

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 11 May 2017 (1)

Case C-677/15 P

**European Union Intellectual Property Office
(EUIPO)**

v

**European Dynamics Luxembourg SA,
Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE,
European Dynamics Belgium SA**

(Appeal — Public service contracts — External service provision for programme and project management and technical consultancy in the field of information technologies — Cascade procedure — Weighting of sub-criteria within the award criteria — Principles of equal opportunity and transparency — Manifest errors of assessment — Failure to state reasons — Loss of opportunity — Non-contractual liability of the EU — Decision to rank the applicant's tender in third place for the purposes of the cascade contract — Claim for damages)

I. Introduction

1. By the present appeal, the European Union Intellectual Property Office (EUIPO) (2) ('the appellant') requests that the judgment of the General Court of the European Union of 7 October 2015, *European Dynamics Luxembourg and Others v OHIM (T-299/11)* ('the judgment under appeal') (3) be set aside. By that judgment, the General Court:

- annulled the decision of EUIPO, adopted in the context of an open call for tenders for the provision of IT services and communicated to European Dynamics Luxembourg SA by letter of 28 March 2011, to rank the latter's bid in third position in the 'cascade' mechanism for the purposes of awarding a framework contract and to rank the bids of Consortium Unisys SLU and Charles Oakes & Co. Sàrl, on the one hand, and of ETIQ Consortium (by everis and Trasys), on the other, in first and second positions respectively ('the contested decision'), and
- ordered the European Union to pay compensation for the harm suffered by European Dynamics Luxembourg for the loss of an opportunity to be awarded the framework contract as the contractor ranked first in the cascade.

II. Legal context

2. Regulation (EC, Euratom) No 1605/2002 (4) ('the Financial Regulation') sets out the basic rules governing the entire budgetary sphere in matters such as public procurement.

3. According to the first subparagraph of Article 100(2) of that regulation, 'the contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded'.

4. Article 149 of Regulation (EC, Euratom) No 2342/2002 (5) sets out the contracting authority's obligations in respect of informing candidates and tenderers under Article 100(2) of the Financial Regulation.

5. Article 115(1) of Regulation (EC) No 207/2009 on the Community trade mark (6) provides that 'the Office shall be a body of the Union. It shall have legal personality.'

6. Article 118(3) of that regulation provides that 'in the case of non-contractual liability, the Office shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties'.

III. Background to the dispute, the action before the General Court and the judgment under appeal

7. The facts of the present case were set out in paragraphs 1 to 28 of the judgment under appeal.

8. On 6 June 2011 European Dynamics Luxembourg, Evropaiki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE and European Dynamics Belgium SA ('European Dynamics Luxembourg and Others' or 'the respondents') lodged an application before the General Court. Having withdrawn one of their heads of claim at the hearing, they claimed that that Court should:

- annul the contested decision ranking the bid of European Dynamics Luxembourg third in the cascade mechanism;
- annul all other related decisions of EUIPO, including those awarding the contract in question to the tenderers ranked first and second in the cascade mechanism;
- order EUIPO to pay compensation of EUR 650 000 for the harm they had suffered due to the loss of an opportunity and the damage to their reputation and credibility, and
- order EUIPO to pay the costs.

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

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

11. First of all, the General Court held, in paragraph 48 of the judgment under appeal, that EUIPO's negative comment on the bid of European Dynamics Luxembourg that the bids obtaining a higher score than it obtained under the first award criterion 'identified change management and

communication as the two most essential tasks for the success of the project’, shows that EUIPO applied a weighting to the various sub-criteria within the first award criterion. In paragraph 53 of that judgment, the General Court found that, since such weighting was not provided for by the tender specifications or communicated in advance to the tenderers, EUIPO breached, to the detriment of European Dynamics Luxembourg and Others, the principles of equal opportunity and transparency. Accordingly, in paragraph 55 of that judgment, the General Court upheld the second plea in part.

12. Next, in its examination of the third plea, the General Court considered that certain negative comments made by EUIPO, concerning the assessment of the bid in question in respect of the first and second award criteria, are vitiated by a manifest error of assessment.

