8] See most recently the BoA Decisions in case A-001-2021 *PSE v ACER* and A-004-2022 *Fingrid v Acer.*
[9] BoA Decision in case A-003-2022 *Uniper v ACER*, paragraph 33.

have been an arbitrary change of the technical quality criteria introduced by ACER in the new tender without justifying this change. The Appellant also invokes Article 10(1) of the European Code of Good Administrative Behaviour and the Model of Rules on EU Administrative Procedure.

37. It should be recalled that the Contested Decision was adopted to comply with BoA Decision A-002-2018. In that Decision, the BoA held that *"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"* (at paragraph 99) .

38. The BoA annulled ACER Decision No. 11/2018, remitted the case to the Director of ACER and left it to ACER to decide "*the best course of action*", leaving it up to ACER to choose between two possible scenarios. The first scenario implied "*to reiterate the entire tendering procedure from its very beginning, asking for new offers by the tenderers"*. The second scenario implied the continuation of the procedure from a later stage (the opening of the proposals) as follows: *"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".*

39. It is thus clear that ACER's decision to restart the procedure from the outset is in line with the possible courses of action identified in BoA Decision A-002-2018. As noted in ACER's Defence, the decision to start the procedure from the beginning was taken, among other reasons, because of the expiry of the validity of the offer submitted by PRISMA.[10]

40. ACER was therefore entitled to restart the procedure from the outset, the question being on whether ACER was entitled to introduce amendments to the technical criteria when issuing its new tender.

41. The Appellant claims that ACER "*should have based its second decision on the same requirements regarding the technical quality of the platform, since the BoA Decision did not question them*".[11] It is true that the BoA Decision A-002-2018 did not question the evaluation criteria. However, the annulment of the first tender proceedings was based on the absence of a proven predetermined evaluation method of the offers. Additionally, the arguments put forward in that appeal did not concern the lawfulness of the evaluation criteria itself. In any case, ACER was free to maintain or alter the tender specifications in the new procedure.

42. The reasoning of BoA Decision A-002-2018 and its conclusion do not imply that ACER was prevented from revising the specifications for the new tender. It did not result from that decision that the requirements on technical quality had to remain unchanged.

43. Within these parameters, it was for ACER to decide upon the specific measures to be taken in order to give due effect to BoA Decision A-002-2018.

[10] Paragraph 38 of the Defence.
[11] Paragraph 11 of the Appeal.

44. With specific reference to an annulment of a tendering procedure, principles developed in the context of EU public procurement law can be used as a useful guidance. The case law provides that '*the contracting authority is entirely at liberty to decide on what subsequent action to take in respect of the contract...It may thus reopen a new procedure by making, if necessary, any amendment to the specifications which it considers appropriate"*.[12]

45. The BoA also notes that, before the Open Call for GAS 2-2019 (also referred to as the "Open Call") was launched, a public consultation took place with the purpose of exchanging views with stakeholders on the definition of the criteria to be used. In that public consultation, the criteria for the new tender were debated and assessed by the interested parties, including the Appellant. ACER decided to revise or refine the criteria on the basis of the result of the public consultation. It subsequently launched the Open Call, which was not only open to the Appellant, RBP and PRISMA, but to any other booking platform operator wishing to participate, which highlights, again, the novel nature of the tender process.

46. It follows that ACER was entitled not only to restart the entire procedure from the outset, but also to introduce new requirements to the technical criteria. The introduction of a Case Study – aimed at carrying out a pragmatic evaluation of the candidates´ proposed services in practice, in particular their ability to implement a good practice in IT service management when serving Mallnow IP and GCP VIP[13] - is the main difference between ACER´s first (annulled) iteration of the tender proceedings and the second (new) iteration of the tender proceedings.

47. However, it is not necessary for the BoA to take a stance on this issue given that ACER was entitled to amend the technical criteria and that the Appellant had been aware, since the public consultation, of the criteria that ACER would follow for the new tender.

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

49. Additionally, the Appellant refers to the Model of Rules on EU Administrative Procedure and to the Opinion of the Advocate General Campos Sánchez-Bordona of 16 May 2019 in *Repower v EUIPO* to claim a breach of the principle of legal certainty.[14] The Appellant emphasises that, when revoking acts, relevant institutions have to take precautions due to the impact of revocations on individual rights that may have been granted to the acts´ beneficiaries. In its opinion, ACER did not take the necessary precautions and adversely affected the legal position of the Appellant, who was the beneficiary of ACER Decision No. 11/2018.

50. However, in the case at hand, ACER Decision No. 11/2018 was not revoked. As Advocate-General Campos Sánchez-Bordona explains in his Opinion in *Repower v EUIPO*, relied upon by the Appellant,*"(…) the term 'revocation' in its broadest sense denotes two legally distinct concepts which may affect administrative acts the tenor of which is favourable to the person concerned: first, a decision pursuant to which an institution sets aside its own earlier, not necessarily unlawful, act, based on considerations of appropriateness; and second, an 'ex officio review' on grounds of legality, which is carried out (subject to compliance with certain conditions) where an*

[12] Judgment of the General Court of 5 March 2019, *Eurosupport – Fineurop support v EIGE*, T-450/17, EU:T:2019:137, paragraph 71. See also judgment of the Court of First Instance of 8 October 2008, *Sogelma v EAR*, T-411/06, EU:T:2008:419, paragraph 136, and judgment of the GCEU of 29 October 2015, *Direct Way and Direct Way Worldwide v Parliament*, T-126/13, EU:T:2015:819, paragraph 68.
[13] Recital 22 of the Contested Decision.
[14] Opinion of the Advocate General Campos Sánchez-Bordona delivered on 19 May 2019, *Repower v EUIPO*, C-281/18 P, EU:C:2019:426.

earlier act is vitiated by defects which render it unlawful".[15]

51. ACER Decision No. 11/2018 was not revoked but annulled by the BoA following an appeal by one of the tenderers. Moreover, the Appellant intervened before the BoA in support of the lawfulness of ACER Decision No. 11/2018; the BoA will abstain from entering into the discussion on *venire contra factum proprium* here. The Appellant cannot derive any specific individual rights, as the BoA Decision was simply part of the appeal procedure as provided by the ACER Regulation. ACER was entirely at liberty to decide on what subsequent action to take following the annulment of the first iteration of these tender proceedings.

52. Finally, the Appeal refers, in a general manner, to a potential misuse of powers, due to the fact that ACER had, when setting the criteria for the new tender, knowledge of the offers submitted by the tenderers in the first (annulled) iteration of these tender proceedings. The Appellant claims that "*setting new evaluation criteria may potentially determine them in a way that would favour a particular offer and its platform*".[16]

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

54. Second, the Appellant does not provide any proof of alleged misuse of powers by ACER. According to the CJEU´s settled case-law, "*a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case*".[17] The Appellant´s mere claim that ACER was aware of the offers of the first (annulled) iteration of these tender proceedings, without any evidence or reasoning in support of this claim, is not sufficient to demonstrate a misuse of powers.

55. The BoA considers that it cannot be concluded from the Appellant's arguments, to a great extent general and unsubstantiated, that ACER infringed Article 2 of the TFEU as regards the rule of law and principle of legal certainty, or Article 15 of the TFEU as regards the principle of transparency, or Article 41 of the CFREU as regards the right to good administration. No arbitrary change of the requirements related to the technical quality was demonstrated by the Appellant, nor detected by the BoA in the exercise of its review.

56. It follows that the Appeal's first plea must be dismissed as unfounded.

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

57. In its second plea, the Appellant argues that ACER infringed the right to good administration and the principle of transparency (Article 15 of the TFEU and Article 41 of the CFREU) because the requirements of the Case Study were "*too general in nature and therefore the offeror had no information how these tasks should be properly*

[15] Cit. above, paragraph 28.
[16] Paragraph 17 of the Appeal.
[17] Judgment of the Court of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 135; judgments of the Court of 16 April 2013, *Spain and Italy v Council*, C-274/11 and C-295/11, EU:C:2013:240, paragraph 33.

prepared".[18]

58. In this plea, the Appeal focuses on an alleged lack of clarity of the criteria (completeness, consistency, robustness, relevance and efficiency) and on how they had to be applied to the Case Study, which allegedly made it impossible for the tenderers, including the Appellant, to submit proposals in accordance with ACER's expectations.

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

60. Second, the Appellant erroneously bases this plea on BoA Decision A-002-2018, quoting the latter Decision with respect to the general obligation to disclose award criteria, sub-criteria and their weighing and the exceptional circumstances in which this can be disregarded.[19] However, in the case at hand, contrary to the issue discussed in BoA Decision A-002-2018, the Appellant does not argue that ACER disclosed sub-criteria and their weighing after the time limit to submit the offers. In fact, ACER did not revise or disclose criteria or sub-criteria after the Open Call. ACER's assessment of the offers was based on the criteria disclosed in the Open Call, in line with the principle of transparency. It follows that the Appellant's reference to BoA Decision A-002-2018 regarding disclosure prior to the time limit to submit the offers is ineffective to support its claim.

