Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

28 February 2018 *

(Non-contractual liability - Public supply contracts - Tender procedure - Admissibility - Misuse of procedure - Conflict of interests - Duty of diligence - Loss of opportunity)

In Case T-292/15,

Vakakis kai Synergates — Symvouloi gia Agrotiki Anaptixi AE Meleton, formerly Vakakis International — Symvouloi gia Agrotiki Anaptixi AE, established in Athens (Greece), represented by B. O'Connor, Solicitor, S. Gubel and E. Bertolotto, lawyers,

applicant,

v

European Commission, represented initially by F. Erlbacher and E. Georgieva, and subsequently by E. Georgieva and L. Baumgart, acting as Agents,

defendant,

ACTION brought under Article 268 TFEU, seeking compensation in respect of the loss which the applicant allegedly suffered as a result of irregularities committed by the Commission in the context of the Tendering Procedure 'Consolidation of the Food Safety System in Albania' (EuropeAid/129820/C/SER/AL),

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of S. Frimodt Nielsen, President, V. Kreuschitz, I.S. Forrester, N. Półtorak (Rapporteur) and E. Perillo, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 January 2017,

gives the following

* Language of the case: English.

Judgment

I. Background to the dispute

1 The applicant, Vakakis kai Synergates — Symvouloi gia Agrotiki Anaptixi AE Meleton, is an undertaking which is primarily active in the field of technical assistance in developing countries.

2 It participated in the tendering procedure 'Consolidation of the Food Safety System in Albania' (EuropeAid/129820/C/SER/AL), in relation to a contract for services organised by the EU Delegation to Albania ('the EU Delegation') on behalf of the European Commission. The contracting authority was the European Union, represented by the Commission, acting through its Delegation to Albania ('the contracting authority').

3 That tendering procedure governed by Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation'), belongs within the context of an EU action seeking to contribute to the improvement of the institutional, legal and administrative framework of the food safety system in that State and which led to the award to company A. of the first public service contract with a view to establishing a National Food Authority in that State.

4 On 17 March 2010, a pre-information notice was published, which announced that a tendering procedure was to be launched in July of that year for the award of a service contract relating to the consolidation of the food safety system in Albania.

5 In June 2010, the project manager of the EU Delegation asked Mr P., one of company A.'s experts, to provide it with certain information for the preparation of that tendering procedure, in particular the Terms of Reference ('the ToR'). Mr P. provided the information requested.

6 Following the publication, on 16 July 2010, of the service procurement notice for contract EuropeAid/129820/C/SER/AL and after verification of the applications, eight candidates were shortlisted, including the consortiums of which company A. and the applicant were members.

7 Following dispatch of the invitation to tender on 15 September 2010, the applicant informed the contracting authority in October 2010 that company A. was the undertaking executing the forerunner project and that, regardless of that undertaking's involvement in the drafting of the ToR, it thereby had information and derived an advantage from that information vis-à-vis the other candidates on the shortlist.

8 The EU Delegation replied to it in the clarification note relating to the tender of 22 October 2010 that the conditions of fair competition were satisfied and that the ToR had been drafted with a view to providing all tenderers with as much information as possible for the preparation of offers.

9 Six selected candidates including the respective consortiums of which company A. and the applicant were members submitted tenders to the contracting authority.

10 In November 2010, the applicant and two other candidates informed the EU Delegation that Mr P., company A.'s expert, appeared to be the author of the Word document containing the ToR and that this constituted a conflict of interests within the meaning of the Practical Guide to contract procedures for European Union external actions ('the PRAG').

11 On 12 November 2010, the chairperson of the Evaluation Committee sent company A. a request for clarification, to which the latter replied on 15 November. It stated, first, that Mr P.'s contribution to the drafting of the ToR was restricted to general information relating to sections 1.4 and 1.5 of that

text; secondly, that the information provided by Mr P., was available to all the candidates and that the situation did not involve unfair competition; and, thirdly, that Mr P. was appointed project manager only following the publication of the shortlist of candidates allowed to tender.

12 On 19 and 23 November 2010, the applicant repeated its warning to the EU Delegation concerning the fact that Mr P. was the author of the Word document containing the ToR and that that situation constituted a conflict of interests.

13 On 27 January 2011, the EU Delegation informed the unsuccessful tenderers that the contract had been awarded to the consortium of which company A. was a member and provided explanations as to the allegations of a conflict of interest.

14 On 7 February 2011, the applicant requested the EU Delegation to undertake a new investigation into allegations of a conflict of interest. On 15 February 2011, the EU Delegation responded that there was no conflict of interest and that there had been no unfair competition in the procedure.

15 On 3 May 2011, the applicant lodged a complaint with the European Ombudsman, who found that, by having allowed an expert of the successful tenderer to participate in the drafting of the ToR, which gave rise to at least an apparent conflict of interest, the Commission had committed an act of maladministration.

II. Procedure and forms of order sought

16 By application lodged at the Registry of the General Court on 3 June 2015, the applicant brought the present action.

17 Since the composition of the Court was changed, the case was assigned to a new Judge-Rapporteur.

18 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was accordingly allocated.

19 On a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of its Rules of Procedure, to assign the case to a Chamber sitting in extended composition.

20 Upon hearing the report of the Judge-Rapporteur, the General Court (Third Chamber, Extended Composition) decided to open the oral procedure.

21 In the context of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court put questions in writing to the Commission. The latter responded within the time allowed.

22 The hearing, which was initially scheduled for 9 December 2016, was postponed until 10 January 2017 at the applicant's request.

23 At the hearing held on 10 January 2017 the parties presented their oral arguments and answered the questions asked by the Court.

24 The applicant claims that the Court should:

– declare that the Commission is bound, under Article 340 TFEU, to compensate all damage incurred due to its unlawful conduct, which damage includes the costs and expenses of participation in the overall tendering exercise, the cost of the challenge to the legality of the tendering exercise, loss of profit and loss of opportunity, increase the sum awarded in respect of costs and expenses of

participation in the overall tendering exercise by compensatory damages and increase the total of the sums to be paid by default interest of 8% calculated from the date of the judgment until the date of actual payment;

– order the Commission to pay the costs.

25 The Commission contends that the Court should:

– dismiss the action as inadmissible or, in any event, as unfounded;

– order the applicant to pay the costs.

III. Law

A. Admissibility

1. Admissibility of the action

26 Without formally raising an objection of inadmissibility, the Commission contends that the action is inadmissible since the applicant seeks damages in a way which, if granted, would put it in the same position as if it had obtained the public contract at issue. The action seeks in fact to secure the withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effects of the decision which has become definitive, to award the contract to the consortium of which company A. is a member. Therefore, the action for damages seeks to challenge the decision awarding the contract since the unlawful act invoked by the applicant is linked to that decision. Moreover, the action is inadmissible in so far as it is clear from the comparison between the amount of damages claimed and that of the profit which the applicant would have obtained had it won the contract that those amounts coincide.

27 The applicant contests the Commission's arguments and maintains that the action is admissible. In that regard, first, it claims that the Commission has not proved the inadmissibility of the action, although it is required to do so. Secondly, it states that the action does not seek to have set aside the decision to award the contract to the consortium of which company A. is a member, but seeks a declaration that that decision caused it damage. Thirdly, the applicant points out that a judgment giving rise to non-contractual liability of the EU and awarding the applicant damages would have no impact on the consortium of which company A. is a member in so far as such a judgment would not call into question the award of the public contract and would not de facto set aside the decision to award the contract. Fourthly, it maintains that any person claiming to have been injured must have the possibility to bring an action for damages and that, in the present case, the action is admissible given the seriousness of the acts and the proof of the acts of maladministration. Fifthly, the applicant claims that the damages sought do not correspond exactly to the amount that it could have received if it had been awarded the contract, but that they correspond to the costs incurred and to an estimate of what it would have partially earned had the contract been awarded to it.

28 Since the admissibility of the action for damages is a matter of public policy and must be examined by the Court of its own motion (see, to that effect, judgment of 17 October 2002, *Astipesca* v *Commission*, T-180/00, EU:T:2002:249, paragraph 139), the applicant's claim that the Commission failed, in the present case, to fulfil its obligation to prove the inadmissibility of the action is unfounded.

29 According to settled case-law, the application for compensation provided for by Article 268 TFEU and the second paragraph of Article 340 TFEU was introduced as an autonomous form of action with a particular purpose to fulfil within the system of remedies provided for (judgment of 26 February 1986,

Krohn v *Commission*, 175/84, EU:C:1986:85, paragraph 26). Therefore, any derogation from the principle of the autonomy of actions for damages vis-à-vis other actions for remedies is exceptional and must be interpreted strictly (see judgment of 7 October 2015, *Accorinti and Others* v *ECB*, T-79/13, EU:T:2015:756, paragraph 62 and the case-law cited).

30 However, although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by those means circumvent the inadmissibility of an application which concerns the same instance of illegality and which has the same financial end in view (judgment of 15 December 1966, *Schreckenberg* v *Commission*, 59/65, EU:C:1966:60). As a result, for the purposes of assessing the admissibility of an action for damages, it is necessary to examine whether that party seeks, by such an action, to obtain a result which is identical to that which he would have obtained from the success of an action for annulment against an act adversely affecting him which he failed to bring in good time (order of 29 September 2016, *Investigación y Desarrollo en Soluciones y Servicios IT* v *Commission*, C-102/14 P, not published, EU:C:2016:737, paragraph 80).

31 In that regard, it should be noted that it is contrary to the autonomy of the action for damages, and to the effectiveness of the system of remedies established by the Treaty, to consider that an action for damages is inadmissible on the sole ground that it might lead to a result comparable to the results of an action for annulment. It is only where an action for damages is actually aimed at securing withdrawal of an individual decision addressed to the applicant which has become definitive — so that it has the same purpose and the same effect as an action for annulment — that the action for damages could be considered to be an abuse of process (see order of 13 January 2014, *Investigación y Desarrollo en Soluciones y Servicios IT* v *Commission*, T-134/12, not published, EU:T:2014:31, paragraph 60 and the case-law cited).

32 Therefore, the key factor governing the admissibility of that action is whether the action for damages seeks the same result as the action for annulment and not whether the amount claimed by means of an action for damages and the amounts that the applicant could have received in the absence of such an act are exactly the same. Moreover, in that regard, the Court merely requires a close link between the action for damages and the action for annulment in order to conclude that that action is inadmissible (see order of 29 September 2016, *Investigación y Desarrollo en Soluciones y Servicios IT* v *Commission*, C-102/14 P, not published, EU:C:2016:737, paragraph 80 and the case-law cited).

33 It is in the light of those considerations that it is necessary to assess the admissibility of the action.

34 In the present case, it is not disputed that, since the applicant did not bring an action for annulment of the decision rejecting its tender and awarding the public contract to the consortium of which company A. is a member, that act has become final with respect to it.

35 It should be noted that, in view of the special nature of disputes relating to EU public contracts, the present action for damages has neither the same object nor the same legal and economic implications as an action for annulment of the decision referred to in paragraph 34 above and it cannot consequently nullify the effects of that decision.