13. First, the General Court found, in paragraph 91 of the judgment under appeal, that, since the negative comment referred to in point 11 of the present Opinion is vitiated by a breach of the principles of equal opportunity and transparency, that judgment is necessarily also vitiated by a manifest error of assessment.

14. Secondly, the General Court held, in paragraph 102 of that judgment, that the negative comment, concerning the assessment of that bid in respect of the second award criterion, that it did not provide ‘any example of a delivery’ stems from a manifest error of assessment since there is no support for it in the tender specifications.

15. Furthermore, the General Court held in paragraphs 86, 89 and 95 of that judgment that a number of EUIPO’s other comments in connection with the evaluation of the same bid in respect of the first award criterion are vitiated by a failure to provide reasons for the purposes of the second paragraph of Article 296 TFEU, read in conjunction with Article 100(2) of the Financial Regulation, and so the General Court was unable to determine whether EUIPO made manifest errors of assessment with regard to those comments.

16. Consequently, the General Court upheld the third plea concerns the complaints against EUIPO’s comments referred to in points 13 and 14 of this Opinion, and rejected it as to the remainder.

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

18. In the light of the above considerations, the General Court, in paragraph 136 of that judgment, annulled the contested decision in its entirety.

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

20. The General Court found that the conditions were fulfilled for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU.

21. First of all, in paragraph 141 of the judgment under appeal, the General Court held that, since the claim for damages was based on the same unlawful conduct as that relied on in support of the application for annulment and the General Court found some instances of such conduct, the condition concerning the existence of unlawful conduct on the part of the institutions or bodies of the European Union was fulfilled.

22. Next, the General Court held in paragraph 143 of that judgment that a causal link could not be held to exist between the several instances of failure to state reasons established and the harm invoked. On the other hand, in paragraph 144 of that judgment, the General Court found that the substantive unlawful conduct which it had also established was likely to affect the opportunity available to European Dynamics Luxembourg to have its bid ranked in first or second position in the cascade mechanism.

23. Lastly, the General Court examined whether European Dynamics Luxembourg suffered actual harm. First, it found in paragraphs 144 to 146 of the judgment under appeal that the loss of opportunity suffered by that company constituted actual and certain harm. However, the General Court considered in paragraph 147 of that judgment that it was not able at that stage of the proceedings to rule on the quantum of that harm. Secondly, the General Court, in paragraph 155 of that judgment, did not consider it necessary to determine whether there was any harm to the reputation and credibility of European Dynamics Luxembourg and Others, since the annulment of the award decision was, in principle, sufficient to make good the damage caused by such harm.

24. Consequently, the General Court, in paragraph 156 of the judgment under appeal, upheld the claim for damages in part. In paragraph 157 of that judgment, the General Court requested the parties to reach agreement on the amount to be awarded as compensation in respect of the loss of opportunity, in the light of the considerations set out in paragraphs 149 to 154 of that judgment, and to inform the General Court of their agreement. Failing such agreement, the parties were requested to send the General Court a statement of their views with supporting figures.

IV. Procedure before the Court of Justice and forms of order sought

25. By its appeal, EUIPO claims that the Court should:

- set aside the judgment under appeal and dismiss the application for annulment of the contested decision and the claim for damages submitted at first instance;
- in the alternative, set aside that judgment and refer the case back to the General Court;
- in the further alternative, set aside that judgment in so far as it orders the European Union to pay damages for the harm suffered by European Dynamics Luxembourg and refer the case back to the General Court, and
- order the respondents to pay the costs of the proceedings.

26. European Dynamics Luxembourg and Others contend that the Court should dismiss the appeal and order EUIPO to pay the costs of both sets of proceedings.

V. Analysis

A. Preliminary observations

27. By the judgment under appeal, the General Court annulled the contested decision on the grounds that there had been of a breach of the principles of equal opportunity and transparency (paragraph 53 of that judgment), two manifest errors of assessment (paragraphs 91 and 102 of the judgment), and several instances of failure to state reasons (paragraphs 86, 89, 95 and 135 of the judgment) vitiating EUIPO's assessment of European Dynamics Luxembourg's bid.