61. Third, the case law on the correct formulation of award criteria in the public procurement procedures can again be used as a useful guidance for the BoA. Award criteria must be formulated - in the contract documents or the contract notice - in such a way as to be clear and comprehensible and should allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.[20] It follows that the BoA must assess whether the Appellant was able to understand the award criteria at issue and whether a reasonably well-informed and normally diligent tenderer would have understood them whilst exercising ordinary care.

62. The case law also demonstrates the need to consider whether the tenderers could submit requests for clarification and, if so, whether the tenderer concerned effectively requested clarifications before submitting the tender.[21] BoA Decision A-002-2018 expressly stated that this case-law does not, in itself, allow to conclude that tenderers who did not request clarifications from the contracting authority before submitting their offers had to be considered to have implicitly admitted that no additional information was required.[22] The BoA notes, however, that for the new tender the three booking platforms had been actively involved in the drafting of the criteria and had been able to request clarifications on the criteria during the public consultation and, subsequently, during the Open Call.

63. Fourth, the Appellant's argument that the requirements for the Case Study were *"too general"* focuses solely on the resource plan.[23] The Appeal correctly indicates that all

[18] Paragraph 21 of the Appeal.
[19] Paragraphs 19-20 of the Appeal and paragraph 72 of BoA Decision A-002-2018.
[20] By analogy: judgment of the Court of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 53-54, and judgment of the Court of 18 October 2001, *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 42.
[21] *eVigilo* cit. above, paragraph 56.
[22] Paragraph 91 of BoA Decision A-002-2018.
[23] Paragraphs 21 and 22 of the Appeal.

the three offers had shortcomings when it came to the resource plan.[24] However, this is *per se* manifestly insufficient to show that the criteria associated with the resource plan were unclear. Otherwise, whenever tenderers would have shortcomings in one of the features assessed in a tender, they would be able to successfully argue - without producing any additional evidence - that the shortcomings derive from a lack of clarity of the criteria regarding these features.

64. The Appellant does not explain nor specify why the requirements of the Case Study are, in its view, "*too general in nature*".[25] Consequently, the Appellant does not meet its burden of proof concerning the alleged lack of clarity. It would have been expected from the Appellant to, *inter alia*, try to demonstrate that, considering the allegedly vague and general terms of the criteria, its offer was valid and should, or at least could have received a higher score. Analysing this plea together with Section 7.3 of the seventh plea of the Appeal,[26] the Appellant appears to be challenging the evaluation method of this feature rather than the clarity of the respective criteria.[27] Although this will be further analysed in the assessment of the seventh plea, it suffices to state with regard to the first plea that ACER has some leeway in carrying out the evaluation in order to assess and rank the tenders in accordance with the circumstances of the case.

65. Additionally, when describing the content of the offers to be submitted by the candidates, the Open Call clearly requested "*a resource plan having regard to the budget, human resources and skills committed for the implementation*" of the relevant task.[28] The Open Call cannot be said to be confusing or ambiguous, as it did not mention any other set of requirements regarding the resource plan. Neither did it convey that these requirements were optional.

66. As for the Appellant's argument on a possible violation of the principle of transparency,[29] the Appellant does not put forward any argument, which directly or indirectly argues or supports that ACER, when assessing the offers, favoured one of the platforms or that the assessment was arbitrary. Nor has it been argued in this plea that the Case Study requirements allowed ACER to introduce favouritism or arbitrariness.

67. Finally, there is necessarily some natural openness in the formulation of the criteria in the tendering procedures which leave the space to tenderers to explain and demonstrate how their tender proposes to implement the requirements, which was the case here. In this context, it cannot be successfully argued that the tenderers had no information on how these tasks should be properly prepared, as this was for the tenderers to propose in their offers.

68. Based on the criteria set by ACER and on the Case Study submitted by the Appellant, the BoA concludes that the criteria associated with the resource plan were clear and comprehensible to the Appellant, and would also have been clear and comprehensible to a reasonably well-informed undertaking in the same position, exercising ordinary care. No violation of the right to good administration and the principle of transparency were demonstrated by the Appellant, nor detected by the BoA in the exercise of its review.

69. It follows from the above that the second plea must be dismissed as unfounded.

Third plea – Infringement of the principle of equal treatment as regards tasks encompassed in the Case Study

[24] Paragraph 22 of the Appeal. See also paragraphs 18-20 of the Reply.
[25] Paragraph 21 of the Appeal.
[26] Section 7.3 The Agency wrongfully awarded points to the Appellant in relation to the resource plan.
[27] See in this respect paragraphs 35-42 of the Rejoinder.
[28] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019.
[29] Paragraph 23 of the Appeal.

70. By its third plea, the Appellant argues that ACER breached the principles of transparency and equal treatment enshrined in Article 15 of the TFEU and Article 41 of the CFREU because "*some of the requirements regarding the scope of the individual tasks encompassed in the case-study might have favoured some booking platform(s)*".[30] Specifically, the Appellant alleges that the formulation of Task B (i) breached the principles of transparency and equal treatment, and that the formulation of Task B (i) and (ii) breached the principle of equal treatment.[31]

71. Task B (i) of the Case Study aimed at evaluating the candidates' ability to improve the user-friendliness of their booking platforms. Annex 6 to the Open Call reads as follows: *"A description of the potential improvements you may offer in order to improve user friendliness of your interface in order to meet the constraints of 3 minutes and have the change process implemented in at most nine months. If you already meet the requirement, describe any additional improvement you may offer in order to improve the actual values of processing time with at least 30% in terms of completing any operation from the users' perspective from the start to the end of the existing processes for any transaction."*[32]

72. Task B (ii) of the Case Study aimed at evaluating the candidate's ability to provide the helpdesk service on a multi-channel platform in addition to the already existing channels. Annex 6 to the Open Call reads as follows: *"A description of the potential improvements you may offer in order to improve helpdesk to allow the use of more than two channels and decrease the response time with 20% the current response time the platform has at the time of the submission of the case study to the Agency. If you already have three channels, please increase the number of channels with one more and improve with at least 20% the current response time the platform has at the time of the submission of the case study to the Agency."*[33]

73. The rules applicable to ACER's Decision when acting under Articles 6(10)(b) of the ACER Regulation and 37(3) of Regulation (EU) 2017/459 imply an obligation for ACER to respect the general principles of EU law, including the principle of transparency and the principle of equal treatment.

74. Regarding the compliance of Task B (i) of the Case Study with the principle of transparency, the Appellant merely argues that "*the criterion of 3 minutes seems to be completely arbitral*" and that "*ACER did not explain why such a criterion was set*".[34] The BoA considers that the Appeal does not sufficiently clarify the reasoning behind the claim of arbitrariness.

It is a generally accepted rule of procedure that each party must justify and, where applicable, support with evidence, its own claims, without the review bodies being obliged (or being able) to guess the intention or the reasoning of each party or, more importantly, to substitute the party in its duties and responsibilities to justify and substantiate its claims. Such possibility would, moreover, contravene the principle of equality of arms between the parties.

75. Additionally, the BoA observes that ACER justifies the choice of this time limit as being a reasonable estimation of an *"acceptable duration"* for online booking platforms *"for completing any operation from the start to the end"*.[35] It is settled case-law that European agencies and institutions have a broad discretion to select the factors to be taken into

[30] Paragraph 25 of the Appeal.
[31] Paragraphs 25 to 30 of the Appeal.
[32] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.3.
[33] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.3-4.
[34] Paragraph 26 of the Appeal and paragraphs 33 and 34 of the Reply.
[35] See paragraph 87 and footnote 36 of the Defence.

consideration and evaluated in tender procedures[36] and the choice of the above-mentioned criterion falls within this margin of discretion.

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

77. Regarding the compliance of Task B (i) of the Case Study with the principle of equal treatment, the Appellant argues that the distinction between, on the one hand, candidates unable to process in 3 minutes when presenting their offer - which were required to achieve a 3 minute requirement - and, on the other hand, candidates able to process in 3 minutes when presenting their offer - which were required to improve their timing by at least 30% - constitutes "*an unequal treatment of bidders, since it is less difficult to achieve the 3 min requirement than to improve it by further 30%*" and that it led to "*the preferential scoring of the lower quality platforms*".[37] The Appellant makes a similar allegation regarding Task B (ii) of the Case Study, which distinguishes between, on the one hand, candidates unable to allow the use of more than 2 channels when presenting their offer (which were required to enable the use of more than 2 channels) and, on the other hand, candidates allowing the use of 3 channels when presenting their offer (which were required to enable the use of 4 channels).[38]

78. The Defendant recognises that both Tasks B (i) and (ii) distinguish between two options. However, the Defendant explains that both tasks aim at evaluating the *"ability to make improvements"*[39] *"whatever the applicable option"*[40]. The Defendant adds that under both options, *"the nature of Task B was exactly identical"* and that the options *"had no influence on the final deliverable"* (the improvement), and *"were equally reasonable: they may have requested different resources, but the five criteria were completely independent from the quantities (human resources and time) involved"*[41] and *"were not relevant to appraise the offers based on their respective qualities"*[42]. The Defendant maintained at the Oral Hearing that ACER´s assessment was not about the status of advancement of the booking platforms, that both options had been assessed in an equal fashion and that the five criteria of the Open Call - completeness, consistency, robustness, relevance and efficiency - had been assessed irrespective of the chosen option, enabling a "like with like" assessment.[43]

79. The BoA states, in this respect, that it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[44] The purpose of this principle is to ensure the development of effective competition, leading to the selection of the best bid.[45]

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[36] Judgment of the Court of 8 December 2011, *Chalkor AE Epexergasias Metallon v. Commission*, C-386/10 P, EU:C:2011:815, paragraph 64; judgment of the Court of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 80; judgment of the General Court of 10 December 2014, *ONP and Others v Commission*, T-90/11, EU:T:2014:1049, paragraph 353; judgment of the General Court of 2 June 2016, *Moreda-Riviere Trefilerías v Commission*, T-426/10, EU:T:2016:335, paragraph 504.

