Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

14 December 2018 *

(Non-contractual liability — Pre-Accession Assistance Instrument — Non-Member State — National public procurement — Decentralised management — Decision 2008/969/EC, Euratom — Early warning system (EWS) — Activation of an EWS warning — Protection of the financial interests of the Union — Commission's refusal of *ex ante* approval — Failure to award the procurement– Jurisdiction of the General Court — Admissibility of evidence — No legal basis for the warning — Rights of the defence — Presumption of innocence — Sufficiently serious breach of a rule of law conferring rights on individuals — Causal link — Material and non-material damage — Loss of the procurement — Loss of opportunity to obtain other procurements)

In Case T-298/16,

East West Consulting SPRL, established in Nandrin (Belgium), represented initially by L. Levi and A. Tymen, then by L. Levi, lawyers,

applicant,

v

European Commission, represented by F. Dintilhac and J. Estrada de Solà, acting as Agents,

defendant,

APPLICATION under Article 268 TFEU for compensation for the material and non-material damage which the applicant claims to have sustained as a result of its inclusion in the Early Warning System (EWS) and the subsequent refusal, based on that warning, to endorse the contract relating to a procurement which had been awarded to the consortium which it led and which was to be funded by the European Union in the context of the Instrument for Pre-Accession Assistance (IPA),

THE GENERAL COURT (First Chamber),

Composed of I. Pelikánová (Rapporteur), President, V. Valančius and U. Öberg, Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written part of the procedure and further to the hearing on 2 May 2018,

gives the following

* Language of the case: French.

Judgment

Facts giving rise to the dispute

The facts preceding the initiation of the action

1 The applicant, East West Consulting SPRL, is a company governed by Belgian law whose activities include the provision of services in Belgium or abroad, on its own behalf or on behalf of or in participation with third parties, and whose director and sole shareholder is Mr L. In addition, the applicant holds 40% of the shares of European Consultants Organisation SPRL ('ECO3'), a company governed by Belgian law whose director is also Mr L.

2 On 17 July 2006, the Council of the European Union adopted Regulation (EC) No 1085/2006 establishing an Instrument for Pre-Accession Assistance (IPA) (OJ 2006 L 210, p. 82, 'the IPA Regulation'). Under Article 1 of the IPA Regulation, the European Union was to assist the countries listed in Annexes I and II, which included the former Yugoslav Republic of Macedonia, in their progressive alignment with the standards and policies of the European Union, including where appropriate the *acquis communautaire*, with a view to membership. According to Article 3 of the IPA Regulation, assistance was to be programmed and implemented according to five components, one of which related to 'Human Resources Development'.

3 Following investigations carried out into facts that might be classified as criminal offences in the context of a tender procedure for procurement funded by the European Union, the European Anti-Fraud Office (OLAF) transmitted to the State Prosecutor attached to the tribunal de grande instance de Paris (Regional Court, Paris, France), on 26 February 2007, information concerning facts that might be classified as criminal offences of corruption in the context of the award of a procurement financed by the European Union in Turkey ('the Turkish case'). That information related, in particular, to Kameleons International Consulting, now KIC Systems ('KIC'), and Mr L. On 5 March 2007, a preliminary investigation was opened in France in the Turkish case and entrusted to the national financial investigation division ('the DNIF').

4 On 12 June 2007, the Commission of the European Communities adopted Regulation (EC) No 718/2007 implementing the IPA Regulation (OJ 2007 L 170, p. 1).

5 On 4 March 2008, a framework agreement was signed by the former Yugoslav Republic of Macedonia and the Commission concerning the rules on cooperation applicable to the EU financial assistance granted to that State in the context of the implementation of the assistance provided under the IPA.

6 On 27 June 2008, OLAF transmitted to the Federal Prosecutor of Belgium information about possible offences of corruption in the context of the award of a contract funded by the EU in Ukraine ('the Ukrainian case'). That information concerned, in particular, KIC, Mr L. and ECO3. A judicial investigation and a prosecution investigation were opened in Belgium in the Ukrainian case.

7 On 17 September 2008, the Ukrainian case was referred to the investigating judge in Belgium.

8 On 14 and 15 October 2008, upon application by the DNIF, searches were carried out, in particular, at KIC's headquarters, in the presence of a number of agents of OLAF who had previously been requested to attend by official requisition on 18 September 2008. On 17 October 2008, new official requisitions were addressed by the DNIF to members of OLAF in order to make use of the electronic data seized. Those investigative measures resulted in the proceedings concerning the Turkish case in France and the Ukrainian case in Belgium.

9 According to the Commission, on 17 November 2008 OLAF requested, in application of Article 5(2) of Commission Decision C(2004) 193/3 on the Early Warning System ('the EWS'), activation of a W3b warning concerning ECO3 in that system, which had been put in place for the purposes of countering fraud and any other illegal activities affecting the financial interests of the Union. That warning was based on the fact that ECO3 was subject to judicial proceedings for serious administrative errors and fraud. The Commission claims that an identical warning was requested by OLAF for Mr L.

10 On 16 December 2008, the Commission adopted, with effect from 1 January 2009, Decision 2008/969/EC, Euratom, on the EWS for the use of authorising officers of the Commission and the executive agencies (OJ 2008 L 344, p. 125, 'the EWS Decision'). The EWS Decision repealed Decision C(2004) 193/3 and introduced new rules concerning the EWS.

11 In the words of recital 4 of the EWS Decision, 'the purpose of the EWS [was] to ensure, within the Commission and its executive agencies, the circulation of restricted information concerning third parties who could represent a threat to the [Union's] financial interests and reputation or to any other fund administered by the [Union]'.

12 In accordance with recitals 5 to 7 of the EWS Decision, OLAF, which had access to the EWS in the context of the exercise of its functions of conducting investigations and collecting information designed to prevent fraud, was to be responsible, jointly with the competent authorising officers and the Internal Audit Service, for requesting entry, modification or removal of warnings in the EWS, the management of which was to be ensured by the Commission's accounting officer or his subordinate staff.

13 In that regard, the second subparagraph of Article 4(1) of the EWS Decision provided that 'the [Commission's] accounting officer [or his subordinate staff] [were to] enter, modify or remove EWS warnings pursuant to requests by the [authorising officer by Delegation] responsible, OLAF and the Internal Audit Service'.

14 In accordance with the third subparagraph of Article 6(2) of the EWS Decision, 'in the case of procurement or grant award procedures the [authorising officer by Delegation] responsible or his staff [were to] verify whether there [was] a warning on the EWS at the latest before the award decision'.

15 Article 9 of the EWS Decision provided that, depending on the nature or the seriousness of the facts brought to the knowledge of the service requesting registration, EWS warnings were to be divided into five categories, numbered W1 to W5. According to Article 9(3) of that decision, category W3 concerned 'third part[ies] subject either to pending legal proceedings entailing the notification of an attachment order, or to judicial proceedings for serious administrative errors or fraud'.

16 Article 12 of the EWS Decision, entitled 'W3 warnings', provided, in particular, as follows:

'2. The [authorising officer by Delegation] responsible shall request the activation of a W3b warning where third parties, especially those who are benefiting or have benefited from Community funds under his responsibility, are known to be the subject of judicial proceedings for serious administrative errors or fraud.

However, where investigations conducted by OLAF lead to such judicial proceedings or OLAF offers assistance or follows up those proceedings, OLAF shall request the activation of the corresponding W3b warning.

3. A W3 warning shall remain active until a judgment having the force of *res judicata* is rendered or the case has been otherwise settled.'

17 Article 17(2) of the EWS Decision, concerning, in particular, the consequences of a W3b warning on contract or grant award procedures, provided as follows:

'If the third party for which a W2, W3b or W4 warning has been registered heads the list of the evaluation committee, the [authorising officer by Delegation] responsible, having due regard to the obligation to protect the Community's financial interests and image, the nature and seriousness of the justification for the warning, the amount and duration of the contract or grant and, where applicable, the urgency with which it has to be implemented, shall take one of the following decisions

(a) to award the contract or grant to the third party despite registration in the EWS, and ensure that reinforced monitoring measures are taken;

(b) where the existence of such warning objectively calls into question the initial assessment of compliance with the selection and award criteria, to award the contract or grant to another tenderer or applicant on the basis of an assessment of compliance with the selection and award criteria differing from that of the evaluation committee and duly justify his decision;

(c) to close the procedure without awarding any contract and duly justify this closure in the information given to the tenderer …'

18 In response to a query that had been sent to it by ECO3 by letter on 16 December 2008, the Commission confirmed, by letter of 12 January 2009, that ECO3 had been the subject of a W3b warning on the EWS since 17 November 2008.

19 On 15 January 2009, the Director of OLAF sent the DNIF his reports on the analysis of the electronic data seized.

20 On 10 March 2009, ECO3 lodged a complaint with the European Ombudsman concerning its inclusion in the EWS. That complaint was registered under reference 637/2009/(ELB)FOR.

21 On 17 March 2009, a judicial investigation was opened in France in the Turkish case.

22 On 14 September 2009, OLAF sent the Federal Prosecutor in Belgium information on possible offences of corruption in the context of the award of a contract funded by the European Union in Serbia ('the Serbian case'). That information concerned, in particular, KIC, Mr L. and ECO3. A judicial investigation and a prosecution investigation were opened in Belgium in the Serbian case.

23 On 1 October 2009, the Serbian case was referred to the investigating judge in Belgium.

24 On 16 October 2009, the Commission adopted Decision C(2009) 7692 final, delegating to the former Yugoslav Republic of Macedonia competence for managing the 'Human Resources Development' component of the IPA. As certain risks had become apparent, it was provided in Article 1 of that decision that competence for the 'Human Resources Development component of the IPA would be delegated to the former Yugoslav Republic of Macedonia, while the Commission would carry out the *ex ante* controls listed in Annex II. According to that annex, when the contract had been awarded, the Commission was, in particular, to endorse the file of the contract relating to the procurement.

25 In May 2010, Mr L. was questioned by a French investigating judge in connection with bribery in the context of the Turkish case.

26 According to the Commission and OLAF, in July 2010 OLAF requested activation of a W3b warning on the EWS concerning the applicant, in application of Article 12 of the EWS Decision. The Commission claims that the activation of an identical warning was requested by OLAF concerning Mr L.