28. EUIPO puts forward four grounds in support of its appeal. The first ground alleges an error of law and a failure to state reasons on the part of the General Court in finding that the contested decision breaches the principles of equal opportunity and transparency. In its second ground of appeal EUIPO claims that the judgment under appeal is vitiated by errors of law in that the General Court annulled that decision on the basis of manifest errors of assessment. The third ground of appeal alleges that the General Court erred in law in finding several infringements of the obligation to state reasons which vitiated that decision, and in annulling the decision accordingly. In the fourth ground of appeal, EUIPO claims that the General Court erred in law and failed to state reasons in that the judgment upholds the claim for damages brought by European Dynamics Luxembourg and Others.

29. For the reasons set out below, I consider that the General Court, in its examination of the application for annulment, erred in law in finding a breach of the principles of equal opportunity and transparency (paragraph 53 of the judgment under appeal) and made a manifest error of assessment

(paragraph 91 of that judgment) vitiating the evaluation of the bid in question in respect of the first award criterion. (7) However, the grounds of appeal do not, in my view, establish that the General Court erred in law in finding instances of failure to state reasons (paragraphs 86, 89, 95 and 135 of that judgment) and a manifest error of assessment (paragraph 102 of the judgment) vitiating the evaluation of that bid under the first and second award criteria, respectively. (8)

30. As I shall also explain below, the errors of law vitiating paragraphs 53 and 91 of the judgment under appeal have the effect, in my view, of setting aside the judgment only in so far as it orders the European Union to pay compensation for the harm suffered by European Dynamics Luxembourg. (9) Moreover, that judgment appears to me to be vitiated by an inadequate statement of reasons in that regard. (10)

31. I consider, however, that the Court has sufficient information to dispose of the case itself, as it is permitted to do under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union ('the Statute'), as regards the claim for damages brought at first instance. In that context it should, in my view, reject that claim. (11)

B. The first ground of appeal: an error of law and a failure to state reasons in so far as the judgment under appeal finds a breach of the principles of equal opportunity and transparency

32. The first ground of appeal is directed against paragraph 53 of the judgment under appeal and comprises two parts.

1. First part of the first ground of appeal

33. By the first part of the first ground of appeal, EUIPO claims that the General Court erred in law in ruling that the contested decision breaches the principles of equal opportunity and transparency, in so far as the bid in question was evaluated under the first award criterion using factors for weighting sub-criteria within that award criterion which were not apparent from the tender specifications and were not communicated to the tenderers.

34. According to the appellant, the assessment in paragraph 53 of the judgment under appeal, which establishes an 'automatic causal link' between the introduction of those weighting factors and the breach of those principles, is based on a misinterpretation of the Court's case-law and, moreover, is not supported by sufficient reasoning. EUIPO points out that, according to the judgment in *ATI EAC e Viaggi di Maio and Others* (12) and two subsequent judgments, (13) the contracting authority may, without necessarily informing the tenderers, attach specific weight to the various subheadings of an award criterion which are defined in advance, provided certain conditions are met, and those conditions were met in the present case.

35. European Dynamics Luxembourg and Others claim that the first ground of appeal is inadmissible, since it relates to arguments which EUIPO did not rely on at any of the earlier stages in the proceedings. On the substance, the respondents maintain, in essence, that the General Court followed that case-law in so far as, even though it did not cite it, that Court held that the introduction of those weighting factors without prior notification caused the respondents harm.

36. The plea of inadmissibility raised by European Dynamics Luxembourg and Others should be rejected, in my view. Irrespective of the fact that EUIPO, the defendant at first instance, did not raise them before the General Court, its arguments in respect of the first ground of appeal seek to criticise, in law, the legal solution provided by the General Court to the pleas and arguments raised before that Court. (14) Examination of that solution does indeed come within the jurisdiction of the Court of Justice in the context of an appeal. (15)

37. As regards the examination of the substance of the first part of the first ground of appeal, I note, as a preliminary point, that the parties do not dispute the General Court's finding, in paragraph 48 of the judgment under appeal, that EUIPO introduced factors for weighting sub-criteria within the first award criterion. (16) The appellant does, however, claim that the General Court erred in finding that the introduction of those factors was unlawful.