[37] Paragraph 27 of the Appeal and paragraphs 23-31 of the Reply.

[38] Paragraph 29 of the Appeal.

[39] Paragraphs 92 to 94 of the Defence and paragraph 10 of the Rejoinder.

[40] Paragraph 93 of the Defence.

[41] Paragraph 93 of the Defence.

[42] Paragraph 94 of the Defence.

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

[44] Judgment of the Court of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraph 27; judgment of the Court of 14 December 2004, *Arnold André*, C-434/02, EU:C:2004:800, paragraph 68.

[45] Judgment of the Court of 22 June 1993, *Commission v Denmark*, C-243/89, EU:C:1993:257, paragraph 37; *Fabricom* cit. above, paragraph 33; judgment of the Court of 28 June 2018, *Amplexor v Commission*, T-211/17, EU:T:2018:392, paragraph 35.

80. Technical specifications shall then afford equal access of economic operators to the tender procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition;[46] also, the equal position of bidders applies during the preparation and the evaluation of the offers.[47]

81. Irrespective as to whether the Case Study introduces a new criterion or merely refines the criteria of the first (annulled) assessment of these tender proceedings as set out above in the first plea, the BoA acknowledges that the evaluation of an ability to improve is not a breach of the principle of equal treatment.

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

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

84. It is not necessary for the BoA to rule on whether the options of Tasks B (i) and (ii) amount to comparable or different situations and on whether the options amount to an objectively justified differential treatment,[48] because the offers demonstrate that all three offers applied the same option, i.e. regarding Task B (i), the option to demonstrate the ability to improve timing with at least 30% from an initial position of at least 3 minutes and, regarding Task B (ii), the option to demonstrate the ability to achieve 1 additional channel accompanied by a decrease of response time of at least 20%. This is confirmed by the fact that all three bidders applied similar options to their offers and were thus in comparable situations.

85. Significant, too, is the fact that the Appellant has not demonstrated *in concreto* how an alleged unequal treatment had affected its position in the tender process and merely states that it led to "*the preferential scoring of the lower quality platforms*".[49] In its Appeal and Reply, the Appellant stated *in abstracto* that it had been affected by the alleged unequal treatment because it had led to a different manner of evaluating the different candidates. The Appellant did not develop this point any further at the Oral Hearing.[50]

86. In light of the above, the BoA concludes that the Contested Decision in Tasks B (i) and (ii) of the Case Study does not constitute a breach of the principle of equal treatment. No violation of the principle of equal treatment and of the principle of transparency were

[46] Article 60(2) of 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, OJ L 94, 28.3.2014, p. 243–374.
[47] Judgment of the Court of 12 March 2008, *Evropaïki Dynamiki v Commission*, T-345/03, EU:T:2008:67, paragraph 76, and *Amplexor v Commission* cit. footnote 45, paragraph 41.
[48] Judgment of the General Court of 13 December 2016, *European Dynamics Luxembourg and Evropaïki Dynamiki v Commission*, T-764/14, EU:T:2016:723, paragraph 257 and *Amplexor v Commission* cit. footnote 45, paragraph 35.
[49] Paragraph 27 of the Appeal and paragraphs 23 to 31 of the Reply.
[50] Summary Minutes of the Oral Hearing, p. 18: *"The Appellant answered that during the hearing it was the first time for him to find out that all the platforms have chosen the option 2 (further improvement)."*

demonstrated by the Appellant, nor detected by the BoA in the exercise of its review.

87. It follows that the third plea must be dismissed as unfounded.

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

88. By its fourth and fifth pleas, which are best assessed jointly, the Appellant argues, in essence, that ACER infringed Article 296 of the TFEU, Articles 41(1) and (2)(c) and 47 of the CFREU, and Article 14(7) of the ACER Regulation by failing to give due reasons for the Contested Decision, specifically by not disclosing in the Contested Decision (including its Annex I), notified to the Appellant, neither the overall nor the particular scores awarded to each offer, by not disclosing PRISMA's offer, and by not granting the Appellant full access to the case-file of the proceedings, as well as by providing internally inconsistent reasoning for the Contested Decision.[51]

89. As a preliminary step, it should be recalled that the Appellant (*inter alia*), as well as an Intervener, requested the BoA to grant it the right to inspect ACER's files relating to the Contested Decision in full or, alternatively, to disclose the scoring in Annex I to the Contested Decision and, then, enable the Appellant to supplement the Appeal with further information based on the new revealed data. The BoA notes that, under the BoA Rules of Organisation and Procedure, these requests are dealt with in the appeal procedure under a specific framework. For a ruling on these issues to be timely and effective, it must occur prior to the final BoA ruling and the BoA Rules of Organisation and Procedure set out how this may occur. When filing its Defence, ACER must provide the BoA – as it did in this case – with the confidential versions of the files in question (i.e., ACER's files relating to the Contested Decision, including the scoring in Annex I to the Contested Decision), and, if it chooses to, it can submit a justified request that some of these documents be treated as confidential in relation to the Appellant and/or third parties under Article 14(1) of the BoA Rules of Organisation and Procedure. The Chairperson, acting on behalf of the BoA under Article 14(2) of the BoA Rules of Organisation and Procedure then evaluates, with the assistance of the Registrar, the confidentiality request and accepts/rejects it in full or in part. Article 14(3) requires ACER to then provide to the Registry "non-confidential" and "marked confidential" versions of the relevant documents. Finally, the Appellant (or Intervener) is given access to all the documents submitted by ACER, excluding those which have been qualified as confidential by the BoA Chairperson (or parts thereof). Through this procedure, the Appellant (or Intervener) has access to any and all information which the BoA deems to have been unjustifiably qualified as confidential by ACER. If the Appellant (or Intervener) is given access to information which was previously not provided to it, it has the right and opportunity to supplement its Appeal (or submission) with any additional facts or references, based on that new information. The admissibility of new evidence and pleas in law which might be put forward by the Appellant, in this context, would be analysed by the BoA on the basis of Article 17(1) and (2) of the BoA Rules of Organisation and Procedure.

90. The BoA further confirms that in the present proceedings, the Chairperson of the BoA acting under Article 14(2) of the BoA Rules of Organisation and Procedure, issued, on 3 December 2019, a Decision on the Confidentiality Claim requested by ACER, in which the Chairperson agreed with ACER's interpretation of the scope of information which should be deemed confidential vis-à-vis the Appellant and accepted ACER's request for confidentiality of certain documents and parts of documents. The effect of this decision was the rejection of the Appellant's and Intervener's requests to inspect ACER´s files

[51] Paragraphs 31 to 52 of the Appeal; paragraphs 35 to 50 of the Reply. See also paragraphs 17 and 18 of Intervention of the President of ERO.

relating to the Contested Decision in full or, alternatively, to disclose the scoring in Annex I to the Contested Decision.

91. ACER provided the BoA with the confidential versions of the relevant documents. This allowed the BoA to carry out a review of the confidential version of the Contested Decision with the full scope and intensity required.

92. As stated in BoA Decision A-002-2018, [52] even though the Public Procurement Directives[53] and partially the EU Financial Regulation[54] are not applicable to the present case, ACER must comply with the fundamental rules of the TFEU (including Article 296 of the TFEU) and the general principles of EU law, including the principles of transparency and good administration (Article 15 of the TFEU and Article 41 of the CFREU).

93. It is not in dispute between the parties that ACER has a duty to duly reason its decisions. This obligation is specifically foreseen in Article 14(7) of the ACER Regulation, and would, in any case, derive from the TFEU and the general principles of EU law.