36 First, it should be noted that, whereas actions for annulment seek a declaration that a legally binding measure is unlawful, actions for damages, on the other hand, seek compensation for damage resulting from a measure or from unlawful conduct, attributable to an EU institution or body (see, to that effect, judgment of 7 October 2015, *Accorinti and Others* v *ECB*, T-79/13, EU:T:2015:756, paragraph 61 and the case-law cited). In the present case, the applicant's action for annulment targets only the decision rejecting its tender and awarding the contract to another tenderer and, provided it is upheld by the Court, it could result only in the annulment of that decision. On the contrary, by its action for

damages, the applicant does not seek to have that decision set aside, but to obtain compensation for damage allegedly resulting from its adoption. The applicant therefore does not seek to obtain, by the present action for damages, the same or similar result as an action for annulment.

37 Secondly, as the Commission acknowledged during the hearing, actions for annulment and actions for damages do not have the same legal effects. In the context of an action for annulment, the finding that an act is unlawful, and consequently the operative part of a judgment setting that act aside, has *ex tunc* effect whereas the finding by the Court that an act is unlawful, justifying the liability of the EU, has *ex nunc* effect and does not, in principle, have the effect of retroactively eliminating the legal basis for that act (judgment of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 89).

38 In particular, it should be noted that, in the context of disputes relating to EU public procurement, the circumstances to be taken into account pursuant to Articles 264 and 266 TFEU in order to give effect to a judgment of annulment are not only linked to the provision set aside and the scope of that judgment, but also to other circumstances such as the date of signing the contract, the possible performance of the contract or implementation of Article 103 of the Financial Regulation. It cannot be excluded, after a judgment setting aside the decision to award a public contract, that the institution may be directed to bring the contract at issue to an end and to organise a new tender procedure (see judgment of 29 January 2013, *Cosepuri* v *EFSA*, T-339/10 and T-532/10, EU:T:2013:38, paragraph 26 and the case-law cited). By contrast, a judgment giving rise to the liability of the EU necessarily results in the payment of compensation to the applicant where the latter requested such compensation and not reparation in kind (see, to that effect, judgments of 10 May 2006, *Galileo International Technology and Others* v *Commission*, T-279/03, EU:T:2006:121, paragraph 63, and of 8 November 2011, *Idromacchine and Others* v *Commission*, T-88/09, EU:T:2011:641, paragraphs 81 to 83).

39 If the present action is upheld, the applicant would be awarded damages, in accordance with its claims, but the judgment of the Court would in no way legally call into question the procedure for the award of the public contract at issue and the award of that contract to the consortium of which company A. is a member. Therefore, the applicant is not in a comparable legal situation to that resulting from a judgment setting aside the decision rejecting its tender and awarding the public contract to another tenderer.

40 It follows that, contrary to what is maintained by the Commission, the present action has neither the same object nor effect as an action for annulment of the decision rejecting the applicant's tender and awarding the contract to the consortium of which company A. is a member. That finding cannot be called into question by the Commission's arguments.

41 Firstly, the fact that the applicant relies, in support of the present action, on the unlawfulness of the decision rejecting its tender and to award the contract to the consortium of which company A. is a member is not decisive in the light of the principle of autonomy of remedies and the fact that that situation cannot in itself prove the existence of a close link between the claim for damages and the action for annulment. The decisive issue is whether, by the action for damages, the applicant seeks to obtain the same result as it would have obtained had it been successful in an action for annulment (see, to that effect, order of 4 October 2010, *Ivanov* v *Commission*, C-532/09 P, not published, EU:C:2010:577, paragraph 24). However, as was established in paragraphs 36 to 40 above, the present action has neither the same object nor the same effects as an action for annulment of the decision rejecting the tender of the consortium of which the applicant is a member and awarding the contract to the consortium of which company A. is a member.

42 Secondly, as regards the argument that, by seeking to obtain damages equivalent to the amount of profit it would allegedly have obtained had it been awarded the contract, together with interest, the applicant is seeking, by the present action, to invalidate the effects of the decision rejecting its tender and awarding the contract to the consortium of which company A. is a member, it suffices to note

that that argument must be rejected since it follows from paragraphs 36 to 39 and 40 above that the present action for damages has neither the same object nor the same effects as an action for annulment of the decision rejecting the tender of the consortium of which the applicant is a member and awarding the contract to the consortium of which company A. is a member.

43 It follows that the action is admissible.

2. Admissibility of the arguments invoked by the applicant

44 Firstly, the Commission contends that, since the applicant has not put forward any arguments in support of the plea alleging infringement of the principle of the protection of legitimate expectations by the contracting authority, that plea is inadmissible pursuant to Article 76(d) of the Rules of Procedure.

45 In the reply, the applicant states that the principle of protection of legitimate expectations was infringed in so far as it informed the EU Delegation about a conflict of interests and it could legitimately expect the latter to take the appropriate measures to investigate that information and take appropriate action. However, by awarding the contract to the consortium of which company A. is a member in spite of that information, the EU Delegation failed to meet its expectations.

46 In that regard, it should be noted that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, read in conjunction with the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure of the General Court of 2 May 1991, all applications initiating proceedings are to state the subject matter of the proceedings and to include a summary of the pleas raised. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary, without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (judgment of 18 December 2014, *Holcim (Romania)* v *Commission*, T-317/12, EU:T:2014:782, paragraph 55).

47 In the present case, it is apparent from paragraphs 19 and 42 of the application that, in support of the action for damages, the applicant relies on unlawfulness by reason, in particular, of an infringement of the principles of equal treatment, sound administration and protection of legitimate expectations. In that regard, it is clearly apparent from the application that all of the arguments invoked alleging that unlawfulness relate to an infringement, during the tendering procedure, of the above mentioned principles, including the principle of protection of legitimate expectations.

48 It follows that the Commission's argument must be rejected and the applicant's claims based on the infringement of the principle of protection of legitimate expectations are admissible.

49 Secondly, the Commission contends that the applicant invokes for the first time at the reply stage an infringement of its fundamental rights and particularly of Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') and concludes that the applicant may not claim at the reply stage that 'the maladministration masks breaches of fundamental rights'. It also contends that that plea, alleging infringement of fundamental rights, fails to comply with the requirements of Article 76(d) of the Rules of Procedure.

50 Under Article 84(1) of the Rules of Procedure, the introduction of new pleas in law in the course of proceedings is prohibited, unless those pleas are based on matters of law or of fact which came to light in the course of the procedure. In addition, a plea in law which may be regarded as amplifying a plea in law made previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible. Moreover, arguments which in substance

have a close connection with a plea raised in the application initiating the proceedings cannot be considered new pleas and they may be raised at the stage of the reply or the hearing (see judgment of 12 September 2012, *Italy* v *Commission*, T-394/06, not published, EU:T:2012:417, paragraph 48 and the case-law cited).

51 In the present case, it must first of all be noted that it follows from paragraphs 39, 42, 43, 46 and 48 of the application that the applicant relies on an infringement of the principle of good or sound administration in support of the present action for damages.

52 Next, it is apparent from paragraph 42 of the defence that the Commission pointed out that, according to the case-law, the principle of sound administration does not, in itself, confer rights on individuals, except where it constitutes the expression of specific rights which were not invoked by the applicant in the present case.

53 Finally, in paragraphs 15 and 16 of the reply, the applicant responds to that contention made by the Commission by claiming that the principle of sound administration was infringed due to a lack of appropriate action in relation to the conflict of interests and the absence of comprehensive and transparent information following its complaint although it was entitled to have its affairs treated fairly by the Commission in accordance with Article 41(1) of the Charter.

54 It follows from those factors that, in the reply, the applicant merely responds to the Commission's arguments and more particularly to the argument that it failed to invoke an infringement of specific rights derived from the principle of sound administration. The Commission is therefore not justified in maintaining that the applicant invokes an infringement of its fundamental rights for the first time at the reply stage.

55 As regards the infringement of Article 41 of the Charter, first of all, it should be noted that the right to sound administration, enshrined in that provision, reflects a general principle of EU law (judgments of 8 May 2014, *N.*, C-604/12, EU:C:2014:302, paragraph 49, and of 19 June 2014, *Commune de Millau and SEMEA* v *Commission*, C-531/12 P, EU:C:2014:2008, paragraph 97). Next, according to the Explanations relating to the Charter (OJ 2007 C 303, p. 17), Article 41 is based on the existence of the Union as subject to the rule of law, whose characteristics were developed in the case-law which enshrined inter alia good administration as a general principle of law. Finally, it is apparent from paragraph 43 of the application that the applicant claims in particular that the Commission had a duty of care and that such a duty flows from the general principle of sound administration. It must be noted that, by doing so, the applicant relies in essence on a specific right recognised by Article 41 of the Charter. The applicant's claims relate to the right recognised by Article 41(1) of that text, according to which 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union', since, according to the case-law, the duty of care is inherent in the principle of sound administration, it applies generally to the actions of the EU administration in its relations with the public and requires that that administration act with care and caution (see, to that effect, judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraphs 92 and 93).

56 It follows therefrom that, first, the mention of Article 41 of the Charter in the reply is, at the very least, closely connected with the arguments alleging an infringement of the principle of sound administration and, second, by relying on the obligation of due diligence inherent in that principle, the applicant invoked, in the application, an infringement of Article 41 of the Charter. Therefore, contrary to the Commission's contentions, the arguments based on Article 41 of the Charter are not new arguments and, consequently, are admissible.

57 As regards the Commission's argument that that plea in law is inadmissible since the applicant failed to state the infringement invoked and the arguments alleging that infringement, it must be noted that the unlawfulness invoked in respect of the infringement of the principle of sound administration and of

Article 41 of the Charter complies with the conditions referred to in paragraph 46 above and which apply mutatis mutandis in the context of the present case. The arguments put forward by the applicant in respect of the infringement of the principle of sound administration must be regarded as alleging that infringement and that of Article 41 of the Charter.

58 Thirdly, the Commission contends that the applicant raises for the first time in the reply a plea alleging infringement of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), and that that plea is, consequently, inadmissible.

59 In that regard, it suffices to note that the applicant clearly states in paragraph 36 of the reply that 'Directive [2007/66] does not apply to Commission tenders'. Therefore, contrary to what the Commission contends, the applicant mentions Directive 2007/66 in support of its claims without relying on an infringement of that text.

60 Consequently, the Commission's argument must be rejected.

B. Substance

1. The requirements for EU liability to be incurred

61 Under the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the Union must, 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.

62 In accordance with settled case-law, for the EU to incur non-contractual liability under the abovementioned provision for unlawful conduct on the part of its institutions, three conditions must be fulfilled, namely the unlawfulness of the acts alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damage complained of (judgments of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraphs 39 to 42; of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 106 and 164 to 166; and of 16 October 2014, *Evropaïki Dynamiki* v *Commission*, T-297/12, not published, EU:T:2014:888, paragraph 28).

63 With regard to the condition relating to the unlawful conduct of an institution, it is required that there be established a sufficiently serious breach of a rule of law intended to confer rights on individuals (judgments of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraphs 42 and 43, and 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 173).