38. That said, I consider that in paragraph 53 of that judgment the General Court misapplied the Court's case-law cited in paragraph 48 of the judgment, namely paragraph 38 of the judgment in *Lianakis and Others*. (17)

39. It is clear from that paragraph that the contracting authority must not introduce, without previously bringing them to the tenderers' attention, either new sub-criteria or weighting rules in respect of award *criteria*.

40. In the present case, however, the contested assessments concerned the introduction of weighting factors not for the award criteria but for the *sub-criteria* within one of the award criteria.

41. The Court of Justice has recognised that the contracting authority enjoys more latitude in that regard. As the Court established in the judgment in *ATI EAC e Viaggi di Maio and Others* (18) and reiterated in the judgments in *Lianakis and Others*, (19) *Evropaiki Dynamiki v EMSA* (20) and *TNS Dimarso*, (21) weighting factors for sub-criteria within award criteria can be introduced after expiry of the time limit for submitting tenders provided three conditions are met. First, that *ex post* determination must not alter the criteria for the award of the contract set out in the contract documents or the contract notice. Secondly, it must not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation. Thirdly, it must not have been adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

42. In my view, it is the latter line of case-law which the General Court should have applied. That Court should therefore have determined whether the arguments put forward in the application established that EUIPO had failed to meet those conditions. (22)

43. Consequently, the General Court misconstrued the scope of the principles of equal opportunity and transparency, as established in the case-law cited in point 41 of this Opinion, and so paragraph 53 of the judgment should appeal is vitiated by an error of law. That judgment should therefore be set aside in that regard.

44. Where a judgment has thus been set aside, the first paragraph of Article 61 of the Statute provides that the Court may either refer the case back to the General Court or itself give final judgment in the matter, where the state of the proceedings so permits.

45. In this case, it seems to me that the Court is in a position to determine itself, on the basis of the evidence before the General Court and in the light of the considerations set out in points 41 and 42 of this Opinion, whether the plea contained in the application at first instance alleging breach of the principles of equal opportunity and transparency vitiating the contested decision is well founded.

46. In the light of that evidence, this does not appear to me to be the case: *European Dynamics Luxembourg and Others* did not claim, still less prove, before the General Court that the three conditions set out in the judgment in *ATI EAC e Viaggi di Maio and Others* (23) and the subsequent case-law (24) were not met in the present case.

47. Moreover, the error of law concerning paragraph 53 of the judgment under appeal also affects the basis for paragraph 91 of that judgment, in which the General Court found that the contested decision is vitiated by a manifest error of assessment since it takes into account a weighting of the sub-criteria of the first award criterion not previously communicated to the tenderers. (25) As it appears from that paragraph, the finding of the manifest error of assessment 'necessarily follows' from the finding of breach of the principles of equal opportunity and transparency vitiating that decision.

48. However, the appellant does not expressly challenge — either in the first ground of appeal or any other ground of appeal — the finding made in paragraph 91 of the judgment under appeal. (26) Is it nonetheless possible for the Court of Justice to raise of its own motion the point that that paragraph is 'contaminated' by the error of law vitiating paragraph 53 of that judgment?

49. That question should, in my view, be answered in the affirmative. I would observe in that regard that if the finding that the contested decision breaches the principles of equal opportunity and transparency was rejected as invalid, that would deprive paragraph 91 of that judgment of all reason.

The Court has previously held that inadequate reasoning vitiating a judgment of the General Court constitutes an infringement of an essential procedural requirement and is a matter of public policy. (27) Accordingly, in my view, the Court should be able to decide, where it finds, in response to a ground of appeal, an error of law vitiating a finding of the General Court, that the error also vitiates another finding by that Court, the reasoning for which is based purely on that first finding.