94. In a context such as the present one, where an agency of the European Union has *"a broad power of appraisal, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to provide adequate reasons for its decisions. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present*".[55]

95. As stated by the Court, "*in the light of the obligation to state reasons laid down in the second paragraph of Article 296 TFEU, the author of the measure must disclose its reasoning in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its power of review. In addition, those requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (...). Furthermore, the obligation to state reasons is an essential procedural requirement, as distinct from the question of whether the reasons given are correct, which goes to the substantive legality of the contested measure"*.[56]

96. Thus, the disagreement between the parties, in the present dispute, focuses on disclosure of confidential information. The issue is whether, by invoking confidentiality and refusing disclosure of certain information to the Appellant, ACER infringed its duty to

[52] Paragraphs 52 to 54 of BoA Decision A-002-2018.
[53] 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, OJ L 94, 28.3.2014, p. 65–242; 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, OJ L 94, 28.3.2014, p. 243–374.
[54] Regulation (EU, Euratom) 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, OJ L 193, 30.7.2018, p. 1–222.
[55] Judgment of the General Court of 7 October 2015, *European Dynamics Luxembourg and Others v OHIM*, T-299/11, EU:T:2015:757, paragraph 125 (and case-law quoted therein; applicable by analogy).
[56] *European Dynamics v OHIM* cit. above, paragraph 126 (and case-law quoted therein; applicable by analogy). See also, e.g.: judgment of the Court of 3 May 2018, *EUIPO v European Dynamics*, C-376/16 P, EU:C:2018:299, paragraph 59; judgment of the Court of 4 October 2012, *Evropaïki Dynamiki v Commission*, C-629/11 P, EU:C:2012:617, paragraph 23; *Sogelma v EAR*, cit. footnote 12, paragraphs 119 and 120; judgment of the General Court of 26 January 2017, *TV1 v Commission*, T-700/14, EU:T:2017:35, paragraph 79.

duly reason the Contested Decision and/or to grant access to the proceeding files.[57]

97. EU Law, as clarified by the case law of the Court, does not grant a general right of unrestricted access to information and documents held by EU institutions and bodies. Limits are imposed on the principle of transparency. EU institutions, bodies and agencies are required to protect confidential information and to safeguard public and private interests which merit protection,[58] as was the case in the proceedings in question. *Inter alia*, Article 4(2) of Regulation (EC) No 1049/2001[59] provides that the access to a document, or part thereof, to be refused *"where disclosure would undermine the protection of commercial interests of a natural or legal person"*. The case law has specifically clarified that *"the principle of transparency* (…) *must be reconciled with the requirements of protection of the public interest, of the legitimate business interests of public or private undertakings and of fair competition"*.[60]

98. Specifically, in what concerns access to the tender case-files, the case law sets out a limited right of access. In the words of the Court, according to settled case-law, 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, second, in the context of notification of the characteristics and relative advantages of the successful tender, a detailed comparative analysis of the successful tender and of the unsuccessful tender (...) Similarly, the contracting authority is not under an obligation to provide an unsuccessful tenderer, upon written request from it, with a full copy of the evaluation report (...).[61] The EU judicature nevertheless verifies whether the method applied by the contracting authority for the technical evaluation of the tenders is clearly set out in the tender specifications including the various award criteria, their respective weighting in the evaluation (that is to say in the calculation of the total score) and the minimum and maximum number of points for each criterion"*.[62] The EU agency *"is not obliged to provide the unsuccessful tenderer access to the full version of the tender of the successful tenderer awarded the contract at issue or the complete version of the evaluation report"*.[63]

99. EU legislation foresees the protection and non-disclosure of information in public procurement procedures, *inter alia*, when such disclosure would infringe rights or harm commercial interests of third parties and fair competition on the market. As specified above at paragraph 92, guidance can be drawn from the principles regulating tenders by EU institutions. EU legislation has systematically set out that the contracting authority must provide certain information to non-selected tenderers, but that *"the contracting*

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

[58] See, e.g., judgment of the General Court of 10 December 2009, *Antwerpse Bouwwerken v Commission*, Case T-195/08, EU:T:2009:491, paragraph 84.

[59] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31/05/2001, p. 43–48.

[60] Judgment of the General Court of 29 January 2013, *Cosepuri v EFSA*, T-339/10, EU:T:2013:38, paragraph 49.

[61] *EUIPO v European Dynamics* cit. footnote 56, paragraphs 57 and 58; *Evropaïki Dynamiki v Commission*, cit. footnote 56, paragraphs 21 and 22 (and case-law quoted therein, applicable by analogy).

[62] *European Dynamics v OHIM*, cit. footnote 55, paragraph 129 (and case-law quoted therein, applicable by analogy). See also *EUIPO v European Dynamics*, cit. footnote 56, paragraph 58; *Evropaïki Dynamiki v Commission*, cit. footnote 56, paragraph 22; judgment of the General Court of 8 July 2015, *European Dynamics v Commission*, T-536/11, EU:T:2015:476, paragraphs 50 and 53.

[63] *European Dynamics v OHIM*, cit. footnote 55, paragraph 131.

authority may decide to withhold certain information where its release would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators or might distort fair competition between them".[64] The same is true for EU law applicable to public tenders by Member State authorities: *"Certain information on the contract award* (…) *may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators"*.[65]

100. As noted by the Court, *"both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them"*.[66] Specifically addressing concerns with impact on competition, the Court noted that *"it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures"*.[67]

101. This approach led to the affirmation of a *"general presumption according to which that access to the bids submitted by tenderers would, in principle, undermine the interest protected"*, which may be refuted by showing that disclosure of a given document or passage thereof is not covered by the presumption or that there is a higher public interest justifying disclosure.[68]

102. It should be observed that the Appellant himself asked ACER to keep the corresponding information, from its own offer, confidential in relation to the other platforms and third parties. Consequently, with its belief that its own sensitive information should be deemed confidential, the Appellant did not argue that the equivalent information of the other platforms should be public. Similarly, PRISMA, intervening in these proceedings, has underlined the need to keep the full version of the offers and, especially, the financial terms thereof confidential.[69]

103. The information, which was not provided to the Appellant, related, fundamentally, to economic and technical information (prices and specific options for the provision of services). Contrary to what is asserted by the Appellant,[70] the version of Annex I to the Contested Decision which was disclosed to it explained the methodology used by ACER while assessing case studies. As detailed in the subsequent analysis, all information which was not provided to the Appellant and which would have had to have been disclosed on equal terms to the three platforms, is important for competition on the markets in question, to the extent that it relates to the individual nature and appeal of the

[64] EU Financial Regulation, Article 170(3). Previously in Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, Article 113(2). Previously in Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, Article 100(2).
[65] 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, OJ L 94, 28.3.2014, p. 65–242, Article 50(4) (see also Article 55(3)).
[66] Judgment of the Court of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 36 (applicable by analogy).
[67] *Varec* cit. above, paragraph 35 (applicable by analogy).
[68] See, e.g. judgment of the General Court, *Secolux v Commission*, T-363/14, EU:T:2016:521, paragraphs 49 and 50.
[69] PRISMA´s Application for Intervention, p.3.
[70] See, e.g., paragraph 39 of the Reply.

platform's offers,[71] and may be replicated and/or adjusted. Removal of uncertainty (in particular, in the context of a short-term Decision) would potentially lead to future parallel behaviours and facilitate coordination in a narrowly oligopolistic market (only three players). The Appellant's attempt to draw analogies with the alleged effects of transparency in markets for household appliances and electronic equipment[72] cannot be accepted, as any transparency in those markets relates to heterogeneous prices practiced in retail markets with atomized structure of supply (the *"wide range of sellers"* the Appellant refers to). The BoA thus confirms ACER's assessment[73] that, in this case, the disclosure of this information would be detrimental to the maintenance of fair and undistorted competition on the market.

104. The BoA takes note of the fact that the greater degree of transparency provided in the previous (annulled) assessment of these tender proceedings was followed by very significant changes in the prices presented by the platforms in the offers submitted in the present proceedings.[74] [CONFIDENTIAL[75]]. At the Oral Hearing, the Appellant alleged that *"the fact, observed by ACER, that in the second proceeding the price offered by the platforms were more convergent that in the first one is rather typical in the repeated proceeding of quasi procurement form. Rather lack of changes in the second price offers would indicate that an undertakings, who lost in the first proceeding, is not intending to win in the second repeated procedure and its offer may indeed be only a courtesy bidding"*.[76] The BoA finds that there was no change in the specifications of the services to be provided which could justify a significant change of prices. The BoA also takes note of Intervener's agreement that disclosure would raise competitive concerns.[77]

105. The Court has noted that in *"the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender,* (…) *the contracting authorities* [have] *the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers"*.[78] The Appellant has provided no counter-arguments to the position that disclosure of the information in question would be detrimental to other persons' rights and interests and to fair competition on the market.

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

107. To this end, first of all, *"the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets"*,[79] which was the case in the present proceedings.

108. The question, which needs to be examined by the BoA, is whether the Appellant needed to have access to confidential information denied to it in order to effectively appeal the Contested Decision and exercise its rights. To carry out this weighing of the conflicting interests, it is appropriate to assess, one by one, the categories of information, which the

[71] See, e.g judgment of the General Court of 14 December 2017, *Evropaïki Dynamiki v European Parliament,* T-136/15, EU:T:2017:915, paragraph 69; *Secolux*, cit. footnote 68, paragraphs 52 to 54; judgment of the General Court of 9 April 2014, *CITEB and Belgo-Metal v European Parliament,* T-488/12, EU:T:2014:195, paragraph 46.
[72] Paragraph 49 of the Reply.
[73] Paragraph 126 of the Defence and paragraph 74 of the Rejoinder.
[74] [CONFIDENTIAL].
[75] [CONFIDENTIAL].
[76] Summary Minutes of the Oral Hearing, p. 23.
[77] PRISMA´s Application for Intervention, p.3.
[78] *Varec* cit. footnote 66, paragraph 38 (applicable by analogy).
[79] *Varec* cit. footnote 66, paragraph 53 (applicable by analogy).