64 Therefore, only the unlawful conduct of an institution giving rise to such a sufficiently serious breach is capable of establishing the liability of the EU. In that regard, it should be noted that the decisive test for finding that a breach of EU law is sufficiently serious is whether there was a manifest and grave disregard by the institution of the limits on its discretion (judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 43). In particular, it follows from the case-law that the system of rules which the Court of Justice has worked out in relation to the non-contractual liability of the EU takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question (judgments of 4 July 2000,

Bergaderm and Goupil v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 40; of 10 December 2002, *Commission* v *Camar and Tico*, C-312/00 P, EU:C:2002:736, paragraph 52; and of 10 July 2003, *Commission* v *Fresh Marine*, C-472/00 P, EU:C:2003:399, paragraph 24).

65 As regards the requirement relating to reality of the damage, it should be noted that the EU can incur liability only if the applicant has actually suffered a 'real and certain' loss. For that purpose, it is incumbent upon the applicant to produce to the Courts of the EU conclusive evidence in order to establish both the fact and the extent of such loss (see judgments of 16 July 2009, *SELEX Sistemi Integrati* v *Commission*, C-481/07 P, not published, EU:C:2009:461, paragraph 36 and the case-law cited, and of 8 November 2011, *Idromacchine and Others* v *Commission*, T-88/09, EU:T:2011:641, paragraph 25 and the case-law cited).

66 As regards the condition that there be a causal link, it is satisfied where there exists a direct link of cause and effect between the unlawful act committed by the institution concerned and the damage invoked, a link which it is for the applicant to prove. The EU can be held liable only for damage which is a sufficiently direct consequence of the wrongful conduct of the institution concerned (see, to that effect, order of 5 July 2007, *Yedaş Tarim ve Otomotiv Sanayi ve Ticaret* v *Council and Commission*, C-255/06 P, not published, EU:C:2007:414, paragraph 61).

67 Where one of the three conditions required for the EU to incur non-contractual liability is not satisfied, the action for damages must be dismissed without it being necessary to examine whether the other two conditions are satisfied (judgments of 15 September 1994, *KYDEP* v *Council and Commission*, C-146/91, EU:C:1994:329, paragraph 81, and of 16 October 2014, *Evropaïki Dynamiki* v *Commission*, T-297/12, not published, EU:T:2014:888, paragraph 33).

68 It is necessary to ascertain whether those conditions are fulfilled in the present case.

(a) The unlawful acts

69 The applicant invokes, in essence, two separate unlawful acts, namely, first, the inadequacy of the supervision of the tendering procedure and the existence of a conflict of interests in favour of company A. and, secondly, the delay with which it was informed of the decision awarding the contract and of the signing of the contract.

70 First of all, it should be noted that the applicant relies, in support of the present action and in order to show the existence of an unlawful act capable of resulting in the EU incurring liability in the present case, on the decision of the European Ombudsman of 27 January 2014 which concludes that, by having allowed an expert of the successful tenderer to participate in the drafting of the ToR, which gave rise to at least an apparent conflict of interests, the Commission had committed an act of maladministration. In that regard, it must be noted, as the Commission submits, that, as such, the conclusions of the European Ombudsman do not bind the EU Courts and constitute only an indication of an infringement, by the institution concerned, of the principle of sound administration. Proceedings before the European Ombudsman, who does not have the power to make binding decisions, are for EU citizens an extrajudicial alternative remedy to an action before the EU judicature, which meets specific criteria and does not necessarily have the same objective as legal proceedings. Consequently, the classification as an 'act of maladministration' by the Ombudsman does not mean, in itself, that the conduct of the institution concerned constitutes a sufficiently serious breach of a rule of law, for the purposes of the case-law (judgment of 25 October 2007, *Komninou and Others* v *Commission*, C-167/06 P, not published, EU:C:2007:633, paragraph 44).

71 It follows from those considerations that, first, it is for the Court to determine, following its own assessment, whether, in the present case, the unlawful acts invoked constitute a sufficiently serious infringement of a rule of law which is intended to confer rights on individuals and, second, to that

end, the decision of the European Ombudsman is, contrary to what is contended by the Commission, relevant, but it must be taken into consideration solely as a possible indication of the infringement by the Commission of the principle of sound administration.

(1) The alleged unlawful act based on the inadequacy of the supervision of the tendering procedure and the existence of a conflict of interests in favour of company A.

72 As regards the first unlawful act invoked, the applicant puts forward two series of arguments, based on the infringement of the principles of equal treatment, sound administration and protection of legitimate expectations, included both in the Financial Regulation and in the PRAG. First, the applicant claims that the inadequacy of the supervision of the tendering procedure and of the investigation relating to the allegations of a conflict of interests due, in particular, to the lack of an investigation following the statements made by Mr P. and company A. claiming not to be in a situation of a conflict of interests, the inadequacies of the investigation relating to the conflict of interests, the failure to assess the advantage conferred on company A. by the involvement of Mr P. in the drafting of the ToR, the Evaluation Committee's lack of impartiality and the vagueness of the information provided in relation to the investigation infringe the obligation of due diligence and the principle of sound administration.

73 Secondly, the applicant states that, if the insufficiencies of the investigation into the conflict of interests infringe the principle of sound administration, they also give rise to an infringement of the duty of due diligence, which required compliance with article 89 of the Financial Regulation to be ensured. Moreover, Article 94 of the Financial Regulation should have been implemented following the statements made by company A. and Mr P. claiming not to be in a situation of a conflict of interests. Finally, the involvement of Mr P. in the drafting of the ToR constitutes, according to the applicant, a conflict of interests which upset the equality between the tenderers and which the Commission failed to prevent by reason of the inadequacies of the investigation.

74 The Commission notes that, according to the case-law, a tenderer must be excluded from the procedure in the event of a conflict of interests and that that risk must be specifically assessed. Moreover, it is apparent from the PRAG that a candidate who has participated in the preparation of a draft call for tenders must be excluded unless it is shown that that does not constitute unfair competition.

75 The Commission maintains that the fact that Mr P. was the expert of company A. during a previous contract does not constitute a conflict of interests justifying his exclusion from the tendering procedure, because the existence of a conflict of interests and, where appropriate, its consequences must be specifically assessed. Moreover, the ToR was drafted in order to ensure fair competition. Therefore, assuming that, as previous contractor, company A. enjoyed an advantage, the other candidates could also acquire the same technical knowledge.

76 Although the Commission acknowledges that the carelessness of the contracting authority could have given rise to an apparent conflict of interests, it contends that, in the light of the circumstances, there was no conflict of interests. Moreover, it considers that the contracting authority complied with its obligation to carry out a detailed examination of the possible conflict of interests.

77 In accordance with the case-law referred to in paragraphs 63 and 64 above, it is necessary to determine whether, in the present case, the applicant has established the existence of a sufficiently serious infringement of a rule of law intended to confer rights on individuals.

(i) The existence of rules of law intended to confer rights on individuals

78 As regards the requirement to establish that the institution infringed a rule of law intended to confer rights on individuals, the applicant claims that the Commission infringed several rules of law intended to confer rights on individuals, namely the principles of protection of legitimate expectations, equal treatment and sound administration, included both in the Financial Regulation and in paragraph 2.3.6 of the PRAG, and the duty of due diligence, which required it to ensure compliance with Article 89 of the Financial Regulation, Article 94 of that regulation and the Guidelines of the Organisation for Economic Cooperation and Development (OECD) for managing conflict of interest in the public service.

79 In that regard, it should be noted that the principle of protection of legitimate expectations is a rule of law conferring rights on individuals (see judgment of 6 December 2001, *Emesa Sugar* v *Council*, T-43/98, EU:T:2001:279, paragraph 64 and the case-law cited).

80 As regards the principle of equal treatment, which innervates Articles 89 and 94 of the Financial Regulation and paragraph 2.3.6 of PRAG, it is apparent from the case-law that it itself confers rights on individuals (judgment of 4 October 1979, *Ireks-Arkady* v *EEC*, 238/78, EU:C:1979:226, paragraph 11). As a result, Article 89(1) of the Financial Regulation, in accordance with which all public contracts financed in whole or in part by the budget comply with the principles of equal treatment and non-discrimination, and Article 94 of that regulation, in accordance with which candidates or tenderers who, during the procedure for the award of a public contract, are in a situation of a conflict of interests or who are guilty of misrepresentation are excluded from the award of that contract, must also be regarded as rules of law intended to confer rights on individuals in so far as they seek to ensure respect for the principle of equal treatment during procedures for the award of public contracts.

81 As regards the principle of sound administration, it follows from the case-law that the obligation of due diligence, inherent to that principle, applies generally to the actions of the EU administration in its relations with the public (judgments of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 92; of 9 September 2008, *MyTravel* v *Commission*, T-212/03, EU:T:2008:315, paragraph 50; and of 16 December 2015, *Chart* v *EEAS*, T-138/14, EU:T:2015:981, paragraph 113) and obliges the relevant institution to examine carefully and impartially all the relevant facts of the case (see judgment of 16 December 2015, *Chart* v *EEAS*, T-138/14, EU:T:2015:981, paragraph 113 and the case-law cited).

82 Moreover, the case-law has acknowledged that the EU administration may incur non-contractual liability where it failed to act with due diligence and caused injury as a result (see judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 91 and the case-law cited). In particular, the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to give rise to the liability of the EU under Article 340 TFEU (judgment of 12 July 2001, *Comafrica and Dole Fresh Fruit Europe* v *Commission*, T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, EU:T:2001:184, paragraph 134).

83 In the present case, the applicant claims that the unlawfulness relating to the insufficient supervision of the tendering procedure arises from the failure to comply with the principle of sound administration. To that effect, it claims, in particular in paragraphs 28 and 43 of the application and in paragraph 15 of the reply, that that unlawfulness results from the infringement of the obligation of due diligence. Therefore, according to the applicant, it is for the Commission to conduct a sufficiently thorough and fair investigation in order to determine whether Mr P.'s involvement in the drafting of the ToR had conferred an advantage on company A. in the tendering procedure.

84 In so doing, the applicant does not restrict itself to invoking an obligation imposed in general on the Commission in order to ensure that the latter conforms with rules to ensure respect for the rule of law. On the contrary, the applicant relies on the obligation of due diligence in so far as respect for that obligation, by ensuring that the Commission examine seriously and in detail all the circumstances connected, first, with the involvement of Mr P. in the drafting of the ToR and, second, with the award of the contract to the consortium of which company A. is a member, is intended to protect individuals and to confer rights on them.

85 In those circumstances, it must be concluded that the principle of sound administration and Article 41 of the Charter as invoked by the applicant constitute the expression of specific rights within the meaning of that provision, namely the right to have its affairs handled impartially and fairly and, therefore, the obligation imposed on the competent institution to carefully and impartially examine all the relevant elements of the individual case. Therefore, the principle of sound administration and Article 41 of the Charter must, in the present case, be classified as rules of law intended to confer rights on individuals.

86 Finally, in so far as the OECD Guidelines for managing conflict of interest in the public service do not bind the EU institutions (judgment of 11 June 2014, *Communicaid Group* v *Commission*, T-4/13, not published, EU:T:2014:437, paragraph 82), they cannot be classified as a rule of law intended to confer rights on individuals.