50. Accordingly, I consider that the judgment under appeal should be set aside also in so far as it establishes a manifest error of assessment vitiating the evaluation of the bid in question under the first award criterion. It is not necessary, however, to refer the case back to the General Court or for the Court of Justice to dispose of the case itself for the purpose of examining the substance of the complaints in the application alleging manifest errors of assessment vitiating that evaluation. The General Court held, in paragraph 95 of the judgment under appeal, that the contested decision fails to provide sufficient reasons in that regard and so that Court was unable to give a ruling on whether or not such manifest errors existed (apart from the error it referred to in paragraph 91 of that judgment). As will be made clear in my examination of the first part of the third ground of appeal, the appellant has not established that that finding is flawed. (28)

51. I shall examine the question of the extent to which the operative part of that judgment must be set aside on account of the errors of law vitiating paragraphs 53 and 91 of the judgment after considering the other grounds of the appeal. (29)

2. *Second part of the first ground of appeal*

52. The second part of the first ground of appeal alleges infringement of the obligation to state reasons, incumbent on the General Court under the first sentence of Article 36 and the first paragraph of Article 53 of the Statute. EUIPO submits, in essence, that the General Court failed to comply with that obligation in finding, in paragraph 53 of the judgment under appeal, a breach of the principles of equal opportunity and transparency, to the detriment of the respondents, without determining whether the three conditions set out in the judgment in *ATI EAC e Viaggi di Maio and Others* (30) were met, or at least stating the reasons why they were not.

53. Given that the analysis of the first part of the first ground of appeal has already led to the conclusion that there is an error of law vitiating paragraph 53 of the judgment under appeal, it is not necessary to examine the substance of the second part of that ground.

54. For the sake of completeness, however, I would observe that, according to settled case-law, the obligation on the General Court to state reasons requires that Court to give reasons for its judgments in such a way as to enable the persons concerned to know why the General Court has not upheld their arguments and to provide the Court of Justice with sufficient material for it to exercise its power of review. (31)

55. In applying the reasoning set out in paragraphs 48 to 52 of the judgment under appeal to support the finding contained in paragraph 53 of that judgment, and making reference to the case-law cited in paragraph 44 of that judgment, the General Court fulfilled those requirements in my view. I consider that the assessment in paragraph 53 of that judgment is vitiated not by a failure to state reasons, in as much as the General Court failed to explain how application of the relevant legal test would have justified the conclusion that there was a breach of the principles of equal opportunity and transparency, but rather — as is clear from the examination of the first part of the first ground of appeal — by an error of law in that the General Court applied another legal test that was irrelevant in the circumstances of the case.

56. Accordingly, the second part of the first ground of appeal is unfounded.

C. *Second ground of appeal and second part of the third ground of appeal: errors of law in so far as the judgment under appeal annuls the contested decision on the basis of manifest errors of assessment and failure to state reasons*

57. The second ground of appeal alleges that the General Court erred in law in finding, in paragraph 136 of the judgment under appeal, that the contested decision must be annulled without

examining whether the manifest errors of assessment found in paragraphs 91, 95, 96, and 97 to 103 of that judgment had any impact on the final outcome of the tendering procedure.

58. By the second part of the third ground of appeal, EUIPO claims that the General Court erred in annulling that decision without determining whether the instances of failure to state reasons found in paragraphs 86, 89, 95 and 135 of that judgment were sufficient, in themselves or in combination with the manifest errors of assessment which it also established, to affect that outcome.

59. In the second ground of appeal and of the second part of the third ground of appeal, the appellant relies on two judgments of the General Court.

60. First, it cites the case-law of the General Court according to which, where the General Court finds that an award decision is vitiated by inadequate reasoning, the decision cannot be annulled on that ground unless other components of that decision which are not vitiated by inadequate reasoning do not provide a sufficient legal basis justifying that decision. (32) According to EUIPO, that case-law should be applied by analogy where the General Court finds a manifest error of assessment vitiating an award decision.

61. EUIPO refers, secondly, to a judgment in which the General Court held that, where the score given to a tender under a given award criterion is based on several negative comments, including one or more which are vitiated by a manifest error of assessment, that score and the evaluation on which it is based are not vitiated by such an error if the score is also based on comments which are free from manifest errors of assessment. (33)

62. According to the respondents, those precedents are not applicable in the present case.

63. I propose to examine the second ground of appeal and the second part of the third ground of appeal together.

64. In that regard, I note from the outset that the appellant does not claim, still less prove, that the manifest errors of assessment and/or the instances of failure to state reasons found by the General Court could not have had any impact on the outcome of the tendering procedure and therefore did not justify annulment of the contested decision. It merely complains that the General Court failed to examine expressly whether those irregularities affected the outcome of that procedure.