Appellant was not provided with.

109. Comparing the confidential version of the Contested Decision to the version which was notified to the Appellant, and the additional elements provided through the letter of 2 September 2019 – which are also relevant to assess compliance with the duty to duly reason the Contested Decision[80] –, the following summary of information provided to the Appellant, in what concerns the assessment of the three offers, is hereby provided:

(a) Correspondence exchanged between ACER and the three platforms. Disclosed.
(b) Offers submitted by the other platforms. Non-confidential version of offer submitted by RBP disclosed.
Offer submitted by PRISMA not disclosed.
(c) Description of the assessment procedure (Contested Decision, s. 2.3). Fully disclosed.
(d) Formal completeness (Annex I to the Contested Decision, s. 1). Fully disclosed.
(e) Assessment of minimum legal requirements (Contested Decision, Recitals 28 and 29; Annex I to the Contested Decision, s. 2.1). Fully disclosed.
(f) Assessment of minimum IT requirements (Contested Decision, Recitals 30 to 32; Annex I to the Contested Decision, s. 2.2). Decision fully disclosed. Annex I disclosed, except for individual and total scores.
(g) Assessment of the Technical Quality ("Case Study Points", including completeness, consistency, robustness, relevance and efficiency)[81]. Decision fully disclosed, including: Recital 35: *"[T]he assessment of the proposal formulated by GSA showed limitations with regard to completeness, consistency, robustness and efficiency. The proposal in particular revealed limitations concerning resource planning and the detailed listing of activities to be performed in order to address the case study"*; Recital 36: *"[T]he assessment of the proposal formulated by PRISMA showed limitations with regard to its robustness and efficiency. The proposal in particular revealed limitations concerning the proposed risk assessment and resource planning."*; Recital 37: *"[T]he assessment of the proposal formulated by RBP showed limitations with regard to its completeness, robustness and efficiency. The proposal in particular revealed limitations concerning the resource planning, its risk-assessment and the detailed listing of activities to be performed in order to address the case study."*. Annex I partly disclosed. Full disclosure of descriptions of criteria and justification of points given in each criterion. Full disclosure of points awarded to Appellant's Case Study. Points awarded to RBP and PRISMA's Case Study not disclosed.
(h) Assessment of the Financial Offer ("Price Points") (Contested Decision, Recital 39 and 40; Annex I to the Contested Decision, p. 21). Decision fully disclosed, including: *"Recital 40: RBP has emerged as having the most favourable offer presenting the highest technical quality-price combination, based on the consolidated evaluation sheet prepared by the Agency."* Annex I to the Contested Decision partly disclosed. Only the tables and the way the information was structured was divulged, not the prices offered and their respective scoring.
(i) Total Points (Case Study Points + Price Points). Not disclosed. Neither the Contested Decision nor its Annex I explicitly indicate the total points, which are arrived at by simply adding the Case Study Points and the Price Points.

110. The Appellant was not provided with the followings:

(a) Individual and total points for IT requirements;
(b) Offer submitted by PRISMA;
(c) Confidential information in RBP's offer;
(d) RBB and PRISMA's Case Study Points; and
(e) All platforms' Price Points (and Total Points), and RBP's and PRISMA's

[80] As stated in *European Dynamics v OHIM*, cit. footnote 55, paragraphs 130 and 132 (and case-law quoted therein).
[81] Recitals 33 to 37 of the Contested Decision; Annex I to the Contested Decision, p. 4-20.

corresponding financial offers (prices).

111. In the procedure under analysis, in order to succeed, a platform had, first, to meet the minimum legal and IT requirements, and, second, to obtain the highest score resulting from the sum of the total scores for the Technical Quality and for the Financial Offer. Each of these could be awarded a maximum of 100 points[82]. The score for Technical Quality accounted for 60% of the final score (meaning the score was divided by 100 and multiplied by 60), and the score for the Financial Offer accounted for 40% of the final score (meaning the score was divided by 100 and multiplied by 40).

112. Although the individual and total scores in the assessment of minimum IT requirements[83] were not disclosed, this information was not relevant to allow the Appellant to effectively exercise its right to challenge the Contested Decision. These criteria were pass/fail and it was not necessary to know the precise score in order to be able to challenge whether another platform met the minimum criteria.

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

114. As for RBP's offer, the Appellant had access to the non-confidential version thereof. This non-confidential version allowed the Appellant to have a detailed understanding of the nature of the confidential contents in this offer. ACER provided the Appellant with a non-confidential version that allowed the Appellant to perceive the nature of the blocked-out information. Since the Appellant invoked an exception to the protection of confidentiality, it was for the Appellant, in order to allow the BoA to weigh the conflicting interests and to apply the proportionality test, to provide a justification as to why it needed to have access to specific information contained in RBP's offer. The Appellant, instead, has merely alleged that it needed access to all of the case-file (including the confidential version of RBP's offer) to exercise its right of appeal, failing to explain why this was so, generally or specifically. Additionally, the disclosed details in the Contested Decision and its Annex I were sufficient, in themselves, for the Appellant to identify the specific points in which an offer was better than the others, and the respective reasons, and it cannot be argued that ACER's assessment is incomprehensible without access to the confidential version of RBP's offer.[84]

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

[82] Recital 23 of the Contested Decision.
[83] Annex I to the Contested Decision.
[84] See, by analogy: *Cosepuri v EFSA* cit. footnote 60, paragraph 46.

and PRISMA's Case Study Points would have allowed it to extrapolate all platforms' Price Points and, from there, the prices put forward by each platform.[85]

116. As for the Price Points awarded to the three platforms, ACER disclosed to the Appellant the calculation method used. This method is purely mathematical and is based on the comparison between the offer in question and the lowest offer, as follows: *Price Points = (Lowest offer / Offer of the Platform) x 40*.

117. Accordingly, the platform with the lowest offer was necessarily awarded 40 Price Points. Disclosing the Price Points would be the same as disclosing the financial offer of each platform.[86] There is no discretionary margin for the assessment by ACER of the Price Points awarded to the other platforms, as these result automatically from this mathematical formula. The Appellant did not challenge the fairness or legitimacy of the formula, which was disclosed. In this context, the only reason why disclosure of the Price Points could be relevant for the purposes of challenging the Contested Decision would be to argue that ACER had committed an error in its calculations. The BoA finds that it would be disproportionate to disclose the confidential information in question, just for this purpose, as nothing prevents the Appellant from expressing its concern that there may have been a miscalculation, and the BoA has access to the full confidential version of the case-file, and is in a position to confirm – as it had done – that no miscalculation has occurred.

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

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

120. In summary, the Appellant had access to the detailed evaluation method (award criteria) used by ACER, including weighing and minimum and maximum points, as well as to the non-confidential version of the winning tender and to the detailed qualitative justification of the points and differentiation between the offers in what concerns the Case Study, allowing it to understand and challenge the preference of one offer over another in any given specific assessment criterion, and to make reasonable guesses as to the specific scores awarded, given the small degree of possible variation of points for each criterion (2 points each). As for Price Points (and the financial offer), which seem to be the main focus of the Appellant's request of access to information, the absence of discretionary margin of ACER in applying the formula disclosed to the Appellant means that the Appellant had all the information it needed to understand why one offer was given more points than the other and to challenge the reasoning of the differentiation of points between them.

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

122. The BoA confirms ACER's assessment that the disclosed information allowed the

[85] Paragraphs 119 to 125 of the Defence.
[86] See, e.g *Secolux* cit. footnote 68, paragraphs 49 to 59.

Appellant to identify the comparative advantages of its proposal and those of RBP, and to verify the consistency between the technical evaluation of its proposal and its quotation, globally and for each specific criterion.[87] It is apparent from the Appellant's detailed arguments set out in its Appeal, in particular in its sixth and seventh pleas, that it had sufficient knowledge of the relative advantages of the successful platform's offer in what concerns the Case Study, and that it was aware that the successful platform had the lowest price, being in a position to adequately challenge ACER's assessments which were not purely mathematical and the methods for scoring the platforms. No failures to duly reason the Contested Decision and to grant access to files of the proceedings were demonstrated by the Appellant, nor detected by the BoA in the exercise of its review.