(ii) The existence of sufficiently serious infringements

87 As regards the existence of sufficiently serious infringements, the applicant raises two sets of arguments, relating, first, to the inadequacy of the supervision of the tendering procedure and of the investigation relating to the allegations of a conflict of interests, which, moreover, would have prevented the contracting authority from complying with the Financial Regulation and the principle of equal treatment, and, secondly, to the fact that company A. was in a situation of a conflict of interests, in order to establish that the Commission committed a sufficiently serious infringement of the principles of equal treatment, of sound administration and protection of legitimate expectations and of Articles 89 and 94 of the Financial Regulation.

88 At the outset, the claims based on the existence of a sufficiently serious infringement of the principle of protection of legitimate expectations must be rejected.

89 According to settled case-law, the possibility of relying on the principle of protection of legitimate expectations is open to any trader in regard to whom an institution has given rise to justified hopes (see judgment of 13 July 1995, *O'Dwyer and Others* v *Council*, T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93, EU:T:1995:136, paragraph 48 and the case-law cited).

90 The award of a public contract takes place following a comparative assessment of the tenders by the contracting authority and no tenderer is entitled to be awarded contracts automatically.

91 Moreover, the applicant in no way alleged that, in the present case, the contracting authority had created certain hopes as to the outcome of the award procedure or the investigation relating to the claims of a conflict of interests.

92 Therefore, the applicant cannot invoke an infringement of the principle of protection of legitimate expectations and that claim must be rejected as unfounded. It is necessary by contrast to determine whether, on the basis of its other arguments, the applicant has established the existence, in the present case, of a sufficiently serious infringement of EU law.

93 In the first place, the applicant claims that the inadequacy of the supervision of the tendering procedure and of the investigation relating to the allegations of a conflict of interests constitutes a sufficiently serious infringement of EU law and more particularly of the obligation of due diligence as a component of the principle of sound administration and of Article 41 of the Charter. It adds that that infringement of the obligation of due diligence gave rise to an infringement of Articles 89 and 94 of the Financial Regulation and of the principle of equal treatment. In support of that allegation, the applicant claims that the investigation could not be impartial due to the composition of the Evaluation Committee, that the information provided in relation to the investigation undertaken following the allegations of a conflict of interests is vague, that the tendering procedure was inadequately supervised and that the investigation following the allegations of a conflict of interests was inadequate.

94 In that regard and first of all, it should be noted that the contracting authority is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (see judgment of 12 July 2007, *Evropaïki Dynamiki* v *Commission*, T-250/05, not published, EU:T:2007:225, paragraph 45 and the case-law cited).

95 Under the principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public tendering procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (see judgment of 9 September 2009, *Brink's Security Luxembourg* v *Commission*, T-437/05, EU:T:2009:318, paragraph 114 and the case-law cited).

96 Moreover, the principle of equal treatment means that tenderers must be on an equal footing both when they prepare their tenders and when those tenders are evaluated by the contracting authority (judgment of 11 June 2014, *Communicaid Group* v *Commission*, T-4/13, not published, EU:T:2014:437, paragraph 580).

97 If a person who is a tenderer for the public contract at issue may, without even intending to do so, influence the conditions of the contract in a manner favourable to himself, that person may be in a situation which may give rise to a conflict of interests. Such a situation is liable to distort competition between tenderers (judgments of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraph 30, and of 11 June 2014, *Communicaid Group* v *Commission*, T-4/13, not published, EU:T:2014:437, paragraph 53) and is characterised by an infringement of the principle of equal treatment between tenderers.

98 In particular, according to the case-law and paragraph 2.3.6 of the PRAG, there is a risk of a conflict of interests where a person responsible for the preparatory work for the award of a public contract participates in that procedure since, in such a situation, that person may be in a situation which may give rise to a conflict of interests (judgment of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraphs 28 to 30).

99 However, although, under Article 94 of the Financial Regulation, the candidates or tenderers who, at the time of the procedure for the award of a public contract, are in a situation of a conflict of interests are excluded from the award of that contract, that provision permits exclusion of a tenderer from a procedure for the award of a public contract only if the situation of a conflict of interests to which it refers is real and not hypothetical. Accordingly, a risk of a conflict of interests must actually be found to exist, following a specific assessment of the tender and the tenderer's situation (see, to that effect, judgments of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraphs 32 to 36; of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 26 to 30; and of 18 April 2007, *Deloitte Business Advisory* v *Commission*, T-195/05, EU:T:2007:107, paragraph 67).

100 Therefore, it is for the contracting authority to determine and verify the existence of a real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers and to allow the tenderer who risks being excluded from the procedure the possibility to demonstrate that, in its case, there is no real risk of such a conflict of interests (see, to that effect, judgments of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraphs 33 and 35; of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 30; and of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 39).

101 Nevertheless, despite the lack of an absolute obligation imposed on the contracting authority to exclude systematically tenderers in a situation of a conflict of interests, the exclusion of a tenderer in a situation of a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency (see judgment of 20 March 2013, *Nexans France* v *Entreprise commune Fusion for Energy*, T-415/10, EU:T:2013:141, paragraphs 116 and 117 and the case-law cited).

102 In that regard, since the contracting authority must treat economic operators equally and non-discriminatorily and shall act in a transparent way, it plays an active role in the application of and compliance with those principles. In particular, the contracting authority is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them (see, to that effect, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 42 and 43).

103 It follows from all of the foregoing that it is incumbent on the contracting authority, first, to ensure, at each stage of a tendering procedure, respect for the principle of equal treatment and, secondly, to determine on a case-by-case basis and following a detailed evaluation whether a person or candidate is in a situation of a conflict of interests prior to the decision whether to exclude it from the tendering procedure and to proceed with the award of the contract.

104 In that context, it should be noted that the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to give rise to the liability of the EU under Article 340 TFEU (judgment of 12 July 2001, *Comafrica and Dole Fresh Fruit Europe* v *Commission*, T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, EU:T:2001:184, paragraph 134).

105 Therefore, the obligation of due diligence requires that the institutions act with care and caution (see, to that effect, judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraphs 92 and 93) and imply the obligation to examine carefully and impartially all the relevant aspects of the individual case (see, to that effect, judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14; of 6 November 2008, *Netherlands* v *Commission*, C-405/07 P, EU:C:2008:613, paragraph 56; and of 9 September 2011, *Dow AgroSciences and Others* v *Commission*, T-475/07, EU:T:2011:445, paragraph 154).

106 In particular, confronted with a risk of a conflict of interests in the area of public contracts, the contracting authority is required to act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. Such an obligation derives in particular from the principles of sound administration and equal treatment since it is obliged to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (judgment of 17 March 2005, *AFCon Management Consultants and Others* v *Commission*, T-160/03, EU:T:2005:107, paragraph 75).

107 Finally, it should be noted that, where an administration is called upon to conduct an inquiry, it is for that administration to conduct it with the greatest possible diligence in order to dispel the doubts which exist and to clarify the situation (see, to that effect, judgment of 11 November 1986, *Irish Grain Board*, 254/85, EU:C:1986:422, paragraph 16).

108 It is in the light of all of those factors that it is necessary to assess the unlawfulness alleged on the basis of the inadequacy in the supervision of the tendering procedure and the existence of a conflict of interests in favour of company A.

109 Firstly, several circumstances pleaded by the applicant in order to demonstrate the existence of an infringement of the obligation of due diligence must be rejected as unfounded.

110 Therefore, the claim that the investigation was not impartial due to the composition of the Evaluation Committee, which, in order to assess the existence of a conflict of interests and to formulate its recommendations to the contracting authority, carried out an investigation, must be rejected on the ground that, first, the fact that the Evaluation Committee was composed for the main part of Commission officials does not in itself show that the investigation lacked impartiality and that, secondly, the applicant does not put forward any evidence capable of showing that that fact constitutes an infringement of the obligation of due diligence.

111 As regards the claim that the information provided relating to the investigation conducted following the allegations of a conflict of interests are vague and did not allow the applicant, in breach of the principle of sound administration, to understand how the lack of a conflict of interests was proven, it must be borne in mind that it follows from the file that the EU Delegation provided the applicant and all of the candidates and tenderers with information concerning the progress and outcome of that investigation.

112 Therefore, following the applicant's request for clarification of 15 October 2010, the EU Delegation replied to it on 22 October 2010 that the ToR had been drafted by the contracting authority in order to provide all the tenderers with as much information as possible for the preparation of their tender and that, therefore, the conditions for fair competition were satisfied. Likewise, it is apparent from the letter of 27 January 2011 informing the applicant that its tender had not been successful that the Evaluation Committee investigated the allegations of a conflict of interests. In that respect, that letter mentions the investigation and more precisely the examination of documents, email correspondence and communication and presents the reasons why Mr P. appeared as the author of the Word document containing the ToR.

113 In the light of all of that information, the applicant could, without any doubt, understand on the basis of which elements the Evaluation Committee and the EU Delegation had rejected both the risk and the existence of a conflict of interests. Therefore, and irrespective of whether those elements suffice for the purpose of rejecting the claims of a conflict of interests, the Commission cannot be criticised for having supplied vague information which did not allow the applicant to understand how it had been shown that there was no conflict of interests and for having infringed its obligation of due diligence.

114 Secondly, it must however be noted that all of the other factors put forward by the applicant show a sufficiently serious infringement of the obligation of due diligence during the tendering procedure.

115 As regards the inadequacy of the supervision of the procedure due to the lack of an investigation following the statements made by company A. then by Mr P. confirming that they were not in a situation of a conflict of interests, it should be noted that, in accordance with Article 94(b) of the Financial Regulation, candidates or tenderers who, during the procurement procedure, are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure are to be excluded from that contract.

116 In the present case, as the applicant claims, it is unlikely that the contracting authority was unaware of the fact that Mr P. was an expert for company A. in the context of the previous public contract and that he had been requested by the project manager of the EU Delegation in relation to the drafting of the ToR.

117 First, it is precisely in his capacity as expert for company A. in the context of the first contract that the project manager of the EU Delegation requested Mr P. to draft the ToR. Secondly, the Commission at no time maintained that the EU Delegation was unaware that Mr P. had been requested to draft the ToR.

118 Moreover, it is not disputed that company A. signed the application form and was aware that a candidate could be excluded from the procedure if he put forward an expert who had participated in the preparation of the tendering procedure and that, as an expert envisaged by company A., Mr P. stated that he was not in a situation of a conflict of interests.

119 In so far as the EU Delegation could not fail to be aware that Mr P. had participated in the drafting of the ToR, the contracting authority was required to verify whether the conditions of application of Article 94(b) of the Financial Regulation were satisfied. First, it must be noted that the meaning of Article 94(b) of the Financial Regulation cannot lead to confusion in so far as it provides that all candidates or tenderers who have made misrepresentations must be excluded from the procedure. Secondly, in the light of the circumstances of the case, the contracting authority cannot fail to be aware that Mr P. had been involved in the drafting of the ToR. Therefore, it was for the contracting authority to ensure that it was not necessary to apply that provision.