27 On 6 July 2010, a restricted service procurement notice entitled 'Reinforcing the fight against undeclared work' ('the procurement at issue') was published in the Supplement to the *Official Journal of the European Union* (OJ 2010 S 128-194817), under the reference EuropAid/130133/D/SER/MK. The procurement at issue was part of the 'Human Resource Development' component provided for in the IPA Regulation. The objective of the procurement notice was to conclude a contract, for an indicative budget of EUR 1 million, designed to improve the effectiveness and efficiency of the fight against undeclared work in the former Yugoslav Republic of Macedonia. The contract was an *ex ante* decentralised public contract for which the contracting authority was the central financing and contracting department of the Ministry of Finance of the former Yugoslav Republic of Macedonia ('the national contracting authority').

28 The tender procedure for the procurement at issue was subject to the provisions of the 'Practical guide on contract procedures for European Union external action' ('the PRAG'), in accordance with the information set out in the header to the instructions to tenderers for that contract.

29 Point 2.2 of the PRAG, on management modes, stated, in particular, that, in a decentralised programme providing for *ex ante* control, decisions concerning the procurement and award of contracts were taken by the contracting authority and referred for approval to the Commission. According to that point, the implication of the Commission related only to the grant of its authorisation to finance the decentralised contracts and the interventions of its representatives within the decentralised procedures for the conclusion or implementation of the contracts were intended solely to establish whether the conditions of EU financing were met. Thus, those interventions did not have the objective and could not have the effect of undermining the principle that the decentralised contracts continued to be national contracts, the preparation, elaboration and conclusion of which was the sole responsibility of the decentralised contracting authorities. It was also apparent from point 2.2 that the decentralised contract was signed and the contract awarded by the contracting authority designated in the financing agreement, namely the government or an entity of the beneficiary country with legal personality with which the Commission had established that agreement, but that that government or that entity must first submit the result of the evaluation to the Commission for approval, then, after having notified the contractor of that result, received and analysed the proofs regarding exclusion and selection criteria, submit the contract to the Commission for endorsement (approval).

30 Point 2.4.13 of the PRAG, on cancellation of procurement procedures, provided that the contracting authority might, before the contract was signed, abandon the procurement or cancel the procurement procedure without candidates or tenderers being entitled to claim any compensation, citing cases where the procedure had been unsuccessful because no qualitatively or financially worthwhile tender had been received. According to that point, the final decision in that regard was to be taken by the contracting authority (with the prior agreement of the Commission in the case of contracts awarded by the contracting authority under the *ex ante* system).

31 Point 2.4.15 of the PRAG, on appeals, provided, in particular, that where the Commission was not the contracting authority and where it had been informed of a complaint by a tenderer which believed that it had been harmed by an error or irregularity during an award process, it was required to communicate its opinion to the contracting authority and to do its utmost to facilitate an amicable solution between the complainant tenderer and the contracting authority.

32 Point 2.9.2 of the PRAG, on contract preparation and signature, stated that, in the *ex ante* decentralised system, the contracting authority was to send the contract dossier to the Delegation of the European Union for endorsement and that the Delegation was to sign all originals of the contract to confirm the EU financing.

33 Furthermore, the instructions to tenderers for the procurement at issue provided, in point 14.1, that the successful tenderer was to be informed in writing that its tender had been accepted and, in point 15, that the tender procedure might be cancelled if it had been unsuccessful, for example because no qualitatively or financially worthwhile tender had been received, and reminded tenderers that, in such a case, the national contracting authority could not be held liable for any damages.

34 A consortium led by the applicant responded to the call for tenders in question.

35 On 13 September 2011, the national contracting authority sent the applicant the notification letter informing it that the procurement at issue had been awarded to the consortium which it led, subject to submission, within 15 days, of admissible proof related to the exclusion situations and/or selection criteria of the tender procedure in question. The letter pointed out that, under certain circumstances, the national contracting authority might still decide to cancel the tender procedure without being liable for damages.

36 By email of 4 October 2011, the national contracting authority informed the applicant that it had received all the supporting documents. For the purpose of carrying out a final verification, it asked the applicant to send its own 2006 balance sheet or, failing that, to provide it with certain information. The applicant attached its 2006 balance sheet to its email in reply of 5 October 2010. The national contracting authority acknowledged receipt by email of the same day.

37 By email of 2 November 2011, the applicant made inquiries of the national contracting authority as to the status of the procedure.

38 By email of 3 November 2011, the national contracting authority replied that it was awaiting the *ex ante* approval of the contract dossier by the EU Delegation to the former Yugoslav Republic of Macedonia ('the Delegation') in order to be able to finalise the contract signature process. It stated that the process ought to be finalised very soon and that the applicant should therefore ensure that the key experts who were to take part in the implementation of the contract would remain available until the end of 2011.

39 By letter of 9 November 2011, the Delegation acknowledged receipt of the draft contract relating to the procurement at issue, which the national contracting authority had sent to it for endorsement. In the note cited as a reference in that letter, the Delegation stated that it had decided not to endorse the contract, pursuant to Article 17(2)(c) of the EWS Decision.

40 In the note referred to in paragraph 39 above, the Delegation relied on a problem of legality or regularity, relating to the fact that the company recommended for the award of the contract, namely the applicant, had been the subject of a W3b warning on the EWS linked with judicial proceedings pending for fraud or serious administrative errors. Last, in the same note, the Delegation suggested that the national contracting authority should close the tender procedure for the procurement at issue without awarding any contract and duly justify that closure in the information sent to the tenderer.

41 In the letter of 9 November 2011, the Delegation added that it had decided not to endorse the contract, having due regard to its obligation to protect the Union's financial interests and image, and also to the nature and seriousness of the justification for the warning at issue. It suggested that the national contract authority should launch a new tender procedure.

42 By letter of 17 November 2011, the national contracting authority informed the Delegation that, having been informed by the Delegation that the only technically acceptable offer for the award of the procurement at issue included a company with a W3b warning in the EWS, it was forwarding to the applicant, for approval, a notice of cancellation of the tender procedure for the procurement at issue and letters to the unsuccessful tenderers.

43 In November 2010, the notice of cancellation of the tender procedure for the procurement at issue was published.

44 By a 'letter to unsuccessful tenderers' of 6 December 2011, the national contracting authority informed the applicant that, 'having due regard to the obligation to protect the Union's financial interests and image [and to] the nature and seriousness of the justification for the warning', it had decided to close the tender procedure for the procurement at issue without awarding that procurement, as provided for in Article 17(2)(c) of the EWS Decision.

45 By letters of 12 December 2011 to the Delegation and the national contracting authority, the applicant disputed the legality of the national contracting authority's decision to close the tender procedure for the procurement at issue without awarding that contract because of the warning on the EWS and requested that that decision be repealed. The applicant claimed, in particular, that the Commission had placed a warning against it on the EWS without informing it and, a fortiori, without first hearing it, in breach of its rights of defence, whereas, as is clear from the order of 13 April 2011, *Planet* v *Commission* (T-320/09, EU:T:2011:172), that warning was an act adversely affecting it. In any event, the national contracting authority did not state the reasons for its decision to close the tender procedure for the procurement at issue without awarding that procurement rather than choosing a different, less harmful, solution provided for in Article 17(2)(c) of the EWS Decision.

46 On 16 December 2011, the Ombudsman issued a draft recommendation concerning his own-initiative inquiry into Case OI/3/2008/FOR against the Commission. In that draft, he recommended that the Commission should review the EWS Decision in such a way as to ensure that its scope did not go further than was necessary in order to protect the financial interests of the Union and did not breach the fundamental rights of persons on the EWS, in particular their right to be heard before a warning was issued. He also recommended, in point 141 of that draft, that W3b should be considered to apply, in an inquisitorial system, only where the judicial authorities had decided to bring the case to trial. According to the Ombudsman, only W1 or W2 warnings could be made during the investigation stage.

47 By letters of 12 January 2012 to the Delegation and the national contracting authority, the applicant restated its position, relying on the Ombudsman's draft recommendation of 16 December 2011.

48 By letters of 1 March 2012 to the Delegation and the national contracting authority, the applicant stated that it considered that the liability of the Union was incurred in the present case and, on the basis of Article 41 of the Charter of Fundamental Rights of the European Union, requested that all correspondence and all documents exchanged between the Commission and the authorities of the former Yugoslav Republic of Macedonia relating to the tender procedure for the procurement at issue be communicated to it, in so far as they concerned the applicant.

49 By letter of 14 March 2012, the Delegation apologised for the belated answer to the applicant's letters and informed it that, in accordance with section 2.4.15 of the PRAG, it was examining together with the national contracting authority, which had sole responsibility for the tender procedure for the procurement at issue, how to address the applicant's request for access to certain documents.

50 By letters of 11 May 2012 to the Delegation and the Commission, the applicant stated that it considered that the decision cancelling the tender procedure for the procurement at issue taken by the national contracting authority was nothing more than the simple consequence of the Commission's decision to include the applicant on the EWS and the Delegation's subsequent decision not to endorse the contract because of that warning. In addition, the applicant referred to its request for communication of documents.

51 By judgment of 24 May 2012, the cour d'appel de Paris (Court of Appeal, Paris, France) annulled the official requisitions submissions of 18 September and 17 October 2008, the ensuing OLAF reports and all subsequent acts.

52 By letters of 25 June 2012, the applicant again reminded the Delegation and the Commission of its request for communication of documents.

53 By letter of 25 June 2012, the applicant also asked the Commission to confirm that it was the subject of a warning on the EWS and to inform it of the nature and the grounds of that warning and also of the identity of the person who had requested that warning and the date of such request.

54 On 6 July 2012, the Ombudsman adopted a decision closing his own-initiative investigation in Case OI/3/2008/FOR against the Commission.

55 By letter of 11 July 2012, the Commission confirmed that the applicant had been the subject of a W3b warning on the EWS since July 2010, in accordance with Article 12 of the EWS Decision, which provided that 'where investigations conducted by OLAF [led] to such judicial proceedings or OLAF offer[ed] assistance or follow[ed] up those proceedings, OLAF [would] request the activation of the corresponding W3b warning'. In addition, the Commission stated that it was for each authorising officer by delegation authority to examine the consequences which that warning would have for the tender procedures and for current contracts.