123. It follows that the Appeal's fourth and fifth pleas must be dismissed as unfounded.

Sixth plea – Manifest error in ACER´s assessment when evaluating the case studies

124. By its sixth plea, the Appellant argues, in essence, that ACER committed a manifest error of assessment, and consequently infringed the principle of equal treatment, when evaluating the case studies presented by each platform, to the extent that there are internal inconsistencies between the assessments expressed in Recitals 36 and 37 of the Contested Decision and in the respective parts of its Annex I.[88]

125. Firstly, the Appellant is concerned that Annex I to the Contested Decision identified deficiencies in RBP's offer in four areas (completeness, consistency, robustness and efficiency), but that the wording of the Contested Decision does not mention consistency[89]. Thus, it states *"shortcomings in terms of consistency of the RBP's Description (Task B), List of Activities (Task B) and Resource Plan (Tasks A and B) were overlooked by ACER during the allocation of points"*, and that shortcomings in the Description of Task B were also overlooked.[90] Secondly, the Applicant raised concerns about possible similar inconsistencies in the assessment of PRISMA's offer.[91] The Appellant adds that these inconsistencies imply an infringement of the principle of good administration and of the duty to duly reason a decision, or *"could also be a signal"* of a manifest error of assessment.[92] The essence of the Appellant's argument is summarized as follows: *"Therefore, if the Agency did not subtract points in case of RBP and PRISMA despite founding the shortcomings in the above-mentioned parts of their proposals, it evidently must be treated as a manifest error of assessment"*.[93] Accordingly, the Appellant asks the BoA to confirm whether the scoring awarded by ACER was not manifestly erroneous, i.e. *"whether ACER has correctly awarded points to particular platforms"*.[94] In its Reply, the Appellant focused instead on the idea that it should, itself, be able to determine whether there was a manifest error of assessment, and that this is only possible if it is given access to the scoring.[95]

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

[87] As detailed in paragraph 104 of its Defence.
[88] Paragraphs 53 to 62 of the Appeal; paragraphs 51 to 52 of the Reply.
[89] Recital 37 of the Contested Decision.
[90] Paragraph 54 of the Appeal.
[91] Paragraph 55 of the Appeal.
[92] Paragraphs 57 and 58 of the Appeal.
[93] Paragraph 59 of the Appeal.
[94] Paragraphs 61 and 62 of the Appeal.
[95] Paragraph 51 of the Appeal.

127. The Appellant's concern in this plea is summarized by its request that the BoA confirms whether ACER subtracted Case Study Points from RBP and PRISMA's offer in all the sub-criteria where Annex I to the Contested Decision identified shortcomings. The BoA has confirmed that, in the Evaluation Report contained in Annex I to the Contested Decision, ACER has indeed subtracted points in all the sub-criteria in which it identified shortcomings, as described in its qualitative assessment, and specifically in those mentioned by the Appellant.[96] The Appellant has been able to raise this issue and have it fully and effectively reviewed by the BoA.

128. The Appellant also argues that the Contested Decision may have infringed the principle of equal treatment. The Appellant does not indicate specific grounds for this argument, other than stating that this would be suggested by *"any differences in the reduction of the points awarded in respect of the inadequately prepared subsections of the case studies"*.[97]

129. The BoA finds that Annex I to the Contested Decision provides sufficiently detailed justifications for the differentiation between the scoring granted to each sub-criterion, and that any *"differences in reduction of the points awarded"*, which the Appellant refers to, adequately correspond to the differences in the qualitative assessment of the offers set forward in the detailed justifications. The scoring of each sub-criterion implies a degree of discretion. No error of assessment leading to the violation of the principle of equal treatment was demonstrated by the Appellant, nor detected by the BoA in the exercise of its review.

130. It follows that the sixth plea must be dismissed as unfounded.

Seventh plea – Manifest error of ACER´s assessment when evaluating the offers

131. In its seventh plea, the Appellant argues that ACER committed a manifest error of assessment when evaluating the offers, in particular with respect to the Case Study, which led to the wrongful award of points to the three tenderers.[98] It argues that this manifest error of assessment contravenes Article 41 of the CFREU, the principle of good administration, the principle of transparency and the principle of non-discrimination and equal treatment.

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

133. First, as an introductory remark, the Appellant emphasises again that "*ACER did not give sufficient and clear statement of reasons and thus made practically impossible to appraise how broad its margin of discretion in fact was*".[99] However, as stated above at paragraphs 114 and 115, the BoA finds that Annex I to the Contested Decision provides sufficiently detailed justifications for the differentiation between the scoring granted to each sub-criterion and the reasoning behind the points awarded to the different offers.

134. As a preliminary point to the seventh plea, the BoA refers to Annex I to the Contested Decision, which contains a clear explanation of the evaluation methodology of the Case Study (emphasis by the BoA): *"1. Scoring per booking platform (maximum 100 points) The Evaluation below contains the Agency's assessment of the technical case studies provided by the three platforms which were considered to meet the minimum criteria to*

[96] Paragraphs 54 and 55 of the Appeal.
[97] Paragraph 60 of the Appeal.
[98] Paragraphs 63 to 91 of the Appeal.
[99] Paragraph 65 of the Appeal.

be further evaluated. The Agency scored the technical case studies uniformly on five criteria, each valued with a maximum of 20 points: a. Completeness (in the sense of including all the requested information in detail, including duly considered constraints); b. Consistency (in the sense of describing a workable and realistic project that could be implemented in practice, with means staff, skills and contracts which are already available); c. Robustness (in the sense of allowing adjustments in scope and time, mitigating expected and unexpected events);d. Relevance (in the sense of being in line with existing working practices and functioning of the platform); and e. Efficiency (in the sense of, as a minimum, being in line with time or other constraints established in the Case Study). Given that the Case Study required the description of the implementation plan for two tasks – Task A and Task B (with the latter containing three sub-tasks) – the Agency valued each of the above-mentioned criteria with a maximum of 10 points per task. Therefore, offers could be assigned a maximum score of 50 points per task and a total score of 100 points for the full Case Study. In some instances, several criteria were affected by the same shortcoming, usually lack of clarity or information. For example, in the case of unclear resource plans, the scoring often decreased for several criteria for the underlying reason that the information on the resource plans did neither meet the criterion on efficiency, nor on robustness, consistency or completeness. The Agency evaluated the five criteria for each of the five distinct features, established in the Open call of the Agency requesting offers (Annex 2, Chapter 6). The Agency distinguished five Case Study features, as follows: (i) description of the task, (ii) list of activities of the task, (iii) risk assessment/plan with the requirement that three major risks are defined and risk mitigation is proposed, (iv) required implementation timelines and (v) proposed resource plans. The five features shall suitably explain the proposals of the platforms for Tasks A and B of the Case Study. The Agency evaluated the case-study features individually along the above-mentioned five criteria. Hence, each feature was evaluated in terms of completeness, consistency, robustness, relevance and efficiency. This meant that a single feature could score a maximum of 10 points, if it fulfilled adequately the requirements of the five criteria. The maximum score for a feature evaluated per a single criterion was 2 points; the smallest reduction of score for a unique feature per a single criterion was established as 0.25 point."[100]

135. It follows from the above that the evaluation methodology used by ACER was detailed and precise and allowed a clearly delimited discretion to the evaluators: each combination of criterion and feature accounts for a maximum of 2 points; given that there were 50 combinations in total for both Tasks A and Task B, this resulted in a maximum of 100 points to be awarded for the Case Study.

136. The BoA notes that ACER explained in its Defence that *"it adopted such an assessment methodology in order to focus, for both Task A and Task B, on each specific criterion required for each feature (i.e. to focus on each matrix of the bid evaluation table separately). Therefore, the total absence of the required criterion for a specific feature in the offer of the booking platform resulted in the granting of 0 points; while the existence, in the offer of the booking platforms, of some required elements of the criterion for a specific feature, led to the granting of 0.25 up to 2 points. In the light of the above, it follows that the discretion left to the Agency and the evaluators was marginal"*.[101]

137. The BoA observes, furthermore, that - in accordance with settled CJEU case-law with respect to the principles of equal treatment and transparency - there is no obligation for ACER to provide a detailed summary of how each detail of a tender was taken into account during the evaluation or to provide a detailed comparative analysis of the

[100] Annex I to the Contested Decision, p. 4.
[101] Paragraph 146 of the Defence.

successful tender and of the unsuccessful tender.[102]

ACER wrongfully awarded points to RBP for Task B (iii) of the Case Study

138. The Appellant *argues* that RBP should not have been awarded points for Task B (iii) of the Case Study, because its offer did not indicate whether it had already implemented Edig@s and what actions it had already taken or was going to take to implement this functionality.[103]

139. The Appellant sets out that Task B (iii) is described in the Case Study as "*the implementation of document-based data exchange with AS4 protocol and Edig@s -XML data format for the communication between the booking platform and the TSOs. If AS4 and Edig@s -XML were already implemented, please describe that process*" [104] and refers to Annex I to the Contested Decision, which expressly states, in relation to RBP, that *"[t]he description of Sub-task B (iii) does not clarify whether Edig@s -XML needs to be implemented or is already implemented*"[105] and that "*it is unclear if the requirement concerning Edig@s -XML is in scope of the proposed implementation project or not*".[106]

140. The Appellant considers that the issue as to whether Edig@s had already been implemented and the actions for its implementation constituted the very core of Task B (iii) and that RBP should, therefore, not have been awarded any points for this task.[107]

141. The Defendant, by contrast, holds that ACER correctly deducted points from RBP´s scoring because its offer did not include all the required elements for Task B (iii). However, ACER did not grant 0 points to RBP´s offer for Task B (iii) because the offer did not amount to a total non-compliance with Task B (iii).[108]

142. First, the BoA finds that the Evaluation Report contained in Annex I to the Contested Decision expressly lists shortcomings with regard to the completeness of the description of Task B (iii) and that "*the description of Sub-task B(iii) does not clarify whether Edig@s-XML needs to be implemented or is already implemented*"; with regard to the consistency of the description of Task B (iii) that "*one exception has been identified in Sub-task B(iii), where it is unclear if the requirement concerning Edig@s-XML is in scope of the proposed implementation project or not*"; with regard to the completeness of the list of activities of Task B(iii) that "*[F]or Sub-task B (iii), there is no list of the activities associated with Edig@s-XML*"; and with regard to consistency of the list of activities of Task B (iii) that "*[N]evertheless for Sub-task B(iii) the proposal does not provide sufficient details about the Edig@s-XML implementation*". *Therefore, the proposal does not completely address the requirements for the implementation of Task B. "*[109]

143. Second, the BoA highlights ACER´s evaluation methodology which is set out in the seventh plea´s introductory statements and implies that each combination of criterion and feature accounts for a maximum of 2 points.