120 As regards the applicant's argument that the EU Delegation was obliged, in the present case, to investigate ex officio regarding the existence of a possible conflict of interests, it should be noted that the Commission has not established, or even alleged, that, before other candidates or tenderers claimed that company A. was in a situation of a conflict of interests, the EU Delegation requested company A. to show that it was not in a situation of a conflict of interests as a result of the involvement of Mr P. in the drafting of the ToR.

121 In that regard, although it is true that paragraph 2.3.6 of the PRAG, according to which, first, a risk of a conflict of interests exists for the person responsible for the preparatory work for a public contract who participates in that same contract and, secondly, a candidate or a tenderer in a situation of a conflict of interests must be excluded from the tendering procedure unless proof is supplied that that fact does not constitute unfair competition, does not expressly provide that the contracting authority is obliged to investigate of its own motion, it must nevertheless be noted that that provision does not exclude such an obligation.

122 Moreover, compliance with the provisions of Article 94 of the Financial Regulation and paragraph 2.3.6 of the PRAG is particularly important given that those provisions constitute the concrete expression of the principles of transparency, proportionality, equal treatment and non-discrimination which, according to Article 89 of the Financial Regulation, must be respected in the case of all public contracts financed in whole or in part by the EU budget. In order to ensure respect for and the effectiveness of those provisions, the contracting authority may be required to investigate of its own motion where the circumstances display features of a conflict of interests.

123 In the present case, since the project manager of the EU Delegation himself requested Mr P. to draft the ToR, the contracting authority could not have been unaware that Mr P. was involved in the drafting of the ToR and that that involvement during the stages preceding the call for tenders could constitute a conflict of interests and create a situation of unfair competition.

124 In those circumstances, it must be concluded that, in the present case, the EU Delegation could not refrain from examining the statements of a tenderer and of one of his experts and to investigate ex officio in order to determine whether that tenderer was in a situation of a conflict of interests.

125 As regards the applicant's argument claiming that the investigation was inadequate, because it focused on the scope of Mr P.'s involvement in the drafting of the ToR, and that the strategic advantage conferred on company A. by that involvement was not examined although it is apparent from the scores obtained by its tender that that advantage was real, it should be noted that, according to the case-law referred to in paragraph 106 above, following the discovery of a conflict of interests, the contracting authority, which must ensure respect for equal treatment at each stage of a tendering procedure, is required to act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue.

126 Since the contracting authority must ensure at each phase of the tendering procedure respect for equal treatment, such an obligation of due diligence is necessarily imposed on the contracting authority where it possesses information relating to a risk of a conflict of interests and where it must, as in the present case, establish whether that risk is shown.

127 That obligation is particularly important in the light of the facts of the present case in so far as, firstly, the project manager of the EU Delegation requested the expert of a company which is a member of a tendering consortium to draft the ToR and that expertappears to be the author of the Word document containing the ToR, thereby creating a clear risk of a conflict of interests, and, secondly, several other candidates claimed during the tendering procedure that such a situation constituted a conflict of interests.

128 It follows that, in the present case, the contracting authority was required, in accordance with the obligation of due diligence, to carefully and impartially examine all the relevant elements in order to confirm or, on the contrary, exclude the risk of a conflict of interests.

129 In that regard, it is apparent from the Evaluation Committee's report that, following the allegations of a conflict of interests received from several tenderers, that committee considered that there was no conflict of interests on the basis of a statement made by company A., statements made by the project manager of the EU Delegation, documents showing that the provisions of the ToR relating to experts had been reviewed as a result of exchanges between the contracting authority and the person awarded the contract, the specifications concerning experts 1 and 2 and the outcome of the evaluation of the tenders in relation to the experts.

130 It is also apparent from the letter of 27 January 2011 informing the applicant that its tender had not been successful that the Evaluation Committee investigated the allegations of a conflict of interests. In that respect, that letter mentions the investigation and more precisely the examination of documents, email correspondence and communication and states that, although Mr P. appeared as the author of the Word document containing the ToR, he merely supplied general information relating to sections 1.4 and 1.5 of the ToR.

131 In this case, it must be noted that the contracting authority failed to act with the required care by concluding that there was no conflict of interests on the basis of those elements.

132 It is apparent from the combined reading of the provisions of the Financial Regulation and paragraph 2.3.6 of the PRAG that the contracting authority is required to determine, on a case-by-case basis and following a concrete evaluation, whether a person or candidate is in a situation of a conflict of interests prior to the decision on whether or not to exclude from the tendering procedure and to award the contract.

133 Next, given that a conflict of interests undermines equality between tenderers, the decision not to exclude a candidate who is the subject of an allegation of a conflict of interests can be adopted only on condition that the contracting authority is able to be certain that that candidate is not in such a situation.

134 In the present case, the conclusions of the Evaluation Committee and, consequently, those of the contracting authority are based on statements and email exchanges showing that certain sections of the ToR were amended, and on the results of the examination relating to experts.

135 Therefore, it is apparent from the Evaluation Committee's report that the statements made by company A. and the project manager of the EU Delegation provide grounds for the premiss that the involvement of Mr P. in the drafting of the ToR was limited to supplying general information relating to sections 1.4 and 1.5 of the ToR.

136 However, according to the case-law, the credibility and, thus, the probative value, of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliable nature of its contents (judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 1053). Moreover, probative value can be attributed to a sworn statement, and a fortiori to a statement, only if it is supported by other evidence (see, to that effect, judgment of 12 March 2014, *Globosat Programadora* v *OHIM — Sport TV Portugal (SPORT TV INTERNACIONAL)*, T-348/12, not published, EU:T:2014:116, paragraph 33 and the case-law cited).

137 In the present case, it is necessary to take into consideration the fact that company A.'s statement emanates from an entity which could have a direct interest in the case (see, to that effect, judgment of 3 March 2011, *Siemens* v *Commission*, T-110/07, EU:T:2011:68, paragraphs 69 and 70).

138 Moreover, since the statements are not substantiated by other evidence allowing the existence of a conflict of interests to be conclusively excluded, the fact that the involvement of Mr P. in the drafting of the ToR was limited to supplying general information relating to sections 1.4 and 1.5 of the ToR cannot be regarded as proved.

139 Indeed, the Evaluation Committee's report states, first, that the provisions of the ToR relating to experts were amended following exchanges between the contracting authority and the person awarded the contract and that those amendments show that the requirements changed qualitatively during the preparation of the tender documents, and, secondly, that the fifth tenderer received the best scores in respect of experts 3 and 4 whereas company A. received the best scores in respect of experts 1 and 2.

140 It follows from those elements that the Evaluation Committee and the contracting authority sought to determine the extent of Mr P.'s involvement in relation to the ToR and to assess the possible strategic advantage that that involvement could have had with regard to the experts' evaluation.

141 The Evaluation Committee's report emphasises that the involvement of Mr P. related only to sections 1.4 and 1.5 of the ToR containing background information about the contract and not requirements concerning inter alia the experts. Moreover, that report highlights the amendments to the sections of the ToR concerning the requirements relating to the experts following exchanges between the contracting authority and the person awarded the contract in order to show that those requirements had significantly changed throughout the amendments to the ToR. Finally, the report contains the results of the evaluation of the tenders as regards the experts.

142 Nevertheless, although that fact shows that the Evaluation Committee and the contracting authority did not restrict themselves to Mr P.'s involvement in the drafting of the ToR and sought to determine whether company A. had enjoyed a strategic advantage, it does not however, contrary to the requirements of the PRAG, allow it to be proved that company A. had not enjoyed a strategic advantage or to conclusively exclude the existence of a conflict of interests and, therefore, to conclude that they complied with the obligation of due diligence.

143 It is not apparent from the file that the Evaluation Committee investigated the circumstances in which the project manager of the EU Delegation requested Mr P. to provide him with information with a view to the drafting of the ToR. Therefore, neither the Evaluation Committee nor the contracting authority were able to determine the scope of the EU Delegation's request and to establish whether that request was effectively limited to general information necessary for sections 1.4 and 1.5 of the ToR only.

144 It is also not apparent from the file that the Evaluation Committee requested access to the Word document drafted by Mr P. and sent to the project manager of the EU Delegation, or that it was able to verify that document, even though it concerned an element which was not only relevant, but also essential, for the purposes of establishing whether Mr P.'s involvement in the drafting of the ToR was limited to sections 1.4 and 1.5 of the ToR only and to determine whether or not there existed a situation of a conflict of interests. When it was questioned in that regard during the hearing, the Commission confirmed that it was not in possession of the USB stick with which, as it acknowledged before the Court, Mr P. sent the information supplied, a note of which was made in the minutes of the hearing.

145 In the absence of that document, the Evaluation Committee and the contracting authority were necessarily unable to verify, first, that the involvement of Mr P. was indeed restricted to sections 1.4 and 1.5 of the ToR and, secondly, that he had not drafted the first version of the ToR in its entirety. Therefore, they could not conclusively exclude that Mr P. did not draft the first version of the ToR in its entirety and that he, consequently, possessed inside information, even if the other elements on which the Evaluation Committee relied, namely documents showing that the provisions of the ToR relating to experts were amended following exchanges between the contracting authority and the person awarded the contract, the specifications concerning experts 1 and 2 and the results of the evaluation of the tenders in respect of the experts, show that the sections of the ToR relating to experts were subsequently amended. Therefore, the Evaluation Committee and the contracting authority did not possess all of the elements allowing them to conclusively determine whether company A. had enjoyed a strategic advantage calling into question the equality between the tenderers.

146 In those circumstances, it appears that the Evaluation Committee and the contracting authority failed to carefully examine all of the relevant elements which would have allowed them to dispel the existing doubts and clarify the situation of company A.

147 Moreover, since the contracting authority's obligations relating to conflicts of interest are unambiguously set out both in the PRAG and in the Financial Regulation, the scope of those provisions does not give rise to any particular problems of interpretation and application. Furthermore, the Commission has not raised any issues so as to show that the circumstances were particularly complex.

148 It follows from all of those considerations that, in the circumstances of the present case, by failing to carry out checks following the statements made by company A. and Mr P. confirming that they are not in a situation of a conflict of interests, by failing to investigate ex officio so as to determine whether that company was in a situation of a conflict of interests and by omitting to conduct an investigation allowing it to be conclusively established that the involvement of Mr P. in the drafting of the ToR did not constitute a conflict of interests, the EU Delegation committed an irregularity which

would not have been committed, in similar circumstances, by an administrative authority, exercising ordinary care and diligence. Such an irregularity must be classified as a manifest and serious breach of the obligation of due diligence and, therefore, as a sufficiently serious infringement of that obligation, of the principle of sound administration and of Article 41 of the Charter.

149 Moreover, as the applicant correctly claims, such an infringement of the obligation of due diligence also constitutes, in light of the circumstances of the present case, a sufficiently serious infringement of the principle of equal treatment set out in Article 89 of the Financial Regulation and in the PRAG.

150 The infringement of the obligation of due diligence as a result of a failure to conduct an inquiry allowing the existence of a conflict of interests during a tendering procedure to be conclusively excluded indeed also infringes the principle of equal treatment of tenderers (see, to that effect, judgment of 17 March 2005, *AFCon Management Consultants and Others* v *Commission*, T-160/03, EU:T:2005:107, paragraphs 90 and 91).