56 By letter of 11 July 2012, the Delegation informed the applicant that the decision to cancel the tender procedure for the procurement at issue had been adopted by the national contracting authority, that it did not have a dossier to which it could give access and that it would therefore forward the applicant's request to the competent national authorities.

57 By letter of 23 August 2012, the applicant lodged a complaint with the Ombudsman, asking him to find that the Commission had breached the principle of sound administration by placing a warning against it on the EWS without informing it beforehand, by refusing to provide it with the information necessary for an understanding of that warning and by having, on that basis, refused to endorse the contract relating to the procurement at issue, which had been awarded to it, without taking account of its subsequent objections. The applicant also requested the Ombudsman to take action so that its warning on the EWS would be cancelled. That complaint was registered under reference 604/2013/FOR.

58 By judgment of 19 December 2012, *Commission* v *Planet* (C-314/11 P, EU:C:2012:823), the Court of Justice dismissed the appeal against the order of 13 April 2011, *Planet* v *Commission* (T-320/09, EU:T:2011:172), confirming that the warning against an entity in the EWS, including a W1 warning, was capable of adversely affecting the entity subject to the warning.

59 Drawing the conclusions from the judgment of 19 December 2012, *Commission* v *Planet* (C-314/11 P, EU:C:2012:823), the Commission adopted provisional measures for the application of the EWS Decision in order to allow entities subject to a request for a warning at level W1 to W4 to submit their observations in writing before the warning was registered.

60 By decision of 8 May 2013, the Ombudsman closed Case 637/2009/(ELB)FOR with the following critical observation: 'OLAF was wrong not to request the withdrawal of the W3b warning activated against [ECO3]'.

61 By letter of 16 December 2013, the Ombudsman sent the applicant the observations which she had received from OLAF by letter of 2 December 2013.

62 By letter of 8 January 2014, the applicant submitted to the Ombudsman its observations on OLAF's letter of 2 December 2013.

63 By letter of 1 September 2014, the Ombudsman sent the applicant her draft recommendation in Case 604/2013/FOR, namely that the Commission should revoke its EWS warning or provide justified reasons for maintaining it, and provide the applicant with a copy of all correspondence between it and the national contracting authority concerning that warning.

64 In February 2015, the Commission cancelled the applicant's EWS warning and also that of Mr L.

65 By order of 16 April 2015, the French investigating judge dealing with the Turkish case declared that it was not appropriate, in that case, to take proceedings against Mr L. for bribery, as the investigation had not established sufficient evidence against him.

66 By letter of 29 April 2015, the Ombudsman sent the applicant OLAF's observations on the draft recommendation concerning the applicant's complaint. In its observations, OLAF stated that, on 10 February 2015, in application of Article 5(3)(b) of the EWS Decision, it had sent the Commission's accounting officer a request for the revocation of the EWS warning concerning the applicant and that on 16 February 2015 the accounting officer had adopted a decision to revoke that warning. As regards the request for the communication of correspondence, OLAF stated that it had forwarded that request to the competent Commission service.

67 By letter of 21 May 2015 to the Ombudsman, the applicant acknowledged the withdrawal of its EWS warning, but expressed reservations about OLAF's observations.

68 By order of 21 May 2015, the chambre du conseil du tribunal de première instance francophone de Bruxelles (the judge in Chambers of the Brussels Court of First Instance (French-speaking), Belgium), inter alia, committed Mr L. and ECO3 to the criminal court for possible offences of corruption in the Ukrainian case.

69 By letter of 26 June 2015, received by the applicant on 1 July 2015, the Commission sent the applicant the correspondence between the national contracting authority and the Delegation, namely the letters of 9 and 17 November 2011, to which the applicant had not thus far been given access.

The facts subsequent to the initiation of the action

70 By order of 14 June 2016, the chambre du conseil du tribunal de première instance francophone de Bruxelles (the judge in Chambers of the Brussels Court of First Instance (French-speaking)), inter alia, committed Mr L. and ECO3 to the criminal court for possible offences of corruption in the Serbian case.

71 By two judgments of 5 October 2017, the tribunal de première instance francophone de Bruxelles (the Brussels Court of First Instance (French-speaking)) declared that the criminal proceedings in the Ukrainian and Serbian cases were inadmissible, as the very foundation of those proceedings had been irremediably impaired by the annulment of essential evidence by the French courts, and, accordingly, declared that it lacked jurisdiction to hear the civil claims. As no appeal was lodged against those judgments, they became final.

Procedure and forms of order sought

72 By application lodged at the Court Registry on 13 June 2016, the applicant brought the present action. The case was assigned to the Fifth Chamber of the General Court.

73 On 6 October 2016, following a change in the composition of the Chambers of the General Court, the case was re-assigned to the Seventh Chamber of the General Court.

74 On 14 February 2017, the case was re-assigned, in the interest of the sound administration of justice, to a new Judge-Rapporteur, in the First Chamber of the General Court.

75 In the context of a measure of organisation of procedure, provided for in Article 89 of the Rules of Procedure of the General Court, which was notified to them on 15 June 2017, the parties were requested to comment on any consequences to be inferred, in the present case, from the order of 13 September 2012, *Diadikasia Symvouloi Epicheiriseon* v *Commission and Others* (T-369/11, not published, EU:T:2012:425), upheld on appeal by the order of 4 July 2013, *Diadikasia Symvouloi Epicheiriseon* v *Commission and Others* (C-520/12 P, not published, EU:C:2013:457). The parties complied with that request within the prescribed periods.

76 On a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure and, in the context of new measures of organisation of procedure notified to them on 23 March 2018, the parties were requested to answer certain written questions. The parties complied with that request within the prescribed periods.

77 The parties presented oral argument and answered the oral questions put by the Court at the hearing on 2 May 2018. Following the hearing, the oral part of the procedure was closed.

78 At the request of the Judge-Rapporteur, the Court, taking the view that the case should be resolved, in particular, on the basis of an argument which had not been discussed between the parties, decided to re-open the oral part of the hearing and, in the context of a measure of organisation of procedure, requested the parties to answer, in writing, a question. The parties complied with that request within the prescribed periods and, by decision of the President of the First Chamber of the General Court, the oral part of the procedure was again closed.

79 The applicant claims that the Court should:

– order the Commission to make good the material and non-material damage which it has sustained as a result of its inclusion on the EWS and of the subsequent refusal, based on that warning, to endorse the contract relating to the procurement at issue, which is evaluated in the total sum of EUR 496 000, corresponding, as to the sum of EUR 166 000, to the material damage resulting from the loss of the procurement at issue and, as to the sum of EUR 330 000, to the material and non-material damage resulting from the loss of an opportunity to be awarded other contracts in the field of employment and in the former Yugoslav Republic of Macedonia;

– order the Commission to pay the costs.

80 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

The Court's jurisdiction to hear the action

81 Although, in the rejoinder, the Commission stated that it did not dispute the admissibility of the present action, it observed in its reply to the measure of organisation of procedure notified on 15 June 2017 that the present action should be declared inadmissible by the Court of its own motion. According to the Commission, it follows from paragraph 62 of the order of 13 September 2012, *Diadikasia Symvouloi Epicheiriseon* v *Commission and Others* (T-369/11, not published, EU:T:2012:425), that where the act giving rise to the damage was adopted by the contracting authority of a third country, only the judicial authorities of that country have jurisdiction to examine a claim for compensation. It submits that the act giving rise to the damage claimed by the applicant is an act of the national contracting authority, namely the decision cancelling the tender procedure for the procurement at issue taken by the national contracting authority, of which the applicant was informed by the letter of 6 December 2011 from that authority.

82 In its reply to the measures of organisation of procedure notified on 15 June 2017 and 23 March 2018, the applicant claims that the present action is admissible; it contends that, even when the national contracting authority's decision to cancel the tender procedure for the procurement at issue without concluding the contract is taken into account, the illegal act alleged to have given rise to the damage, namely the warning on the EWS and the subsequent refusal to endorse the contract relating to the procurement at issue, is attributable to the Commission or to the Delegation. The situation is therefore different from the situation that gave rise to the order referred to in paragraph 81 above, where the applicant claimed compensation for the damage resulting from the decision adopted by the contracting authority of the third country, the legality of which it disputed.

83 Under the guise of admissibility, the parties discuss, in the present case, the question whether the General Court has jurisdiction to determine the present case or whether it comes within the jurisdiction of the courts of the former Yugoslav Republic of Macedonia.

84 Even though the question discussed by the parties is not covered by any form of order sought in the strict sense, it may be examined by the Courts of the European Union of their own motion, as it relates to the actual jurisdiction of those Courts to adjudicate on the dispute, which is a question of public policy (see, to that effect, judgments of 18 March 1980, *Ferriera Valsabbia and Others* v *Commission*, 154/78, 205/78, 206/78, 226/78to à 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79, EU:C:1980:81, paragraph 7, and of 15 March 2005, *GEF* v *Commission*, T-29/02, EU:T:2005:99, paragraph 72 and the case-law cited).

85 In that regard, it must be emphasised that the act the illegality of which the applicant claims as the basis of its right to compensation is not the decision to cancel the tender procedure for the procurement at issue, which was taken by the national contracting authority, but the Commission's decision to include the applicant on the EWS and the Delegation's subsequent refusal to endorse the contract relating to the procurement at issue. On the other hand, as the applicant states in its reply to the measures of organisation of procedure notified on 15 June 2017 and 23 March 2018, '[the applicant] does not base its action for compensation on the decision of the national contracting authority, which is competent in the context … of what is known as an *ex ante* decentralised contract', but which 'cannot conclude a contract without the prior agreement of the Commission', which is therefore solely 'responsible for granting that agreement or refusing that agreement'.

86 It follows that, even if the decision to cancel the tender procedure for the procurement at issue was taken by the national contracting authority, the illegality relied on in support of the present action was indeed taken by an institution, body, agency or office of the Union and cannot be regarded as attributable to a national public authority.

87 It follows from Article 1 of Decision C(2009) 7692 final, read in conjunction with Annex II to that decision, and from point 2.2 of the PRAG that the Delegation did not issue a simple opinion concerning the conclusion of the contract with the successful tenderer, but did indeed have the power to allow or refuse to allow the contract to be concluded when it considered that the conditions that would permit its conclusion were not satisfied.