144. Third, the BoA observes that Annex 6 to the Open Call describes Task B (iii) as follows: "*The third request consists in the implementation of document-based data exchange with AS4 protocol and Edig@s-XML data format for the communication between the booking*

[102] Paragraph 123 of BoA Decision A-002-2018; *Evropaïki Dynamiki v Commission* cit. footnote 56, paragraphs 21 and 22.
[103] Paragraph 68 of the Appeal and paragraph 53 of the Reply.
[104] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.2.
[105] Annex I to the Contested Decision, p.16.
[106] Annex I to the Contested Decision, p.16.
[107] Paragraph 68 of the Appeal.
[108] Paragraph 149 of the Defence and paragraph 102 of the Rejoinder.
[109] Annex I to the Contested Decision, p.16.

platform and the TSOs. If AS4 and Edig@s-XML were already implemented, please describe that process."[110] Hence, Task B (iii) dealt with the implementation of data exchange tools Edig@s and AS4 Protocol. At the Oral Hearing, ACER clarified that, even though from an IT perspective, these tools can be provided jointly or separated, both tools had the same weighting in the evaluation of Task B (iii).[111]

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

146. Fifth, the BoA verified, as can be seen in the confidential version of Annex I to the Contested Decision, that ACER deducted points from RBP´s scoring with regard to the completeness of the description of Task B (iii), the consistency of the description of Task B (iii), the completeness of the list of activities of Task B (iii) and the consistency of the list of activities of Task B (iii).[112]

147. In conclusion on this point, the BoA finds that ACER identified the shortcomings of RBP's offer and accordingly deducted points from RBP´s scoring. The BoA did not find any error in the way ACER awarded points to RBP for Task B (iii) of the Case Study.

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

148. The Appellant argues that ACER erroneously deducted points from the Appellant´s score for Tasks B (i) and (ii) of the Case Study.[113]

149. The Appellant sets out that the aim of Task B (i) was to improve the user-friendliness of the graphical user interface by its simplification in order to allow completing any possible operation in less time and that Task B (ii) was focused on the provision of the helpdesk on a multichannel platform in addition to the already existing channels. The Appellant notes that, as "*it is visible from the description, both tasks were based on ensuring the communication between the platform and network users*", concluding that "*disruption of communication between GSA and its users being the possible result of the cyber attack was a significant risk in the analysed situations*".[114] The Appellant also highlights that "*cybersecurity is currently one of the main areas of risks*".[115]

150. The Appellant claims that ACER wrongly assessed that one of the risks was not specific enough in its offer in the context of Tasks B (i) and B (ii). The Appellant argues that the feature risk assessment in Task B (i) and (ii) was assessed by ACER "without sufficient grounds and thus constitutes manifest error of assessment".[116]

151. The Defendant explains that the Appellant´s risk assessment plan only addressed the risk of cyber-attacks in a general fashion and failed to provide the three required and specific

[110] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.2.
[111] Summary Minutes of the Oral Hearing, p. 20: "*With respect to AS4 Protocol and Edig@s-XML, the Defendant clarified that the two requested elements cover different aspects of the communication flow in the context of the booking platforms. The defendant explained that, while Edig@s-XML provides a way for operators to exchange machine understandable messages about the operations, the AS4 protocol defines the way that those messages can be exchanged at lower level. In this respect the two "standards" can work independently: having this in mind, it can be derived that the presence of one element was independent from the presence of the other and that both received the same weight as the presence of one of them would not have excluded the presence of the other, and vice versa*.".
[112] Confidential version of Annex I to the Contested Decision, p.29.
[113] Paragraph 73 of the Appeal and paragraph 55 of the Reply.
[114] Paragraph 71 of the Appeal.
[115] Paragraph 72 of the Appeal.
[116] Paragraph 71 of the Appeal.

risks related to the management of the change requested for these sub-tasks B (i) and B (ii). Therefore, ACER deducted points from the Appellant´s score in accordance with its evaluation methodology.

152. First, the BoA finds, that the Evaluation Report contained in Annex I to the Contested Decision expressly mentions the following shortcoming with regard to the relevance of the Appellant's risk assessment plan of Task B (i) and (ii): "*Nevertheless, on the content, one of the risks (ID 3) is too general in nature and is not specific enough in the context of Sub-tasks B (i) and B (ii).*"[117] The BoA observes that the Appellant does not only refrain from challenging this assessment, but also expressly confirms the exactitude of ACER's description of the Appellant´s offer in Annex I to the Contested Decision when confirming that its risk assessment focused on the loss of information security caused by a cyber-attack.[118]

153. Second, the BoA observes that Annex 6 to the Open Call describes the risk assessment/plan for Tasks B (i) and (ii) as follows: "*The risk assessment/plan focusing on three major risks related to the management of the change request*".[119] Hence, the risk assessment/plan for Tasks B (i) and (ii) required the tenderers to identify three major risks.

154. Third, the BoA finds that the Appellant simply argues that it is a good practice to analyse possible cyber-attacks from a "wide" perspective, because a "*too detailed description of the given risk might result in missing some significant threat*".[120] In this respect, the BoA notes that any disagreement with the tasks and sub-tasks of the Case Study should have been raised during the public consultation.

155. Fourth, the BoA verified in the confidential version of Annex I to the Contested Decision, that ACER deducted points from the Appellant´s scoring with regard to the relevance of the risk assessment plan of Tasks B (i) and (ii).[121]

156. In conclusion, the BoA finds that ACER identified the shortcomings of the Appellant's offer and accordingly deducted points from the Appellant´s scoring, having committed no error.

ACER wrongfully deducted points from the Appellant´s score for Tasks A and B of the Case Study

157. The Appellant argues that ACER erroneously deducted points from the Appellant´s score regarding the evaluation and consequent scoring of the Appellant's resource plan (one of the features of the Case Study), both for Tasks A and B of the Case Study.[122]

158. As a preliminary point, the Appellant argues that the Open Call was not detailed enough and only contained a general reference to the areas that should be covered by the resource plan.[123]

159. The BoA considers that when describing the content of the proposal to be submitted by the candidates, the Open Call and its Case Study Assignment in Annex 6 clearly requested "*a resource plan having regard to the budget, human resources and skills committed for the implementation*" of the relevant task.[124]

[117] Annex I to the Contested Decision, p.12.
[118] Paragraph 71 of the Appeal.
[119] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.3 and 4.
[120] Paragraph 72 of the Appeal.
[121] Confidential version of Annex I to the Contested Decision, p.25.
[122] Paragraphs 74 to 86 of the Appeal and paragraph 56 of the Reply.
[123] Paragraphs 75 and 76 of the Appeal.
[124] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.3.

160. It appears from the reading of the Open Call that it is not confusing or ambiguous and that it mentioned the relevant set of requirements regarding the resource plan. Neither did it convey that these requirements were optional. As for the vagueness the Appellant criticizes, the BoA finds that the requirements regarding the resource plan were explained with sufficient clarity in the Open Call, especially when interpreted with the rest of the requirements of the Case Study. The BoA notes that any doubt, concern or disagreement with the requirements of the Case Study should have been raised during the public consultation and that the Appellant could have requested a detailed clarification from ACER in case of doubts on the scope or the extent of the requirements.

161. Before turning to the analysis of the Appellant´s claims regarding ACER´s assessment of its offer´s resource plan under some of the Open Call´s criteria, the BoA observes that the resource plan is a feature of the tender´s Case Study and notes that case studies are, per definition, pragmatic exercises. The Case Study was aimed at assessing the candidates´ ability to implement good practices in IT service management when serving the Mallnow IP and GCP VIP.[125] The candidates were asked to submit a detailed proposal of how they would deal with service requests in case they were selected as booking platform for the said interconnection points for a period of three years. In so doing, the candidates had to provide information in order to sufficiently demonstrate the feasibility of the assignment, with realistic expectations of resources and costs and of the productive allocation of such resources to deliver the tasks at hand. In other words, the very nature of a Case Study implies that the information provided by the candidates should be detailed enough to allow the contracting authority to assess the workability of each proposal by reference to the tender´s criteria.

162. Furthermore, when examining ACER´s evaluation of the Appellant´s resource plan in Tasks A and B of the Case Study, the BoA observes that all shortcomings identified by ACER stem from the absence of fully exhaustive information on the criteria of completeness, consistency, robustness and efficiency.