151 As the Court pointed out in paragraphs 94 to 103 above, the contracting authority is required to ensure, at each stage of a tendering procedure, respect for equal treatment and, in consequence, that all tenderers enjoy equal opportunities. Therefore, in order to ensure respect for the principle of equal treatment, it is required to determine on a case-by-case basis, and following a detailed evaluation, whether a person or candidate is in a situation of a conflict of interests prior to the decision whether to exclude from the tendering procedure and to award the contract.

152 In the present case, since the EU Delegation failed to carefully and impartially examine all the elements precluding the existence of a conflict of interests in favour of company A. and calling into question the existence of a clear risk of a conflict of interests resulting, in accordance with paragraph 2.3.6 of the PRAG, from the involvement of Mr P. in the drafting of the ToR, it was unable to treat all the tenderers in the same way. Therefore, the mere fact that the EU Delegation failed to conduct a proper inquiry allowing the existence of a clear risk of a conflict of interests alleged by several tenderers to be conclusively excluded constitutes an infringement of the principle of equal treatment as set out in Article 89 of the Financial Regulation and in the PRAG and, therefore, a sufficiently serious infringement of rules of law intended to confer rights on individuals, given the seriousness of the consequences of a possible conflict of interests for the outcome of procedures for the award of public contracts.

153 In the second place, the applicant relies on an infringement of Articles 89 and 94 of the Financial Regulation and of the principle of equal treatment in so far as the contracting authority treated all the tenderers in the same way although the involvement of Mr P. in the drafting of the ToR created a situation of a conflict of interests benefiting company A. in the preparation of its tender.

154 That line of argument cannot succeed.

155 Although the facts and evidence invoked by the applicant show the existence, in the present case, of a clear risk of a conflict of interests and constitute a sufficiently serious infringement of the obligation of due diligence and of the principle of equal treatment, they do not suffice in order to allow the Court to conclusively find the existence of a conflict of interests and the applicant's argument must, consequently, be rejected. In that regard, it must nevertheless be noted that the impossibility for the Court to establish or conclusively exclude the existence of a conflict of interests in the present case results from the conduct of the Commission, which failed to adequately examine, during the tendering procedure, the allegations of a conflict of interests and did not provide the Court with any other information allowing it to carry out such an examination.

156 Therefore, the applicant, first, demonstrated the existence in the present case of a sufficiently serious infringement of the obligation of due diligence and, therefore, of the principle of sound administration and of Article 41 of the Charter, in so far as the EU Delegation failed to carry out checks following

statements made by company A. confirming that it was not in a situation of a conflict of interests and neither adequately inquired into the involvement of Mr P. in the drafting of the ToR, nor carefully examined all the relevant elements in order to conclusively establish an absence of a conflict of interests and of a strategic advantage granted to company A. Secondly, the applicant established the existence of a sufficiently serious infringement of the principle of equal treatment as set out in Article 89 of the Financial Regulation and in the PRAG in so far as the contracting authority treated all the tenderers in the same way although the inadequacies of the inquiry did not allow it to conclusively exclude the existence of a conflict of interests benefiting company A.

(2) The alleged unlawful act based on the delay with which the applicant was informed about the decision awarding the contract and the signing of the contract

157 The applicant claims that the Commission infringed paragraph 2.9.3 of the PRAG by failing to inform it 'as soon as possible' of the decision awarding the contract although that decision had been adopted before the signing of the contract. Moreover, by failing to inform it within 15 calendar days from the receipt of the countersigned contract provided for by paragraph 2.9.3 of the PRAG, the Commission infringed the general principle of sound administration in the evaluation of the tenders.

158 Although the Commission acknowledges that the applicant was not informed of the decision awarding the contract within the time limits prescribed, namely within 15 calendar days from the receipt of the countersigned contract, it contends that that delay did not prejudice the applicant's right of recourse and that the applicant itself in no way invokes such prejudice.

159 For reasons of procedural economy and taking into account the fact that, in accordance with the case-law referred to in paragraph 67 above, if any one of the three conditions required for the EU to incur non-contractual liability is not satisfied, the action for damages must be dismissed, without there being any further need to consider whether the other two conditions are met, the applicant's argument will be examined in the light of the requirement concerning the existence of a causal link.

(b) The damage and the causal link

(1) The causal link between the alleged unlawful act based on the delay with which the applicant was informed about the decision awarding the contract and the signing of the contract and the damage invoked

160 As is apparent from paragraph 66 above, the applicant must adduce evidence of the existence of a direct link of cause and effect between the unlawfulness and the damage invoked. In the present case, the applicant claims that it suffered loss constituted by the costs and expenses relating to the participation in the tendering procedure, the cost incurred connected with contesting the lawfulness of the tendering procedure, loss of profit, loss of an opportunity and loss of an opportunity to participate in and win other calls for tender and that that loss was caused by the Commission's maladministration, the breach of the general principles of equal treatment, sound administration and protection of legitimate expectations and by the infringement of Article 94 of the Financial Regulation and of paragraph 2.3.6 of the PRAG. Although it points out a direct causal link between, on the one hand, the unlawful adoption of the decision granting the contract to the consortium of which company A. is a member, and, on the other hand, the loss suffered, the applicant fails to show, or even allege, that the delay with which it was informed of the result of the evaluation process directly and decisively caused it the loss invoked. Moreover, it is apparent from the applicant's argument as a whole that the event giving rise to the loss invoked is constituted by unlawful acts committed by the contracting authority during the tendering procedure and not by the fact that the decisions awarding the contract and the signing of the contract were brought to its attention belatedly.

161 It follows that, without it being necessary to determine whether the applicant has established the existence of a sufficiently serious infringement of the rules of law which are intended to confer rights on individuals, due to a lack of a causal link, the applicant's claims based on the delay with which it was informed of the decision awarding the contract and the signing of the contract must be rejected.

(2) The damage invoked and the causal link between the alleged unlawful act relating to the inadequacy of the supervision of the tendering procedure and that damage

162 Since the Court concluded that the inadequacy of the supervision of the tendering procedure was unlawful, it is necessary to determine whether the damage invoked by the applicant is real and certain and whether, as the case may be, there is a direct link of cause and effect between the unlawfulness found by the Court and that damage.

163 The applicant claims that it suffered five different heads of damage constituted, first, by loss of profit, secondly, by the cost incurred in contesting the lawfulness of the tendering procedure, thirdly, by the loss of an opportunity to participate and win other tenders, fourthly, by the loss of an opportunity to be awarded the contract and, fifthly, by costs relating to the participation in the tendering procedure.

(i) The damage based on loss of profit

164 The applicant claims that, in response to its complaint, company A. should have been excluded from the tendering process and that in that case it would have been awarded the contract. Therefore, even if the Court has never in the past awarded damages for loss of profit in relation to illegal tender procedures, it considers that the circumstances of the case and the blatant inappropriate Commission conduct require a derogation from the case-law.

165 The Commission disputes that line of argument and contends that, in the present case, the loss of profit is not damage capable of compensation. Therefore, it points out that the contracting authority has a broad discretion to decide on the award of a public contract and is not bound by the Evaluation Committee's recommendation. Moreover, it is not certain that the applicant would have won the contract in the absence of company A. Finally, the Commission considers that, in calculating the amount of compensation, a profit margin of 33.3% is unreasonable.

166 In that regard, it must be noted that, in the present case, contrary to the requirement referred to in paragraph 65 above, the damage resulting from a loss of profit or loss of revenue is not real and certain, but rather future and hypothetical (judgment of 22 May 2012, *Evropaïki Dynamiki* v *Commission*, T-17/09, not published, EU:T:2012:243, paragraph 123). The damage invoked in relation to the loss of profit or loss of revenue presupposes that, in the absence of the unlawful conduct alleged against the Commission, the applicant, whose tender was rejected, was entitled to be awarded the contract at issue. Even assuming that the Evaluation Committee proposed to award the contract to it, the contracting authority is not bound by the Evaluation Committee's proposal, but has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract (see judgment of 8 December 2011, *Evropaïki Dynamiki* v *Commission*, T-39/08, not published, EU:T:2011:721, paragraph 47 and the case-law cited). Moreover, it follows from Article 101 of the Financial Regulation that the contracting authority may, before the contract is signed, either abandon the contract or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation.

167 It follows that the damage invoked by the applicant and corresponding to a loss of profit or loss of revenue as a result of the award of the contract at issue to another tenderer is not real and certain and, therefore, that the claim for damages must be dismissed in that regard.

(ii) The damage based on the cost incurred in contesting the lawfulness of the tendering procedure

168 As regards the costs incurred in connection with contesting the lawfulness of the tendering procedure, the applicant claims that, as a result of the serious infringement of EU law during the tendering procedure, it suffered loss in that it had to consult a lawyer both during that procedure and during that before the Ombudsman.

169 First of all, the Commission considers that the applicant's claim that, in the context of a public procurement procedure, the legal costs connected with filing a complaint before the Ombudsman could be regarded as 'necessary' is not substantiated. It points out next that the applicant was not obliged to address itself to the Ombudsman, but it could have brought a case before the Court. Finally, it disputes the amount of the legal costs in that the invoice submitted by the applicant does not state either the services supplied or the rate at which they were invoiced. The Commission adds that, according to the case-law, the costs which the applicant incurred for its defence are not material damage but expenses, and that the lawyer's costs incurred prior to the bringing of legal proceedings are a result of the applicant's choice and cannot therefore be directly attributed to it.

170 In that regard and in order to prove the existence and scope of the loss invoked, the applicant submitted an invoice to the Court, included in Annex A 12 to the application, establishing that, on 29 January 2014, it had to pay the sum of EUR 10 000 for legal costs in connection with the tendering procedure 'Consolidation of the Food Safety System in Albania' (EuropeAid/129820/C/SER/AL) for the period from December 2010 to January 2014.

171 It must be noted that, by doing so, the applicant neither proved the existence nor established the scope of the loss which it alleges, contrary to the requirements of the case-law referred to in paragraph 65 above.

172 The applicant has not produced any evidence explaining what exactly those costs covered and justifying the amount thereof. Therefore, the invoice provided in Annex A 12 to the application merely mentions a total of EUR 10 000 without specifying the costs involved in the contestation of the lawfulness of the tendering procedure during the eponymous procedure and those involved in the procedure before the Ombudsman, and without detailing those costs.

173 Moreover, the applicant's decisions to introduce a complaint to the European Ombudsman and to be represented by a lawyer during the procedure before the Ombudsman, even though that procedure is designed in such a way that recourse to a lawyer is not necessary, are a result of its own choice. Therefore, the maladministration which may be attributable to the EU institutions cannot be regarded as being the direct cause of the damage invoked (see, to that effect, order of 11 July 2005, *Internationaler Hilfsfonds* v *Commission*, T-294/04, EU:T:2005:280, paragraphs 48, 52 and 56, and judgment of 28 September 2010, *C-Content* v *Commission*, T-247/08, not published, EU:T:2010:409, paragraph 90 and the case-law cited).

174 It follows that the applicant cannot be compensated for costs incurred connected with contesting the lawfulness of the tendering procedure.