88 Furthermore, it is apparent from the documents in the file and from the discussion before the Court that, by its letter of 9 November 2011, the Delegation did in fact use the power thus conferred on it to refuse to allow the contract to be concluded with the consortium led by the applicant, as a result of which the national contracting authority had no other choice, since the only technically acceptable offer had been submitted by that consortium, than to cancel the tender procedure for the procurement at issue.

89 It follows from the foregoing that the illegality alleged by the applicant as the basis of its right to compensation is attributable not to the national contracting authority, which was required to draw the conclusions from the Delegation's refusal, which was itself based on a prior decision of the Commission, but to the Delegation and the Commission themselves.

90 The present situation may thus be distinguished from the situation that gave rise to the order of 13 September 2012, *Diadikasia Symvouloi Epicheiriseon* v *Commission and Others* (T-369/11, not published, EU:T:2012:425), in which the only acts the illegality of which had been relied on in support of the claim for compensation were those adopted by the national public authority.

91 It follows from all of the foregoing findings that the Court has jurisdiction to hear the present action and that the Commission's argument to the contrary must be rejected.

The admissibility of the material produced in Annexes C.1 to C.12 to the reply

92 Under Article 113 of the Rules of Procedure, the Court may of its own motion examine the conditions of admissibility of the action, which are a matter of public policy (see judgment of 2 April 1998, *Apostolidis* v *Court of Justice*, T-86/97, EU:T:1998:71, paragraph 18 and the case-law cited). However, the Courts of the European Union cannot, as a general rule, base their decisions on a plea raised of their own motion — even one involving a matter of public policy — without first having invited the parties to submit their observations on that plea (see judgment of 17 December 2009, *Review M* v *EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 57 and the case-law cited).

93 In the present case, it is appropriate for the Court to examine of its own motion the admissibility of the material produced in Annexes C.1 to C.12 to the reply.

94 In answer to a measure of organisation of procedure adopted by the Court (see paragraph 78 above), the applicant claimed that all the material produced in Annexes C.1 to C.12 to the reply fell outside the scope of the time-bar prescribed in Article 85(1) of the Rules of Procedure, as it constituted evidence in rebuttal or was intended to amplify evidence produced. The Commission, for its part, observed that the applicant had not thus far justified the belated production of the material in question and, while leaving the matter to the discretion of the Court, claimed that the material could be declared admissible, either as supplementary evidence or as evidence in rebuttal or evidence intended to amplify evidence produced.

95 In that regard, it is apparent from the application that the present action has as its object a claim for compensation for the material and non-material damage alleged to have been sustained by the applicant following the Commission's decision to include it on the EWS and of the Delegation's subsequent refusal to endorse the contract relating to the procurement at issue. The action is therefore one whereby the applicant seeks to establish the non-contractual liability of the Union.

96 According to settled case-law, in an action to establish non-contractual liability, it is for the applicant to adduce evidence before the Courts of the European Union to establish the reality and the extent of the damage which it claims to have sustained (see judgment of 28 January 2016, *Zafeiropoulos* v *Cedefop*, T-537/12, not published, EU:T:2016:36, paragraph 91 and the case-law cited, and judgment of 26 April 2016, *Strack* v *Commission*, T-221/08, EU:T:2016:242, paragraph 308 (not published)).

97 Admittedly, the Courts of the European Union have acknowledged that, in certain cases, particularly where it is difficult to express the alleged loss in figures, it is not absolutely necessary to particularise its exact extent in the application or to calculate the amount of the compensation claimed (see judgment of 28 February 2013, *Inalca and Cremonini* v *Commission*, C-460/09 P, EU:C:2013:111, paragraph 104 and the case-law cited).

98 The application in the present case was submitted on 13 June 2016. In the application, the applicant quantified the non-material and material damage which it considered it had sustained, relying on the material produced in the annexes to the application.

99 As a preliminary point, it should be borne in mind that, in accordance with Article 76(f) of the Rules of Procedure, an application is to contain, where appropriate, any evidence produced or offered.

100 In addition, Article 85(1) of the Rules of Procedure provides that evidence produced or offered is to be submitted in the first exchange of pleadings. Article 85(2) of the Rules of Procedure adds that in reply or rejoinder a party may produce or offer further evidence in support of his arguments, provided that the delay in the submission of such evidence is justified. In the latter case, in accordance with Article 85(4) of the Rules of Procedure, the Court is to decide on the admissibility of the evidence produced or offered after the other parties have been given an opportunity to comment on such evidence.

101 The time-bar rule laid down in Article 85(1) of the Rules of Procedure does not concern evidence in rebuttal and the amplification of previous evidence, submitted in response to evidence in rebuttal put forward by the opposing party (see judgment of 22 June 2017, *Biogena Naturprodukte* v *EUIPO (ZUM wohl)*, T-236/16, EU:T:2017:416, paragraph 17 and the case-law cited).

102 It follows from the case-law on the application of the time-bar rule laid down in Article 85(1) of the Rules of Procedure that the parties must state the reasons for the delay in submitting or offering new evidence (judgment of 18 September 2008, *Angé Serrano and Others* v *Parliament*, T-47/05, EU:T:2008:384, paragraph 54) and that the Courts of the European Union have jurisdiction to review the merits of the reasons for the delay in submitting or offering that evidence and, depending on the case, the content of that evidence and also, if its belated production of that evidence is not justified to the requisite legal standard or substantiated, jurisdiction to reject it (judgments of 14 April 2005, *Gaki-Kakouri* v *Court of Justice*, C-243/04 P, not published, EU:C:2005:238, paragraph 33, and of 18 September 2008, *Angé Serrano and Others* v *Parliament*, T-47/05, EU:T:2008:384, paragraph 56).

103 It has already been held that the belated submission or offer of evidence by a party might be justified by the fact that that party did not previously have the evidence in question at its disposal or if the belated production of evidence by the opposing party justifies the file being supplemented, in such a way as to ensure observance of the *inter partes* principle (judgments of 14 April 2005, *Gaki-Kakouri* v *Court of Justice*, C-243/04 P, not published, EU:C:2005:238, paragraph 32, and of 18 September 2008, *Angé Serrano and Others* v *Parliament*, T-47/05, EU:T:2008:384, paragraph 55).

104 In the present case, the applicant produced certain material in Annexes C.1 to C.15 to the reply, without providing specific justification for the delay producing it.

105 By way of preliminary point, it should be observed that the table setting out the applicant's operating costs, produced in Annex C.7 to the reply, does not, as the applicant observes, constitute evidence. It is merely information supplied by the applicant for the purpose of answering a question formulated by the Commission in paragraph 52 of the defence, and which the Commission 'duly noted' in paragraph 34 of the rejoinder. Consequently, it does not constitute material the admissibility of which should be examined in the light of Article 85(1) of the Rules of Procedure.

106 In so far as, in its answers to the questions put by the Court (see paragraph 78 above), the applicant claimed that Annexes C.1 to C.12 to the reply contained material necessary to rebut the arguments put forward by the Commission in the defence, it should be pointed out that, as the applicant correctly observes and as the Commission acknowledges, the belated submission of the evidence in Annexes C.1 to C.4 to the reply may in fact be justified for the purposes of ensuring observance of the *inter partes* principle with respect to certain arguments developed in the defence. First, the extract from the order of committal to the criminal court and partial discharge, of 16 April 2015, made in the context of the criminal proceedings initiated in France was produced, in Annex C.1 to the reply, in order to show that Mr L. had been discharged on substantive grounds, namely the lack of sufficient incriminating evidence, and not on jurisdictional grounds, as the Commission maintained in paragraph 12 of the defence. Second, the documents relating to the procedure before the Ombudsman were produced, in Annexes C.2 and C.3 to the reply, in order to prove that only Mr L. and ECO3 had been the subject of a warning in the EWS, and not the applicant, as the Commission maintained in paragraph 16 of the defence. Third, the extracts from the final audit reports relating to three projects in which the applicant had participated were produced, in Annex C.4 to the reply, in order to establish that the number of days actually supplied in the context of a project generally corresponded to the number estimated in the budget, which the Commission had queried in paragraph 50 of the defence.

107 On the other hand, the evidence in Annexes C.5, C.6 and C.8 to C.12 to the reply, namely the statements of two of the key experts referred to in the table evaluating the damage annexed to the application ('the table evaluating the damage linked with the loss of the procurement at issue') and confirming their daily rate, a payslip of a project manager whom the applicant employed in 2012, statements of the members of the consortium confirming the allocation key set out in the table evaluating the damage linked with the loss of the procurement at issue and an opinion concerning a public procurement contract to be concluded with the authorities of the former Yugoslav Republic of Macedonia and intended to provide them with support in order to combat undeclared work, published on 13 February 2013, and also the list of tenderers preselected for that contract, were produced by the applicant for the sole purpose of establishing, in accordance with the case-law cited in paragraph 96 above, the reality and extent of the alleged material and non-material damage, as quantified in the application. The fact that the Commission argued in the defence that the applicant had not proved to the requisite legal standard the reality and extent of the damage which it claimed to have sustained does not permit the conclusion that the belated production of the evidence in Annexes C.5, C.6 and C.8 to C.12 to the reply was therefore justified by the need to respond to the Commission's arguments and to ensure observance of the *inter partes* principle.

108 It follows from all of the foregoing findings that, among the material produced in the annexes to the reply, that appearing in Annexes C.5, C.6 and C.8 to C.12 to the reply must be rejected as inadmissible and will not be taken into account at the stage of the examination of the substance of the action.

Substance

109 Under the second paragraph of Article 340 TFEU, 'in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. In

accordance with settled case-law, in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct complained of and the damage pleaded (see judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 106 and the case-law cited; judgments of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraph 113, and of 25 November 2014, *Safa Nicu Sepahan* v *Council*, T-384/11, EU:T:2014:986, paragraph 47).

110 In support of the present action, the applicant claims that the three conditions referred to in paragraph 109 above are satisfied in the present case.

111 The Commission contends that the present action should be dismissed as unfounded, on the ground that the applicant does not adduce proof, as it is required to do, that all the conditions required to establish the non-contractual liability of the Union are satisfied in the present case. Primarily, it maintains that the applicant has not adduced proof of the existence and the extent of the damage which it pleads. In the alternative, it disputes the illegality of the conduct which the applicant attributes to it.