163. First, with respect to the criterion of completeness, ACER considered that the Appellant´s resource plan was unclear.[126]

164. With respect to the budget, the Appellant´s proposal did not include the budget allocation [CONFIDENTIAL[127]].[128] The Appellant argues that its proposal described the structure of the calculation of the costs and fees of the different services and the platform's billing policy in detail, but that it did not provide detailed figures because the Open Call (i) did not ask for detailed figures and (ii) did not specify the national requirements, making it impossible to assign an exact cost to this task. When reviewing the offer submitted by the Appellant, the BoA finds that, even if its proposed resource plan designated the three possible categories (operation, maintenance and development) to which the budget could be allocated, it did not allow ACER to assess the costs that each task was foreseen to generate and the resources allocated to cover such costs.[129]

165. Furthermore, ACER considered that, even though there was a high-level description of how the platform estimated and allocated IT budget in general, the operation and maintenance cost coverage was not detailed.[130] The BoA finds, in this respect, that the candidates were required to submit a resource plan regarding, among others, the available budget to implement the tasks described in the Case Study. As already mentioned, the very nature of a Case Study requires such proposal to be sufficiently realistic to assess

[125] Recital 22 of the Contested Decision.
[126] Paragraph 151 of the Defence.
[127] [CONFIDENTIAL]. See Case Study of the Offer of GSA, p. 1-7.
[128] Confidential version of Annex I to the Contested Decision, p.23 and 25.
[129] Confidential version of Annex I to the Contested Decision, p.23 and 25.
[130] Confidential version of Annex I to the Contested Decision, p.23 and 25.

the ability of the booking platform to implement good practices in IT service management. To achieve that, the candidate's proposal had to include realistic goals and realistic limitations, such as the available budget to implement the requirements and the costs that the budget would have to cover. To this end, the BoA considers that it was indispensable to provide an indicative estimation of the budget and its allocation. Despite the Appellant's claim that those requirements lacked clarity, the wording of its proposal suggests that it sufficiently understood and knew the national requirements included in the Case Study.

166. As regards the human resources and skills, ACER found that the Appellant's proposal [CONFIDENTIAL]. It adds, regarding Task A, [CONFIDENTIAL] and, regarding Task B, [CONFIDENTIAL].[131]. The Appellant argues that [CONFIDENTIAL[132]]. The BoA finds that the information included in the Appellant's Case Study [CONFIDENTIAL]. The same applies to [CONFIDENTIAL]. In its offer, the Appellant [CONFIDENTIAL]. However, neither did it [CONFIDENTIAL] nor [CONFIDENTIAL]. In this sense, the BoA finds that it cannot be sustained that the Appellant´s description of the recruitment process and of required skills entirely fulfils the requirements of the Case Study.

167. Second, with respect to the criterion of consistency, ACER considered the Appellant´s resource plan workable, although [CONFIDENTIAL] impeded ACER to assess its feasibility for Tasks A and B (e.g. [CONFIDENTIAL]).[133]

168. The BoA finds that the information included in the Appellant's Case Study was not sufficiently detailed to allow ACER to ascertain whether the proposal was realistic and feasible, as it did not contain detailed information with respect to [CONFIDENTIAL]. This also applies to [CONFIDENTIAL] rendered it impossible to determine whether the Appellant would be able to fully and successfully implement the Case Study tasks.[134]

169. Third, with respect to the robustness criterion, ACER found that the Appellant's proposal lacked sufficient details[135]. Even though ACER acknowledged that the Appellant introduced [CONFIDENTIAL], the lack of clarity on [CONFIDENTIAL] for both Task A and Task B did not allow ACER to assess to which extent the proposal for the implementation of these Tasks could be [CONFIDENTIAL]. This lack of clarity also raised uncertainty on the solidness of [CONFIDENTIAL].[136]

170. The BoA verified that ACER duly took account of the Appellant´s proposed [CONFIDENTIAL]. However, the BoA also finds that, contrary to the Appellant´s claims, the robustness of its resource plan - which, according to the Open Call, had to include the budget, human resources and professional skills - was not [CONFIDENTIAL].

171. Fourth, with respect to the criterion of efficiency, ACER pointed out that it could not assess whether the allocation of resources was efficient and solid, as the Appellant's proposal did not include any such information.[137] ACER found that the resource plan did not provide [CONFIDENTIAL]. In particular, the lack of clarity on [CONFIDENTIAL] hinder the systematic assessment of potential efficiencies with respect to the implementation proposed for Tasks A and B.[138] The Appellant argues that ACER only evaluated [CONFIDENTIAL]. ACER explains in its Defence that the efficiency criterion was intended to measure the relation between the available resources and the costs

[131] Confidential version of Annex I to the Contested Decision, p.23 and 25.
[132] [CONFIDENTIAL]. See Case Study of the Offer of GSA, p. 1-7.
[133] Paragraph 151 of the Defence; Confidential version of Annex I to the Contested Decision, p.23 and 25.
[134] Confidential version of Annex I to the Contested Decision, p.23 and 25.
[135] Paragraph 151 of the Defence.
[136] Confidential version of Annex I to the Contested Decision, p.23 and 25.
[137] Paragraph 151 of the Defence.
[138] Confidential version of Annex I to the Contested Decision, p.23 and 25.

expected from the implementation of the tasks.[139]

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

173. In conclusion on this point, the BoA finds that ACER did not commit any errors in deducting points from the Appellant´s score for Tasks A and B of the Case Study.

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

174. The Appellant argues that ACER erroneously deducted points from the Appellant´s score for Task B (iii) of the Case Study.[140] The Appellant argues that there was no requirement for the platform operator to provide ACER with [CONFIDENTIAL]. That is why, according to the Appellant, ACER should not have deducted points when evaluating the Appellant´s list of activities on the basis of the completeness criterion. The Appellant makes a similar claim with respect to the assessment of its list of activities on the basis of the criterion of consistency, stating that the description was exhaustive and that the process was already implemented.

175. The BoA finds that ACER´s Evaluation Report assessed the Appellant´s list of activities of Task B (iii) as follows under the criteria of, respectively, completeness and consistency: [CONFIDENTIAL[141]] and [CONFIDENTIAL].[142]

176. The BoA also finds that the Case Study includes in the scope of sub-task B (iii) "*the implementation of document-based data exchange with AS4 protocol and Edig@s-XML data format for the communication between the booking platform and the TSOs*" [143]. Moreover, the Case Study expressly required "*[I]f AS4 and Edig@s-XML were already implemented, please describe that process*" [144]. In addition, the Case Study, in its instructions for Task B (iii), also includes the following: "*[A] description of how the platform will implement task B (iii) or how it was already implemented in your platform*".[145] It is clear from the above that even if a candidate had already implemented AS4 and Edig@sXML, it had to explain the process of these data exchange tools in detail.

177. As explained by the Defendant,[146] although some operators had already implemented AS4 Protocol and Edig@s-XML Data Format, this implementation did not exempt them from providing ACER with a complete description of their processes in order to fulfil both criteria of completeness and consistency as requested by the Case Study. Hence, given that the Appellant did not provide this information, ACER could not assess the proposal on the basis of information *in concreto*, but only on assumptions. This seems to be exactly what a Case Study tries to prevent. In its Rejoinder, ACER indicated that the Appellant only stated that it had implemented Edig@s and AS4, but had not demonstrated *"its capability to run a project by itself"*.[147]

178. In conclusion on this point, the BoA finds that ACER did not commit any errors in

[139] Paragraph 151 of the Defence.
[140] Paragraphs 87 to 91 of the Appeal and paragraph 57 of the Reply.
[141] Confidential version of Annex I to the Contested Decision, p.24.
[142] Confidential version of Annex I to the Contested Decision, p.24.
[143] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.2.
[144] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.2.
[145] Annex 6 Case Study Assignment to the Open Call for GAS 2-2019, p.4.
[146] Paragraph 152 of the Defence.
[147] Paragraph 16 of the Rejoinder.

deducting points from the Appellant´s score for Task B (iii) of the Case Study.

179. On the seventh plea in its entirety, the BoA concludes that the Contested Decision correctly states that *"[T]he assessment of the proposal formulated by RBP showed limitations with regard to its completeness, robustness and efficiency. The proposal in particular revealed limitations concerning the resource planning, its risk-assessment and the detailed listing of activities to be performed in order to address the case study"*[148] and that *"[T]he assessment of the proposal formulated by GSA showed limitations with regard to completeness, consistency, robustness and efficiency. The proposal in particular revealed limitations concerning resource planning and the detailed listing of activities to be performed in order to address the case study."*[149]

180. Consequently, the seventh plea must be dismissed as unfounded.

181. By consequence, the Appeal must be dismissed as unfounded in its entirety.

182. In these circumstances, as the BoA has re-examined the Contested Decision thoroughly, there is no need to reply to the argument of the Defendant that there is no further interest in the proceeding.

V. Conclusion

183. The BoA has examined the arguments of the parties and proceeded to a full review of the Contested Decision as required by the GCEU Order.

184. For the reasons set out above, the BoA, pursuant to Article 28(5) of the ACER Regulation, hereby dismisses the relaunched appeal case as unfounded and confirms the Contested Decision.

Done at Ljubljana, 9 August 2024

For the Registry | *For the Board of Appeal*

The Deputy Registrar
J. NORDSTROM

The Chairperson
M. PREK

[148] Recital 37 of the Contested Decision.
[149] Recital 35 of the Contested Decision.