(iii) The damage based on the loss of an opportunity to participate in and win other tenders

175 The applicant claims that, in so far as the irregularities of the contract award procedure and its award to the consortium of which company A. is a member prevented it from participating in and winning other tendering procedures, the Commission is obliged to compensate it for the loss of that opportunity.

176 The Commission considers that, even assuming that the applicant had won the tender at issue and had been able to meet the technical requirements of other tenders, nothing guarantees that it would have obtained other contracts, so that the damage is not, contrary to the requirements of the case-law, 'real and existing'.

177 In that regard, it should be noted at the outset that the applicant relies on the fact that the unlawful acts which led to the award of the contract to the consortium of which company A. is a member not only prevented it from participating in other tendering procedures, but also from being successful in those other procedures.

178 As regards the loss of an opportunity to participate in other tendering procedures, it must be noted that the loss invoked by the applicant does not directly and conclusively follow from the unlawful acts found in the present case. The applicant considers that, as a result of the absence of a diligent investigation during the tendering procedure, it lost an opportunity to win the contract at issue and consequently to invoke the grant and performance of that contract in order to demonstrate that it fulfilled the selection criteria allowing it to participate in other later tendering procedures. In that context, the applicant invokes two tendering procedures requiring, in respect of the technical capacity of the candidates, the supply of services in at least two projects covering certain defined sectors of activity. Nevertheless, the applicant has in no way claimed, or moreover shown, that the award of the public contract at issue constituted the only possibility of obtaining sufficient experience so as to fulfil the selection criteria for those subsequent tenders and was necessary for that purpose. On the contrary, it is apparent from the documents provided by the applicant that that experience could be acquired by carrying out any project in the listed sectors of activity. It follows that the loss of an opportunity to participate in other tendering procedures results more from the applicant's lack of experience than from the failure to award the public contract at issue and that, therefore, the unlawful acts at issue could not have directly and conclusively caused the loss invoked by the applicant.

179 Finally, as regards the loss of an opportunity to win the contract in other tendering procedures, it suffices to note that, even assuming that the applicant could have suffered damage as a result of the loss of an opportunity to obtain the public contract at issue, such a situation does not suffice to give rise to actual and certain damage resulting from the loss of an opportunity to obtain other public contracts (see, to that effect, order of 22 June 2011, *Evropaïki Dynamiki* v *Commission*, T-409/09, EU:T:2011:299, paragraph 86 and the case-law cited). In a public tendering system such as in the present case, the contracting authority enjoys a broad discretion in a decision to award a contract. As a result, it cannot be assumed that the applicant would have fulfilled all of the conditions for the award of those other contracts. That loss must therefore be considered to be an uncertain and hypothetical loss.

180 It follows that the applicant cannot be compensated for the damage alleged relating to the loss of an opportunity to participate, and win, other tenders.

(iv) The damage based on the loss of an opportunity and the costs and expenses relating to the participation in the tendering procedure

181 The applicant claims that it must be compensated for the loss of an opportunity to be awarded the contract which is the subject of the invitation to tender if the Court refused to compensate it for lost profits. It constitutes damage that can be made good and that, in the present case, as a result of the absence of a response from the Commission to the allegations of a conflict of interests, it was deprived of the possibility of winning the contract even though it had a clear opportunity.

182 The Commission contends that the case-law invoked by the applicant is not relevant to disputes relating to public contracts and states that, in that context, the Court has dismissed actions for damages deriving from loss of profit or loss of opportunity.

183 The applicant acknowledges that, according to the case-law, participation in a procedure for the award of a public contract does not, in principle, constitute an element of damage, but considers that the case-law according to which, exceptionally, those costs must be reimbursed when the competent authority's infringement of EU law in the conduct of the tendering procedure has impinged upon the tenderer's chances of being awarded the contract, is applicable in the present case. It showed that the Commission committed a sufficiently serious infringement of EU law in the conduct of the tendering procedure by allowing a conflict of interests to arise and by infringing the principle of equal treatment, thus reducing its chances of obtaining the contract. Furthermore, compensatory interest relating to the costs and expenses incurred in participating in the overall tendering exercise should be added to that sum.

184 The Commission points out that the costs of participation in a tendering procedure are not considered to be damage that is capable of being remedied by an action for damages and considers that, in the present case, the case-law invoked by the applicant is not applicable.

185 In the light of the conditions governing compensation for loss of an opportunity and for costs and expenses relating to the participation in the tendering procedure, the Court considers it appropriate to examine them successively. The question of compensatory damages will then be addressed.

186 First, as regards the damage based on the loss of an opportunity, it is necessary first of all to reject the Commission's argument that the damage invoked by the applicant in respect of the loss of an opportunity is uncertain.

187 By maintaining that the Court, on numerous occasions, rejected claims for damages alleging loss of profit or the loss of an opportunity due to the broad discretion enjoyed by the contracting authority in deciding to award a contract, the Commission wrongly equates damages resulting from a loss of profit and those resulting from the loss of an opportunity.

188 First, those two types of damage are different. The loss of profit concerns compensation for the loss of the contract itself, whereas the loss of opportunity concerns compensation for the loss of the opportunity to conclude that contract (see, to that effect, judgments of 21 May 2008, *Belfass* v *Council*, T-495/04, EU:T:2008:160, paragraph 124, and of 20 September 2011, *Evropaïki Dynamiki* v *EIB*, T-461/08, EU:T:2011:494, paragraph 210).

189 Secondly, the fact that the contracting authority enjoys a broad discretion in the context of the award of the contract at issue does not prevent the damage caused by the loss of opportunity from being actual and certain for the purposes of the case-law (see, to that effect and by analogy, judgment of 9 November 2006, *Agraz and Others* v *Commission*, C-243/05 P, EU:C:2006:708, paragraphs 26 to 42, and Opinion of Advocate General Cruz Villalón in *Giordano* v *Commission*, C-611/12 P, EU:C:2014:195, points 60 and 61). Moreover, the fact that the contracting authority is never obliged to award a public contract does not preclude the finding of a loss of opportunity in the present case. Although that fact affects the tenderer's certainty of winning the contract, and, therefore, the corresponding loss, it cannot preclude all likelihood of winning that contract and therefore the loss of opportunity. In any event, although it is true that the contracting authority may always, until the signature of the contract, either abandon the procurement, or cancel the procedure for the award of a public contract, without the candidates or tenderers being entitled to claim compensation, the fact remains that those situations of abandonment of the procurement or cancellation of the procedure did not actually materialise and that, as a result of the unlawful acts committed during the procedure for the award of the contract, the applicant lost an opportunity of winning that contract (see, to that effect, judgment of 29 October 2015, *Vanbreda Risk & Benefits* v *Commission*, T-199/14, EU:T:2015:820, paragraph 199).

190 Next, as is apparent from paragraph 156 above, the Court considered that, during the tendering procedure, the Commission committed several unlawful acts in the context of the investigation relating to the existence of the conflict of interests. Such unlawful acts in the conduct of the tendering procedure fundamentally vitiated that procedure and affected the chances of the applicant, whose tender was ranked in second position, being awarded the contract. If the EU Delegation had fulfilled its obligation of due diligence and adequately investigated the extent of Mr P.'s involvement in the drafting of the ToR, it is not excluded that it might have established the existence of a conflict of interests in favour of company A. justifying its exclusion from the procedure. Therefore, by deciding to award the contract to the consortium of which company A. was a member without having conclusively established that the latter was not in a situation of a conflict of interests even though significant evidence suggested the existence of an apparent conflict of interests, the EU Delegation affected the chances of the applicant being awarded the contract.

191 In those circumstances, the damage invoked with respect to the loss of an opportunity must, in the present case, be considered to be actual and certain, because there is evidence that, as an unsuccessful tenderer, the applicant definitively lost an opportunity to be awarded the contract and that that opportunity was real and not hypothetical.

192 Finally, the damage directly and immediately results from the unlawful acts committed in the present case by the EU Delegation. The condition relating to the existence of such a causal link must be assessed in the light of the loss alleged. Without it being necessary to determine whether the situation in the present case constituted a conflict of interests, it is clear that, due to the inadequacies of the investigation and the award of the contract to the consortium of which company A. is a member, the EU Delegation vitiated the tendering procedure and, consequently, directly affected the applicant's chances of being awarded the contract.

193 Since the applicant established that the EU Delegation committed several unlawful acts in the context of the investigation relating to the existence of the conflict of interests, that it suffered damage in respect of the loss of an opportunity, that that loss is actual and certain and results directly from those unlawful acts, it must be concluded that the conditions for compensating the applicant in respect of the loss of an opportunity are satisfied.

194 Secondly, as regards the costs and expenses relating to the participation in the tendering procedure, it should be noted that economic operators are to bear the risks forming an integral part of their activities. In the context of a tendering procedure, those economic risks include, inter alia, the costs associated with the preparation of the tender. The costs incurred for that purpose therefore remain chargeable to the undertaking which chose to participate in the procedure, since the right to bid for the award of a contract does not signify that the contract will definitely be awarded to that undertaking (see, by analogy, judgment of 30 April 2009, *CAS Succhi di Frutta* v *Commission*, C-497/06 P, not published, EU:C:2009:273, paragraph 79). In that regard, Article 101 of the Financial Regulation provides that the Commission is free to decide not to make any award at all. Therefore, there was no guarantee that even the tenderer offering the most advantageous bid would win the contract.

195 Consequently, the costs and expenses incurred by a tenderer in connection with its participation in a tendering procedure cannot, in principle, constitute harm which is capable of being remedied by an award of damages (judgments of 30 April 2009, *CAS Succhi di Frutta* v *Commission*, C-497/06 P, not published, EU:C:2009:273, paragraph 81; of 17 December 1998, *Embassy Limousines & Services* v *Parliament*, T-203/96, EU:T:1998:302, paragraph 97; and of 8 May 2007, *Citymo* v *Commission*, T-271/04, EU:T:2007:128, paragraph 165).

196 However, that principle cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of EU law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract (judgments of 30 April 2009, *CAS Succhi di Frutta* v *Commission*, C-497/06 P, not published, EU:C:2009:273,

paragraph 82; of 17 March 2005, *AFCon Management Consultants and Others* v *Commission*, T-160/03, EU:T:2005:107, paragraph 98; and of 8 May 2007, *Citymo* v *Commission*, T-271/04, EU:T:2007:128, paragraph 165).

197 In the present case, since the Court considered that the unlawful acts invoked by the applicant in the conduct of the tendering procedure had affected its chances of being awarded the contract and that, therefore, it was necessary to compensate it for the loss of an opportunity, the costs and expenses relating to the participation in the tendering procedure are damage capable of being remedied by the grant of damages.

198 Moreover, as regards the causal link between that damage and the unlawful acts found by the Court, it should be noted that those unlawful acts vitiated the tendering procedure. As a result, those unlawful acts caused the applicant, as tenderer, to needlessly incur costs in relation to the participation in the tendering procedure. It results therefrom that the damage invoked by the applicant follows directly from the unlawful acts found by the Court and that the conditions for compensating the applicant for the costs and expenses relating to the participation in the tendering procedure are satisfied.