112 According to settled case-law, the conditions for the incurring of the non-contractual liability of the Union within the meaning of the second paragraph of Article 340 TFEU, as already set out in paragraph 109 above, are cumulative (judgment of 7 December 2010, *Fahas* v *Council*, T-49/07, EU:T:2010:499, paragraphs 92 and 93, and order of 17 February 2012, *Dagher* v *Council*, T-218/11, not published, EU:T:2012:82, paragraph 34). It follows that where one of those conditions is not fulfilled the action must be dismissed in its entirety (judgment of 26 October 2011, *Dufour* v *ECB*, T-436/09, EU:T:2011:634, paragraph 193).

113 The Court must therefore ascertain, in the present case, whether the applicant, as it is required to do, has adduced proof of the illegality of the conduct in respect of which it takes issue with the Commission, of the reality of the material and non-material damage which it claims to have sustained and of the existence of a causal link between the illegal conduct complained of and the damage on which it relies.

The illegal conduct of which the Commission is accused

114 The applicant maintains, in essence, that the Commission and the Delegation erred, first of all, by placing a warning in the EWS, then by refusing, because of that warning, to endorse the contract relating to the procurement at issue after it had been awarded to the consortium which it led. In the applicant's submission, that error is the result of a number of illegalities attributable to the Commission and to the Delegation.

115 The applicant submits that the warning on the EWS was illegal.

116 First, that warning had no legal basis, since the decision that formed the basis of the warning, namely the EWS Decision, itself lacked such a legal basis and, accordingly, was adopted in breach of the principle of the allocation of powers laid down in Article 5 TFEU and also of the principle of the presumption of innocence, enshrined in Article 48(1) of the Charter of Fundamental Rights, as this Court has already found in the judgment 22 April 2015, *Planet* v *Commission* (T-320/09, EU:T:2015:223, paragraphs 57, 58 and 66 to 68).

117 Furthermore, the EWS Decision was adopted in breach of the principle of legal certainty, in that the conditions for a W3b warning requiring that the person concerned is the subject of 'judicial proceedings' was not sufficiently clear and precise for individuals to be able to ascertain their rights and obligations without ambiguity, as the Ombudsman found in his draft recommendation of 16 December 2011 in Case OI/3/2008/FOR.

118 Second, the W3b warning on the EWS infringed Article 41 of the Charter of Fundamental Rights and breached the principle of sound administration, the principle of respect for the rights of the defence, the fundamental right to be heard and the obligation to state reasons, in so far as the warning was implemented without the applicant being informed, without, a fortiori, its being heard in advance and without sufficient reasons being provided to it.

119 Third, and in the alternative, the applicant's EWS warning infringed the EWS Decision and breached the principle of proportionality, in that the condition for a W3b warning relating to the existence of 'judicial proceedings' was not satisfied in the applicant's case, or even in that of Mr L. or ECO3, in so far as the prosecution investigation or judicial investigation phase, in an inquisitorial system, is not covered by that concept.

120 Furthermore, the refusal to endorse the contract relating to the procurement and, consequently, to cancel the procedure without awarding the procurement at issue, pursuant to Article 17(2) of the EWS Decision, was illegal. The Commission breached the obligation to state reasons enshrined in Article 41 of the Charter of Fundamental Rights, the duty of care and the principle of proportionality, in that it did not apply Article 17(2) of the EWS Decision or explain the reasons why it had not applied those provisions, which, where the person who is the subject of a W3b warning is first on the evaluation committee's list, permits the contract to be awarded to that person with reinforced monitoring measures. In addition, the Commission disregarded point 15 of the instructions to tenderers for the procurement at issue, which contains a restrictive list of cases in which the tender procedure for the procurement at issue could be cancelled, but does not mention the case of a W3b listing in the EWS.

121 The Commission denies having committed an illegality of such a kind as to incur the non-contractual liability of the Union.

122 According to settled case-law, a finding of the unlawfulness of a legal measure is not enough, however regrettable that unlawfulness may be, for it to be held that the condition for the incurring of the European Union's non-contractual liability relating to the unlawfulness of the institutions' alleged conduct has been satisfied (judgment of 25 November 2014, *Safa Nicu Sepahan* v *Council*, T-384/11, EU:T:2014:986, paragraph 50; see also, to that effect, judgments of 6 March 2003, *Dole Fresh Fruit International* v *Council and Commission*, T-56/00, EU:T:2003:58, paragraphs 72 to 75, and of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 31).

123 The condition relating to the existence of illegal conduct on the part of the institutions of the Union requires a sufficiently serious breach of a rule of law that is intended to confer rights on individuals (see judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30 and the case-law cited).

124 The requirement of a sufficiently serious breach of a rule of law that is intended to confer rights on individuals is intended, whatever the nature of the unlawful act at issue, to avoid the risk of having to bear the losses claimed by the persons concerned obstructing the ability of the institution concerned to exercise to the full its powers in the general interest, whether that be in its legislative activity or in that involving choices of economic policy or in the sphere of its administrative competence, without however thereby leaving individuals to bear the consequences of flagrant and inexcusable conduct (see judgment of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 34 and the case-law cited; judgment of 25 November 2014, Safa *Nicu Sepahan* v *Council*, T-384/11, EU:T:2014:986, paragraph 51).

125 In the present case, the applicant is correct to maintain that its W3b warning on the EWS was illegal.

126 First, that warning had no legal basis.

127 In fact, the principle of allocation of powers set out in Article 5 TFEU requires that each institution is to act within the limits of the powers conferred on it by the Treaty (see, to that effect, judgment of 22 April 2015, *Planet* v *Commission*, T-320/09, EU:T:2015:223, paragraphs 57 and 58). In addition, the principle of legal certainty requires that any act intended to have legal effects must be derived from a provision of EU law that prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis (judgment of 16 June 1993, *France* v *Commission*, C-325/91, EU:C:1993:245, paragraph 26).

128 In the present case, the applicant's W3b warning on the EWS was done in application of the provisions of the EWS Decision governing that type of warning and its consequences. However, no existing legal basis authorised the Commission to adopt such provisions, which are capable of having negative consequences for the legal position of the persons to whom that type of warning applies (see, to that effect, judgment of 22 April 2015, *Planet* v *Commission*, T-320/09, EU:T:2015:223, paragraphs 64, 68, 70 and 71).

129 Furthermore, in so far as the applicant's W3b warning on the EWS had undeniable consequences for its legal position, the Commission cannot validly maintain that the provisions of the EWS Decision governing that type of warning and its consequences are merely internal rules on the implementation of the general budget of the European Union.

130 Nor, likewise, can the Commission validly claim that the lack of a legal basis for the EWS Decision had not yet been established at the time when it placed the applicant in the EWS. The fact that the lack of a legal basis had not been established does not in any way prevent the applicant, in the context of the present action from pleading the illegality of that decision in order to obtain compensation for the damage which it claims to have sustained as a result of being placed in the EWS.

131 Second, the applicant's W3b warning on the EWS was done in breach of its rights of defence.

132 Observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 36).

133 In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities are subject to that obligation when they take decisions which come within the scope of EU law, even though the legislation applicable does not expressly provide for such a procedural treatment (see judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraphs 37 and 38 and the case-law cited). Article 41(2)(a) of the Charter of Fundamental Rights also provides that every person is to have the right to be heard, before any individual measure which would affect him or her adversely is taken.

134 The purpose of the obligation to state reasons, which is another corollary of the principle of respect for the rights of the defence, is, according to settled case-law, to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the Courts of the European Union and to enable those Courts to review the legality of that act (judgments of 2 October 2003, *Corus UK* v *Commission*, C-199/99 P, EU:C:2003:531, paragraph 145; of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 462; and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 148). It follows that the statement of reasons

must in principle be notified to the person concerned at the same time as the decision adversely affecting him and that a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Courts of the European Union (judgment of 26 November 1981, *Michel* v *Parliament*, 195/80, EU:C:1981:284, paragraph 22).

135 According to settled case-law, the statement of reasons required by Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights must be appropriate to the nature of the contested measure and to the context in which it was adopted. Thus, first, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to the person concerned and which enables him to understand the scope of the measure concerning him. Second, the degree of precision of the statement of reasons for a measure must be weighed against practical realities and the time and technical facilities available for taking the measure (see judgment of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraphs 94 and 95 and the case-law cited).

136 In the present case, it was only by the letter of 11 July 2012 that the Commission formally notified the applicant that it had been the subject of a W3b warning on the EWS since July 2010. It therefore failed to hear the applicant before including it on the EWS or refusing to endorse the contract awarded to the consortium which it led because of that warning.

137 As regards the reasons for that warning, the Commission merely referred in the letter of 11 July 2012 to the general and abstract circumstances, mentioned in Article 12(2) of the EWS Decision, in which OLAF requested activation of a W3b warning in the EWS, namely where its investigations led to judicial proceedings or OLAF offered assistance or followed up those proceedings. In doing so, the Commission failed to communicate to the applicant the reasons for its W3b warning on the EWS at the actual time of the warning, nor did it explain, in the letter of 11 July 2012 or even in the exchange of correspondence between the Delegation and the national contracting authority which were communicated to the applicant by letter of 26 June 2015, the actual and specific reasons why it considered that Article 12(2) of the EWS Decision was applicable to the applicant. Such reasoning was all the more necessary in the context of the present case because, as is apparent from the documents in the file, there were no judicial proceedings concerning the applicant personally and the proceedings in France and Belgium concerning persons with whom the applicant was linked, namely Mr L. and ECO3, were only at the investigation stage, and not at the trial stage, which was the only stage of the proceedings capable, in the French and Belgian inquisitorial systems, of concluding in a judgment having the force of *res judicata*. As is apparent from the parties' written pleadings and from the draft recommendation of the Ombudsman of 16 December 2012 in Case OI/3/2008/FOR (see paragraph 46 above), the precise scope of Article 12 of the EWS Decision was uncertain. In particular, it was not clear, in the light of Article 12(3) of that decision, that W3b warnings could apply, in an inquisitorial system, at the investigation stage.

138 In accordance with the case-law cited in paragraph 134 above, that failure to state reasons cannot be remedied by the explanations provided by the Commission in its written pleadings in the present case. In any event, it should be observed that the precise reasons justifying the applicant's W3b warning on the EWS remain uncertain at this stage, since the Commission has never supplied documents showing that requests to activate a warning on the EWS were addressed to it by OLAF concerning the applicant or the persons linked with it, namely Mr L. and ECO3.

139 In so far as the Commission maintains, for the first time at the stage of the defence, that it was able in the present case to derogate from the principle of respect for the rights of the defence with regard to the applicant for the purpose of preserving the confidentiality of the investigative procedures and the judicial proceedings initiated by OLAF and by the French and Belgian authorities with regard to Mr L. and ECO3, it is sufficient to state that, in so far as the applicant's W3b warning on the EWS was capable of adversely affecting its legal position, its rights of defence had to be observed, without

prejudice to certain arrangements that might have been necessary in order for those rights to be reconciled with those of third parties. However, the Commission has neither maintained nor, a fortiori, established that it sought to reconcile those rights in the present case. In particular, the Commission has provided no explanation of why that confidentiality still had to be preserved, in November 2011, at the time when in had refused to endorse the contract relating to the procurement at issue on the ground that the applicant was the subject of a W3b warning in the EWS.

140 Third, the applicant's W3b warning on the EWS breached the principle of the presumption of innocence, enshrined in Article 48(1) of the Charter of Fundamental Rights, which is intended to ensure that no-one is declared guilty, or treated as being guilty, of an offence before his guilt has been established by a court or tribunal law. That principle also means that, if the Commission considered it necessary to take preventive measures at an early stage, it needed a legal basis that would allow such a warning system to be set up and the relevant measures to be taken, and that system had to respect the rights of the defence, the principle of proportionality and the principle of legal certainty, which meant that the rules of law had to be clear and precise and predictable in their effect, in particular where they could have adverse consequences for individuals (see, to that effect, judgment of 22 April 2015, *Planet* v *Commission*, T-320/09, EU:T:2015:223, paragraphs 66 and 67). As is clear from paragraph 128 above, however, such a legal basis was lacking in the present case.

141 In order to place the applicant's W3b warning in the EWS, the Commission relied, in accordance with the wording of Article 9(3) and Article 12(2) of the EWS Decision, and as is apparent from the transmission note enclosed with the Delegation's letter of 9 November 2011, on the fact that the applicant was the subject of judicial proceedings for serious administrative errors or fraud. As already stated in paragraphs 128 and 137 above, however, there was no existing legal basis authorising the Commission to adopt provisions governing the W3b type of warning and its consequences. In addition, at the time of the applicant's W3b warning in the EWS, no investigation request or judicial proceedings directly concerned the applicant and the judicial proceedings concerning persons linked with the applicant were only at the investigation stage. Since that warning had adverse consequences for the applicant, it must be held that the applicant was treated as being guilty of serious administrative errors or fraud without its guilt, whether direct or indirect, for such conduct having been established by a court or tribunal.

142 As to whether the rules of law thus breached by the Commission confer rights on individuals, it must be borne in mind that, in order to ensure the practical effect of that condition, it is necessary that the protection afforded by the rule relied on is effective as regards the person who relies on it and, therefore, that that person is among those on whom the rule in question confers rights. A rule that does not protect the person concerned against the illegality which he pleads, but another person, cannot be accepted as a source of compensation (judgment of 12 September 2007, *Nikolaou* v *Commission*, T-259/03, not published, EU:T:2007:254, paragraph 44).

143 It has already been held that the principle of respect for the rights of the defence constituted a rule of law intended to confer rights on individuals (judgment of 11 July 2007, *Sison* v *Council*, T-47/03, not published, EU:T:2007:207, paragraph 239), just like the principle of the presumption of innocence (judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T-48/05, EU:T:2008:257, paragraph 218). The applicant, whose W3b warning on the EWS affected its legal position, must itself benefit, with regard to that warning, from the protection conferred by the principles of respect for the rights of the defence and the presumption of innocence.

144 As regards the lack of a legal basis for the warning, it has already been held that, whilst a failure to observe the system of the division of powers between the various institutions of the European Union, whose aim is to ensure that the balance between the institutions provided for in the Treaties is maintained, and not to protect individuals, cannot be sufficient on its own to render the European Union liable towards the individuals concerned, the position was different if a measure of the European Union were to be adopted which not only disregarded the division of powers between the

institutions but also, in its substantive provisions, disregarded a rule of law intended to confer rights on individuals (see, to that effect, judgment of 19 April 2012, *Artegodan* v *Commission*, C-221/10 P, EU:C:2012:216, paragraph 81 and the case-law cited). In the present case, it was found in paragraphs 131 and 140 above that the applicant's W3b warning on the EWS breached the principles of respect for the principles of the rights of the defence and the presumption innocence, which conferred rights on the applicant.

145 As to whether the breach of the rules of EU law found may be considered to be sufficiently serious, the Court of Justice has already had occasion to state that that condition might be considered to be satisfied where the institution concerned had manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU authority (see judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30 and the case-law cited).

146 According to the case-law, where the EU authority has only a considerably reduced, or even no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach (see judgments of 14 December 2005, *FIAMM and FIAMM Technologies* v *Council and Commission*, T-69/00, EU:T:2005:449, paragraphs 88 and 89 and the case-law cited, and of 11 July 2007, *Sison* v *Council*, T-47/03, not published, EU:T:2007:207, paragraph 235 and the case-law cited).

147 It follows from the case-law, last, that a breach of EU law will, in any event, clearly be sufficiently serious if it has persisted in spite of a judgment finding the breach in question to be established, or in spite of a preliminary ruling or settled case-law of the Courts of the European Union on the matter from which it is clear that the conduct in question constituted a breach (see judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 31 and the case-law cited).

148 In the present case, since the Delegation itself refused to endorse the contract awarded to the consortium led by the applicant on the sole ground that the Commission had placed a W3b warning concerning the applicant in the EWS, the Commission cannot maintain that that warning was not intended to produce effects outside the internal sphere of the institution, or to have a negative impact on the applicant's legal position.

149 In fact, in July 2010, a well-established body of case-law and the Charter of Fundamental Rights, which entered into force on 1 December 2009, enabled the Commission to understand that, if the applicant's legal position was liable to be thus adversely affected by its W3b warning in the EWS, its right that that warning be founded on a legal basis and its rights of defence and the principle of the presumption of innocence had to be respected.

150 The application of those rights in the present case did not give rise to particular difficulties and the Commission had no discretion in that connection. In particular, the fact that the Commission was required to ensure the protection of the financial interests and the reputation of the European Union could not justify its breach of the applicant's rights.

151 Furthermore, in spite of the applicant's numerous letters and attempts to secure respect for its rights, the Commission did not react, either to amend the EWS Decision or to withdraw the warning in respect of the applicant or the persons linked to it in the EWS, before its acts or conduct were directly called in question by the Ombudsman.

152 Last, the Commission's conduct was neither transparent nor coherent. First, it never supplied to the applicant or produced in the context of these proceedings documents attesting to the requests for activation of a warning on the EWS addressed to it by OLAF concerning the applicant or concerning Mr L. and ECO3 (see paragraph 138 above). Second, the Delegation, by letter of 9 November 2011,

informed the national contracting authority that it had decided to cancel the tender procedure for the procurement at issue without awarding the contract, in application of Article 17(2)(c) of the EWS Decision, which was applicable to the Commission's authorising officers and authorising officers by delegation, while indicating, in its reply to the measures of organisation of procedure notified on 15 June 2017 and 23 March 2018, that the act giving rise to the damage sustained by the applicant was issued by the national contracting authority, which alone had the power to decide to cancel the tender procedure for the procurement at issue, in accordance with point 2.4.13 of the PRAG and point 15 of the instructions to tenderers for that procurement. Third, following the Ombudsman's interventions, the Commission, in February 2015, withdrew the warning in respect of the applicant and Mr L. on the EWS (see paragraph 64 above), while continuing to observe, in its written pleadings before the Court, that the judicial proceedings that justified those warnings were continuing in Belgium, where proceedings had been requested against Mr L. Fourth, although the applicant was still the subject of a W3b warning on the EWS and although, on that ground, the Commission had refused to endorse the contract relating to the procurement at issue, it signed with the applicant, on 15 December 2010, a contract having a value of EUR 1 338 225 for a procurement in Albania funded, within the framework of the IPA, by EU funding, and did not succeed, in its replies to the measures of organisation of procedure notified on 23 March 2018 and at the hearing, in showing that it had ensured that reinforced monitoring measures, within the meaning of Article 17(2)(a) of the EWS Decision, had been applied.

153 In the light of the foregoing findings, and without there being any need to examine the other illegalities on which the applicant relies, it must be held that, by activating a W3b warning on the EWS and refusing, on the ground of that warning, to endorse the contract relating to the procurement at issue, the Commission, by itself or through the Delegation, committed a sufficiently serious breach of a rule of law of such a kind as to incur the liability of the European Union.

The existence of damage and of a causal link between that damage and the illegality committed by the Commission

154 The applicant claims that, owing to the illegality committed by the Commission, it has sustained twofold damage, evaluated at a total sum of EUR 496 000 and corresponding, as to the sum of EUR 166 000, to material damage arising from the loss of the procurement at issue and, as to the sum of EUR 330 000, to the material and non-material damage arising from the loss of an opportunity to obtain other public procurement contracts.

– The damage arising from the loss of the procurement at issue and the causal link between that damage and the illegality committed by the Commission

155 The applicant claims to have sustained material damage corresponding to the loss of profits which it would have made by carrying out the procurement at issue. It evaluates that failure to profit at the sum of EUR 166 000, referring to the table evaluating the damage linked with the loss of the procurement at issue. That sum, in the applicant's submission, is equivalent to the maximum profit margin that it could have achieved in the event of the complete and perfect performance of the contract and corresponds, in the amount of around EUR 78 000, to the management commission which it would have received as leader of the consortium, namely 10% of the total amount of the experts' fees envisaged in the consortium's financial offer and, in the amount of around EUR 88 000, to the 45% share of the net profit margin that it ought to have received, that margin representing the difference between, on the one hand, the expected net profit margin, namely EUR 315 455, and, on the other hand, the operational expenditure and the management commission, namely EUR 41 500 and EUR 78 305 respectively. The gross profit margin corresponded to a percentage, varying between 22 and 27%, of the experts' fees provided for in the consortium's financial offer. In addition, the

conclusion of the contract relating to the procurement at issue might have resulted in the conclusion of amendments, of which the applicant was deprived, which constitutes a loss of profits for the applicant.