199 Third, as regards compensatory interest, it should be noted that the conditions for non-contractual liability must be satisfied for an applicant to be eligible to receive compensatory interest (judgments of 2 June 1976, *Kampffmeyer and Others* v *EEC*, 56/74 to 60/74, EU:C:1976:78, and of 26 February 1992, *Brazzelli and Others* v *Commission*, T-17/89, T-21/89 and T-25/89, EU:T:1992:25, paragraph 35, upheld on appeal by judgment of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 42).

200 Compensation for damage within the framework of non-contractual liability is intended so far as possible to provide restitution for the party applying for compensation. Consequently, since the criteria giving rise to non-contractual liability are fulfilled, the adverse consequences resulting from the lapse of time between the occurrence of the event causing the damage and the date of payment of the compensation cannot be ignored, in so far as it is appropriate to take into account the fall in the value of money (judgments of 27 January 2000, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:2000:38, paragraph 51, and of 13 July 2005, *Camar* v *Council and Commission*, T-260/97, EU:T:2005:283, paragraph 138; see also, to that effect, judgment of 3 February 1994, *Grifoni* v *Commission*, C-308/87, EU:C:1994:38, paragraph 40). Therefore, compensatory interest is designed to compensate for the time that passes before the judicial assessment of the amount of damage, irrespective of any delay attributable to the debtor (judgment of 12 February 2015, *Commission* v *IPK International*, C-336/13 P, EU:C:2015:83, paragraph 37).

201 In the present case, since it follows from paragraphs 197 and 198 above that the applicant must be compensated for the loss consisting in the costs and expenses relating to the participation in the tendering procedure and that the compensation is intended so far as possible to provide restitution for the party applying for compensation, the applicant's claim that the amount of the loss consisting in the costs and expenses relating to the participation in the tendering procedure be increased by compensatory interest must be upheld.

202 It follows from all those considerations that it is necessary to uphold the applicant's claim for damages in so far as it seeks compensation for the loss of an opportunity to be awarded the contract at issue and compensation for the costs and expenses relating to the participation in the tendering procedure, plus compensatory interest, and to reject it as to the remainder.

2. The compensation

203 As regards the quantification of the damage constituted by the costs and expenses of participating in the tendering procedure and by the loss of an opportunity, the applicant states that the first amounts to EUR 22 916. That sum is based on the applicant's official accounts submitted to the Greek administration for the year 2010. Moreover, compensatory interest equal to the interest rate in Greece in force during the period concerned, namely 3.67% in October 2010 increased by two percentage points, should be added to that amount. The interest should start to run from the first day of the month following the month in which the applicant took the last steps prior to initiating the judicial proceedings. Since the lodging of a submission to the Ombudsman took place on 27 February 2013, the relevant date is 1 March 2013.

204 As regards the second damage, the applicant claims that, in so far as it had a serious opportunity of being awarded the contract, that damage must be estimated at EUR 1 002 125, that is to say 50% of the amount of the tender for that contract of the consortium of which it is a member.

205 The applicant requests in addition that the amount of compensation be increased by default interest of 8% calculated, on the sum awarded, from the date of the judgment until the date of the actual payment.

206 The Commission considers that the amount invoked by the applicant in respect of the costs and expenses of participating in the tendering procedure is not substantiated and that the document presented in Annex A 11 does not prove that it actually incurred those costs. Moreover, the Commission contends that the applicant does not explain on what legal basis it relies for its claim of default interest and does not state either how the interest rate is calculated or the period from which interest is calculated.

207 The Commission adds that the amount invoked by the applicant in relation to the compensation for damage resulting from the loss of opportunity is manifestly excessive. Contrary to what the applicant claims, compensation amounting to 50% of the tender cannot be regarded as fair and reasonable.

208 Firstly, it should be noted, in that regard, that a reading of Annex A 11 to the application does not enable it to be determined to what the category 'general expenses' in that document corresponds, or the reasons why the costs are calculated from 12, 14 or 18 days of work. When it was questioned on that subject during the hearing, the applicant was unable to provide further clarification.

209 Secondly, as regards compensatory interest, it must be emphasised that the applicant has not supplied any evidence capable of showing that the amount of the costs and expenses relating to the participation in the tendering procedure could, if it had been invested, have produced interest, the rate of which would be the interest rate in force in Greece in 2010, plus two percentage points (see, to that effect, judgments of 27 January 2000, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:2000:38, paragraph 219, and of 26 November 2008, *Agraz and Others* v *Commission*, T-285/03, not published, EU:T:2008:526, paragraph 49).

210 Moreover, the applicant failed to provide any evidence capable of showing that the lodging of a submission before the Ombudsman constitutes in the present case the last steps it took prior to initiating proceedings.

211 Thirdly, it must be noted that the applicant failed to provide any evidence in its written submissions supporting the estimate of the damage with respect to the loss of opportunity. Moreover, when it was questioned in that regard during the hearing, it was unable to explain to the Court the evidence justifying its estimate.

212 In the light of all of the foregoing, it must be concluded that, although the existence of damage in respect of the loss of an opportunity and the costs and expenses relating to the participation in the tendering procedure as damages capable of being remedied is proven sufficiently in principle, the amount of those damages cannot be determined to a sufficient degree, as matters stand, to enable the Court either to rule on the basis of the amount claimed by the applicant, or to fix another amount in the light of the elements on the file.

213 Since it is not possible to assess the damage, it is appropriate, for reasons of economy of procedure, to give an initial interlocutory ruling on the liability of the European Union. The determination of the amounts of compensation resulting from the unlawful conduct of the EU is deferred to a later stage, either by mutual agreement of the parties, or by the Court in the absence of such an agreement (see, to that effect, judgment of 16 September 2013, *ATC and Others* v *Commission*, T-333/10, EU:T:2013:451, paragraph 199 and the case-law cited).

214 Nevertheless, to that end, both the parties and the Court are required to take into account the following aspects.

215 In the first place, it is necessary to take into account the fact that, in the context of the tendering procedure at issue in the present case, since the applicant was part of a consortium, the compensation should correspond to its participation in that consortium.

216 In the second place, as regards the costs and expenses relating to the participation in the tendering procedure, first, it is necessary to take into consideration the exact proportion of the costs linked to the participation in the tendering procedure in the 'general expenses' submitted by the applicant and the exact number of workdays necessary for that purpose.

217 Secondly, as regards the compensatory interest, it is necessary to take into account the fact that the starting point and the end of the period giving rise to a right to the monetary revaluation must respectively be fixed on the first day of the month following the month during which the applicant last took steps prior to initiating proceedings and on the date of delivery of the judgment establishing the obligation to make good the damage. As regards the rate of compensatory interest, it is necessary to take into consideration the fact that the monetary depreciation linked to the passage of time is, in principle, reflected by the annual rate of inflation recorded, for the period in question, by Eurostat (the European Union's statistical office) in the Member State where the applicant is established.

218 In the third place, as regards the loss of an opportunity, firstly, it is necessary to take into account the probability the applicant would have had of winning the tender in the absence of the unlawful acts found by the Court. For that purpose, it is first of all necessary to take into consideration the probability that a diligent investigation would have resulted in the exclusion of company A.'s tender in so far as the existence of a conflict of interests justifies the exclusion of a tenderer only on condition that that fact constitutes a situation of unfair competition, that the contracting authority be able to adopt measures in order to offset the advantage resulting from the conflict of interests and that it can cancel the tendering procedure. Next, it is necessary to take into account the fact that, since the applicant's tender was ranked in second place, it would have had a very good chance of winning the contract in the event of the exclusion of company A. Finally, it is necessary to take into consideration the fact that, in the present case, the contracting authority did not make use of the possibility provided for by the Financial Regulation to abandon the contract or cancel the award procedure.

219 Secondly, it is necessary to take into consideration the net profit which could have resulted from performance of the contract by the applicant. In that regard, it is necessary to determine the net profit margin to which the performance of similar contracts generally gives rise.

220 In the light of all those elements, it will be necessary, in order to determine the total amount capable of being compensated in relation to the loss of an opportunity, to take into consideration the net profit and the probability of winning the tender.

221 It is necessary to ask the parties, subject to a subsequent decision of the Court, to reach agreement on that amount in the light of the above considerations, and to inform the Court, within three months from the date of delivery of this judgment, of the amount to be paid, reached by agreement, failing which they are to send the Court a statement of their views with supporting figures within the same period (see, to that effect, judgment of 16 September 2013, *ATC and Others* v *Commission*, T-333/10, EU:T:2013:451, paragraph 201).

222 Finally, as regards the applicant's claim that the amount of the compensation be increased by default interest of 8% on the sum awarded from the date of the judgment until the date of the actual payment, it follows from the case-law that the obligation to pay default interest arises on the date of the judgment establishing the obligation to make good the damage, and that is the case even where the Court establishes, by an initial interlocutory ruling, the obligation to make good the damage and reserves the determination of the amounts of the compensation for the damage to a later stage (judgments 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 25; of 13 November 1984, *Birra Wührer and Others* v *Council and Commission*, 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 and 282/82, EU:C:1984:341, paragraph 37; and of 26 June 1990, *Sofrimport* v *Commission*, C-152/88, EU:C:1990:259, paragraph 32).

223 The interest rate to be applied is calculated on the basis of the rate set by the European Central Bank (ECB) for main refinancing operations, as applicable during the period in question, increased by two percentage points (judgments of 17 March 2005, *AFCon Management Consultants and Others* v *Commission*, T-160/03, EU:T:2005:107, paragraph 133; of 26 November 2008, *Agraz and Others* v *Commission*, T-285/03, not published, EU:T:2008:526, paragraph 55; and of 25 November 2014, *Safa Nicu Sepahan* v *Council*, T-384/11, EU:T:2014:986, paragraph 151).

224 Consequently, the compensation in respect of the loss of an opportunity and the costs and expenses connected with participating in the tendering procedure, including compensatory interest borne by that compensation, must be increased by default interest, starting from the date of delivery of the present judgment and continuing until full payment, the rate of which is that applied by the ECB to its principal refinancing operations, increased by two percentage points.

IV. Costs

225 The costs must be reserved.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Orders the European Union to pay compensation for the damage suffered by Vakakis kai Synergates — Symvouloi gia Agrotiki Anaptixi AE Meleton in relation to the loss of an opportunity to be awarded the contract 'Consolidation of the Food Safety System in Albania' (EuropeAid/129820/C/SER/AL) and for the costs and expenses incurred in participating in that call for tenders;**

2. **Orders that the compensation referred to in point 1 of the present operative part be increased by default interest, starting from the date of delivery of the present judgment until full payment, at the rate set by the European Central Bank (ECB) for its main refinancing operations, increased by two percentage points;**

3. **Dismisses the action as to the remainder;**

4. **Orders the parties to inform the Court, within three months from the date of delivery of the present judgment, of the amount of compensation arrived at by agreement;**

5. **Orders that, in the absence of agreement, the parties shall transmit to the Court, within the same period, a statement of their views with supporting figures;**

6. **Reserves the costs.**

Frimodt Nielsen Kreuschitz Forrester

Półtorak Perillo

Delivered in open court in Luxembourg on 28 February 2018.

E. Coulon
Registrar

M. van der Woude
President

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