156 In the reply, the appellant maintains that the maximum estimate that serves as the basis for the evaluation of its loss of profits in the context of the procurement at issue is reliable, since the proper performance of public contracts always involves the use of all or virtually all of the means set out in the successful tenderer's financial offer, as shown by the extracts from the final audit reports in three projects entrusted to the applicant in Albania, Montenegro and Chad. As regards the table evaluating the damage linked with the loss of the procurement at issue, the applicant admits that there is a material error concerning the calculation of the amount of its loss of profits, which in reality amounts to the sum of EUR 130 348. It maintains that the management commission used in the table evaluating the damage linked with the loss of the procurement at issue corresponds to reimbursement of the cost incurred in the management of the project, as leader of the consortium, and is equivalent to what a project manager would have cost it on average over the 18-month period necessary to complete the project. The reason for the abbreviation 'TBC', corresponding, in English, to the expression 'to be confirmed' and shown in that table concerning the management commission and the share of the net profit margin, is that the signature of the contract between the members of the consortium was supposed to take place only after the conclusion of the contract with the national contracting authority, in accordance with market practice.

157 The applicant maintains that the loss of profits on which it relies with regard to the procurement at issue is a direct consequence of the illegality committed by the Commission, since the procurement at issue had been awarded to the consortium which it led, as is apparent from the national contracting authority's letter of 13 September 2011, and that it was cancelled, as is apparent from the national contracting authority's letter of 6 December 2011, only because the Delegation refused to endorse the contract relating to the procurement at issue on the ground that the applicant was the subject of a W3b warning in the EWS.

158 The Commission contends, in essence, that the applicant has not adduced proof, as it was required to do, of the damage which it alleges and of the causal link between that damage and the illegality committed.

159 In that regard, it should be borne in mind, as concerns the condition relating to the existence of a causal link between the conduct and the damage relied on, that the alleged damage must be a sufficiently direct consequence of the conduct complained of, which must be the determining cause of the damage, while there is no obligation to make good every harmful consequence, even a remote one, of an illegal situation (see judgment of 10 May 2006, *Galileo International Technology and Others* v *Commission*, T-279/03, EU:T:2006:121, paragraph 130 and the case-law cited; see also, to that effect, judgment of 4 October 1979, *Dumortier and Others* v *Council*, 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, EU:C:1979:223, paragraph 21). The burden of proof of the existence of a causal link between the conduct complained of and the damage claimed is borne by the applicant (see judgment of 30 September 1998, *Coldiretti and Others* v *Council and Commission*, T-149/96, EU:T:1998:228, paragraph 101 and the case-law cited).

160 In the present case, although the contract relating to the procurement at issue was never signed by the national contracting authority and although the latter could, until the contract was signed, decide to cancel the tender procedure for that contract, in accordance with point 2.4.13 of the PRAG and point 15 of the instructions to tenderers for that contract, the fact nonetheless remains that in its letter of 3 November 2011 that authority had clearly and specifically manifested its intention to conclude the contract relating to the procurement at issue with the consortium led by the applicant, to which the procurement had been awarded, and to do so quickly, the only outstanding condition for finalising the procedure for signature of the contract being the endorsement of the contract file by the Commission.

161 As already observed in paragraph 88 above, it is apparent from the documents in the file and from the discussion before the Court that, by its letter of 9 November 2011, the Delegation used the power conferred on it by Article 1 of Decision C(2009) 7692 final, read in conjunction with Annex II to that decision, and by point 2.2 of the PRAG, to refuse to allow the contract relating to the procurement at issue to be concluded with the consortium led by the applicant on the ground that the applicant was the subject of a W3b warning in the EWS, with the consequence that the national contracting authority had no choice, since the only technically acceptable offer had been submitted by that consortium, other than to cancel the tender procedure for the procurement at issue.

162 In those circumstances, it should be stated that the applicant's W3b warning on the EWS was the determining cause of the Delegation's refusal to endorse the contract relating to the procurement at issue, which had been awarded to the consortium led by the applicant, that refusal having itself been the determining cause of the cancellation, by the national contracting authority, of the tender procedure for that contract. Thus, in the circumstances of the present case, the loss of the profits which the applicant would have made by carrying out the procurement at issue was a sufficiently direct consequence of the conduct complained of for it to be found that there was a causal link between that conduct and the damage alleged.

163 Furthermore, it should be borne in mind, as regards the condition of the reality of the damage, that, according to the case-law (see, to that effect, judgments of 27 January 1982, *De Franceschi* v *Council and Commission*, 51/81, EU:C:1982:20, paragraph 9; of 13 November 1984, *Birra Wührer and Others* v *Council and Commission*, 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 et 282/82, EU:C:1984:341, paragraph 9; and of 16 January 1996, *Candiotte* v *Council*, T-108/94, EU:T:1996:5, paragraph 54), the non-contractual liability of the European Union can be incurred only if the applicant genuinely incurred actual and certain damage. It is for the applicant to prove that that condition is fulfilled (see judgment of 9 November 2006, *Agraz and Others* v *Commission*, C-243/05 P, EU:C:2006:708, paragraph 27 and the case-law cited) and, more particularly, to adduce conclusive proof as to both the existence and the extent of the damage (see judgment of 16 September 1997, *Blackspur DIY and Others* v *Council and Commission*, C-362/95 P, EU:C:1997:401, paragraph 31 and the case-law cited).

164 More specifically, any claim for compensation for damage, whether material or non-material and whether the claim is for symbolic compensation or for real compensation, must state the nature of the alleged damage by reference to the conduct complained of and, even in an approximate fashion, evaluate the total damage (see judgment of 26 February 2015, *Sabbagh* v *Council*, T-652/11, not published, EU:T:2015:112, paragraph 65 and the case-law cited).

165 In the present case, it should be observed that the applicant has not evaluated, even in an approximate fashion, the damage corresponding, in essence, to a loss of opportunity to conclude amendments to the contract relating to the procurement at issue. Its claim for compensation for that head of damage cannot therefore be taken into account by the Court, in accordance with the case-law cited in paragraph 163 above.

166 As regards the profits which the applicant might have made in the context of the procurement at issue, it should be observed that the consortium led by the applicant did not have an unconditional right to receive the sums that had been budgeted in the contract, in a total amount of EUR 893 050, taking account of the consortium's financial offer. In fact, the right to receive those sums was subject to the procurement at issue being carried out in full and perfectly by the consortium and to all the means set out in the consortium's offer being used for that purpose. Compliance with those conditions was subject to a certain element of chance, so that the applicant can rely, in the context of the present action, only on the loss of an opportunity to make the profits which it might have obtained if the consortium had performed the procurement at issue completely and perfectly, using with all the means set out in its offer.

167 In the present case, although the applicant, the project leader, states that it did not have previous experience in the employment sector, it nonetheless succeeded in demonstrating to the national contracting authority that the consortium which it led had the necessary financial, economic, technical and professional capacity to carry out the procurement at issue, in particular because the key experts whom it had chosen had sufficient competence and experience in the sector covered by the contract. Thus, it must be considered that the consortium had a very good chance of successfully carrying out the procurement at issue with the support of those experts.

168 As regards the management commission that the applicant would have received as leader, that commission, as the Commission maintains and as the applicant itself acknowledges, corresponds to reimbursement of expenditure that the applicant would have had to incur as project leader and is thus linked with 'the duration of the project and workload associated with [the project, namely] support for the experts, site visits, the re-reading of reports, checking of attendance sheets, preparation of invoices, team management, problem-solving, changing the experts, etc.'. It follows that that commission does not correspond to a loss of profits, but to expenditure, for the most part on personnel, that the applicant would have had to incur, as leader, if the procurement at issue had been carried out by the consortium which it led. As the contract was not performed, the applicant cannot claim reimbursement of that expenditure, which it does not show that it incurred. It follows that the applicant cannot validly claim reimbursement of a sum rounded to EUR 78 000 in respect of the management commission which it would have received as leader.

169 As regards the share of the net profit margin which the applicant ought to have received, it should be observed, as concerns the reliability of the amount of the experts' fees, that, as the Commission acknowledges, the daily rate of those fees and the number of working days in the table evaluating the damage linked to the loss of the procurement at issue corresponds to those set out in the consortium's financial offer.

170 As for the Commission's objection that the applicant has not shown that all the working days budgeted in the consortium's offer had actually been employed in carrying out the procurement at issue, it should be observed that such proof was impossible to adduce, since the consortium did not have the opportunity to carry out the procurement at issue effectively. However, it is appropriate to take account of the fact that, whereas the maximum budget envisaged for the performance of the contract was EUR 1 000 000, as is apparent from the contract notice and from point 4.2 of the information for tenderers, the consortium's financial offer came to a total amount of EUR 893 050, of which the sum of EUR 783 050 corresponded to the remuneration of the experts. It follows that the consortium had adjusted and limited its financial offer in order to be more competitive in the context of the tender procedure for the procurement at issue, by complying precisely, for each category of experts, to the minimum requirements of working days required in point 6 of the instructions to tenderers, namely at least 275 working days for key expert 1, at least 193 working days for key expert 2, at least 80 working days for key expert 3 and at least 539 working days for other experts, including 184 for senior experts and 355 for junior experts. In those circumstances, there is no reason to assume that the consortium, whose financial offer had been accepted by the national contracting authority, would, in performing the public procurement at issue, have failed to use all the budgeted means, essentially in the form of experts' fees, and thus failed to comply with the minimum requirements of the use of personnel required by the instructions to tenderers.

171 As regards the Commission's objection that the applicant has not demonstrated the reality of the fees that would be payable to the experts, it should be observed that, in accordance with points 4.1 and 4.2 of the instructions to tenderers, the consortium was to include in its technical offer statements of exclusivity and availability on the part of the three key experts and also, in its financial offer, the fee rates for each category of experts. The consortium's financial offer thus mentioned the daily rates of EUR 900 for the three key experts and senior experts and EUR 350 for the junior experts, which included the fees paid to the experts, general expenditure and the profit margin charged by the consortium, as detailed, for each category of experts, in the table evaluating the damage linked with

the loss of the procurement at issue. Those daily rates were the rates which were to be applied by the consortium when carrying out the procurement at issue and which were validated by the national contracting authority when it accepted the consortium's financial offer. In those circumstances, the Commission cannot maintain that the daily rates which the consortium was to apply in performing the contract remained to be demonstrated.

172 The profit margins charged by the consortium on the fees of each category of experts, and likewise the amount of the costs attributable to each of those categories, have not been disputed by the Commission in these proceedings and there is nothing in the file to cast doubt on their reliability. On the other hand, as the Commission has correctly observed and as the applicant itself has acknowledged, there were a number of errors in the addition of those costs and profit margins in the table evaluating the damage linked with the loss of the procurement at issue. It follows that the gross profit margin expected when the procurement at issue was carried out by the consortium was not EUR 315 455, as the applicant maintains in support of its claim for compensation, but EUR 235 455.

173 As for the operating costs and the management commission which, in the table evaluating the damage linked with the loss of the procurement at issue, were deducted from the gross profit margin expected when the procurement at issue was carried out by the consortium, in the amounts of EUR 41 500 and EUR 78 305 respectively, the Commission stated in the rejoinder that it took due note of the table, in which the applicant provided summary details of its operating costs. In that context, and in the absence of any material in the file that would cast doubt on their reliability, there is no need to query the amounts deducted, in the table evaluating the damage linked with the loss of the procurement at issue, for the purpose of calculating the net profit margin expected when the procurement at issue was carried out by the consortium, which, following the correction made in paragraph 172 above, comes to the sum of EUR 115 650.

174 As regards the 45% share of that net profit margin that ought to have been received by the applicant, the Commission objects that the applicant has produced no written agreement to that effect with the members of the consortium, that in the table evaluating the damage linked with the loss of the procurement at issue that share is accompanied by the abbreviation 'TBC' and that it seems disproportionate, since, when added to the management commission, it would have resulted in the applicant's receiving 67% of the net profit margin expected when the procurement at issue was carried out, leaving the other four members of the consortium with only the remaining 33% of that margin to share among them. In that regard, it should be observed that the only admissible evidence which the applicant has adduced does not show the key for allocating the net profit margin on which the members of the consortium agreed in the event that the procurement at issue should be awarded to them. Nor does the applicant dispute that the abbreviation 'TBC', in the table evaluating the damage linked with the loss of the procurement at issue, showed that the allocation key mentioned remained 'to be confirmed' when the contract had been formally signed. Since the applicant was necessarily entitled, on the same basis as the other members of the consortium, to a share of the net profit margin expected when the procurement at issue was carried out, but since it has not succeeded, in the present case, in establishing that its share ought to have been greater than that of the other members of the consortium and, more particularly, since it would have been equivalent to 45% of that margin, the Court considers that, on a fair assessment of the applicant's rights to compensation, that share will be fixed at 20%, which corresponds to an allocation in equal shares of the expected net profit margin among the five members of the consortium.

175 Consequently, the share of the net profit margin expected when the procurement at issue was carried out by the consortium that ought to have been paid to the applicant is estimated at the sum of EUR 23 130, corresponding to 20% of that margin, which is itself evaluated at EUR 115 650 (see paragraph 173 above). For the purpose of taking into account the element of chance relating to the perfect and complete performance of the procurement at issue by the consortium, referred to in paragraph 167 above, it is appropriate, moreover, to reduce that sum to an amount of EUR 20 000.

176 Following the preceding findings, the applicant's claim for compensation for the material damage corresponding to the loss of an opportunity to achieve the profits which it expected when the procurement at issue was carried out must be allowed in the sum of EUR 20 000 and the claim for compensation concerning the loss of the procurement at issue must be rejected as to the remainder.

– The damage arising from the loss of an opportunity to obtain other public contracts and the causal link between that damage and the illegality committed by the Commission

177 The applicant claims to have sustained material and non-material damage arising from the loss of an opportunity to obtain other public contracts. It maintains, in that regard, that the cancellation of the tender procedure for the procurement at issue because of its W3b warning in the EWS, made public by the opinion published in November 2010, adversely affected its image and therefore its commercial reputation, in particular with respect to the former members of the consortium, and deprived it of the important reference that would have been represented by the procurement at issue, on which it would have been able to rely in order to participate in other tender procedures in the same sector or in the former Yugoslav Republic of Macedonia. Consequently, it maintains that it has lost the opportunity to participate in 15 tender procedures. Since at the time it was successful, on average, in one in five of the occasions in which it participated in calls for tenders, it maintains that it has lost the opportunity to conclude three contracts equivalent to the contract relating to the procurement at issue. Thus, it evaluates the amount corresponding to that loss at three times the amount of profit lost in the context of the procurement at issue, namely EUR 480 000, while provisionally setting the damage at a lower amount, namely EUR 330 000.

178 The applicant maintains that the loss of opportunity on which it relies is a direct consequence of the illegality committed by the Commission, for the same reasons as those set out in paragraph 157 above.

179 The Commission denies, in essence, that the applicant has adduced proof, as it is required to do, of the damage on which it relies and of the causal link between that damage and the illegality committed.

180 In the present case, it should be observed that the applicant has not evaluated, even approximately, the non-material damage corresponding to the loss of an opportunity to obtain other public contracts. Accordingly, its claim for compensation under that head of claim cannot be taken into account by the Court, in accordance with the case-law cited in paragraph 163 above.

181 As regards the material damage corresponding to the loss of an opportunity to obtain other public contracts, which the applicant evaluates in the amount of EUR 330 000, it should be observed that the cancellation of the tender procedure for the procurement at issue because of the applicant's W3b warning on the EWS undoubtedly had an adverse effect on its image and therefore on its commercial reputation, both with the public authorities of the former Yugoslav Republic of Macedonia and with the former members of the consortium, who were aware of it. In addition, the cancellation of the procedure certainly deprived the applicant of the opportunity to be able to rely on the procurement at issue, as a reference, in order to establish its technical capacity to operate in the sector covered by that contract in other tender procedures in which it would have participated or wished to participate.

182 However, it does not follow directly, by a link of cause and effect, from the findings set out in paragraph 181 above that the applicant would have lost the opportunity to conclude three contracts equivalent to the contract relating to the procurement at issue and therefore to make profits corresponding to three times those which it expected from the performance of the latter contract, namely an amount of EUR 480 000, reduced, in the form of order sought, to the sum of EUR 330 000.

183 As a preliminary point, it should be noted that, as the Commission observes and as the applicant acknowledges, the fact that the applicant was the subject of a W3b warning on the EWS between June 2010 and February 2015 did not prevent it from signing, alone or in the framework of consortia, five contracts with the Commission, between 15 December 2010 and 3 August 2015, relating to public procurement financed by EU funds, in particular in the context of the IPA, in sectors other than employment, in neighbouring States of the former Yugoslav Republic of Macedonia (Bosnia-Herzegovina, Montenegro and Albania) and in Africa, for a total value of EUR 3 503 955.

184 In so far as the applicant maintains that the reference connected with the procurement at issue was a determining factor as regards its eligibility to tender in other relevant procurement procedures, it should be stated that its assertions concerning its lack of experience in the employment sector are contradicted by the information on the pages of its website, placed in the file by the Commission, in which the applicant states, among its reference sectors, 'Employment and Labour Market'. Even on the assumption that, as the applicant maintains, it lacked references in that sector, that did not prevent it from winning public contracts such as the procurement at issue by forming a consortium with other undertakings with such expertise, as already observed in paragraph 167 above.

185 In so far as the applicant claims that, following the cancellation of the procurement at issue, it became impossible for it to become associated with other undertakings, in particular with former members of the consortium, it has not, as the Commission correctly observes, adduced any evidence to show that, in order to be able to participate in tender procedures, in the employment sector or in the former Yugoslav Republic of Macedonia, it had contacted other undertakings with a view to forming a consortium and those undertakings had refused to do so. In addition, the applicant itself acknowledges that, as the leader of a consortium, it successfully tendered in procedures relating to sectors other than employment or outside the former Yugoslav Republic of Macedonia. The applicant's assertions in that regard are therefore not sufficiently substantiated.

186 In the same way, in so far as the applicant claims that it had lost the opportunity to obtain other public contracts in the former Yugoslav Republic of Macedonia because its image there was tarnished in the eyes of the authorities of that State, it should be noted that, as the Commission correctly observes, the applicant has not indicated, nor, a fortiori, has it shown, that it was a candidate for the award of public contracts in which the authorities of the former Yugoslav Republic of Macedonia would have been the contracting authority. In those circumstances, the applicant cannot claim to have lost a genuine opportunity to obtain those contracts because its image was tarnished in the eyes of those authorities.

187 Last, it should be observed that the table evaluating the damage linked with the loss of the procurement at issue set out in the application contains data which are purely hypothetical. In fact, the applicant has not mentioned any specific tender procedures in which it would have participated or might have participated, but merely inferred the number of tender procedures in which it considered that it would have been able to participate from data based on its past experience, without providing any evidence that would allow the veracity and the relevance of those data to be verified.

188 It follows from the foregoing findings that the applicant has neither demonstrated the actual and certain nature of the material damage corresponding to the loss of opportunity to obtain other public contracts nor shown that that damage arose in a sufficiently direct manner from the illegality established in paragraph 153 above, in the sense that that illegality constituted the determining cause of that damage.

189 The claim for compensation based on the loss by the applicant of the opportunity of obtaining other public contracts must therefore be rejected in its entirety.

190 In the light of all of the foregoing findings, the Commission must be ordered to pay the applicant the sum of EUR 20 000 by way of compensation for the injury sustained by it and the action must be dismissed for the remainder.

Costs

191 Under Article 134(2) of the Rules of Procedure, where there is more than one unsuccessful party the General Court is to decide how the costs are to be shared. In the present case, as the parties have been partly unsuccessful in the forms of order sought, each of them must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. Orders the European Commission to pay East West Consulting SPRL the sum of EUR 20 000;

2. Dismisses the action as to the remainder;

3. Orders each of the parties to bear its own costs.

Pelikánová Valančius Öberg

Delivered in open court in Luxembourg on 14 December 2018.

[Signatures]

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