65. That complaint seems to me to be based on a misunderstanding of the requirements placed on the General Court.

66. Naturally, the General Court cannot annul an award decision on grounds of irregularities vitiating the decision where other components of that decision which are not vitiated by irregularities are sufficient to justify the final outcome. In such a situation, the pleas alleging those irregularities are ineffective, since, even if they were well founded, they would not bring about annulment of that decision. (34) That is so where, even without the irregularities referred to in those pleas, the decision would not have been more favourable to the applicant.

67. In this regard, the General Court — rightly in my view — has repeatedly held that the inadequacy of the statement of reasons vitiating certain assessments of the contracting authority cannot have the effect of annulling the decision rejecting a tender in a situation where, even if that tender had been awarded the full number of points available for the award criteria or sub-criterion in respect of which the statement of reasons was inadequate, it would not have scored the minimum number of points that would have enabled it to proceed to the financial stage or the stage of the comparative selection of tenders. (35)

68. The same logic dictates that in a situation where, as in the present case, the contracting authority has ranked a bid in a favourable position under a cascade mechanism but has not placed it in first position, the pleas in the application are ineffective if, even if that bid has been awarded the full number of points available in respect of the award criteria to which the assessments allegedly vitiated by an irregularity relate, it has obtained a final score below that of the bids that are ranked higher under the cascade mechanism.

69. However, I do not think that the General Court is required to state expressly the reasons why it considers that the pleas in the application are not ineffective. The General Court is, in my view, required not to annul an award decision only where those pleas are actually ineffective — that is to say, as is clear from the foregoing, where the irregularities referred to in those pleas, viewed overall, could not have had any impact on the outcome of the tendering procedure.

70. The appellant has not established or even claimed that, even without the various irregularities found by the General Court, the contested decision would not have been more favourable to European Dynamics Luxembourg.

71. In the light of all the foregoing, the second ground of appeal and the second part of the third ground of appeal must be rejected as unfounded.

D. Third ground of appeal: an error of law in that the judgment under appeal finds that the contested decision is vitiated by instances of failure to state reasons justifying its annulment

72. In its third ground of appeal, which can be divided into three parts, EUIPO claims that the General Court committed several errors of law by finding, in paragraphs 134 and 135 of the judgment under appeal, that the contested decision is vitiated by instances of failure to state reasons and by annulling the decision on that basis.

1. First part of the third ground of appeal

73. The appellant claims, in the first part of the third ground of appeal, that the General Court misconstrued the scope of the obligation to state reasons incumbent on the contracting authority under Article 100(2) of the Financial Regulation. In examining each of the evaluation committee's comments separately, whilst failing to consider the broader context of the evaluation in which they were made, the General Court, it is alleged, construed that obligation more narrowly than is required by the case-law of the Court cited in paragraph 129 of the judgment under appeal. (36) According to that case-law, the contracting authority is not required to provide an unsuccessful tenderer with a detailed summary of how each detail of its tender was taken into account or a detailed comparative analysis of that tender and the successful tender.

74. The respondents counter this by saying that the General Court, rightly, limited itself to examining the pleas raised in the application, which focus on certain specific comments.

75. In my view, the arguments put forward by EUIPO do not show that the General Court — in order to reach the findings in paragraphs 86, 89, 95 and 135 of the judgment under appeal that EUIPO's assessments referred to in paragraphs 81, 87 and 90 of that judgment were vitiated by failure to state reasons (37) — applied a stricter test than that established by the case-law of the Court.

76. As is clear from paragraphs 85, 88, 93 and 94 of that judgment, the General Court found that EUIPO had failed to state reasons on the basis, inter alia, of the lack of precision in the tender specifications and the brief and vague judgments of the evaluation committee. It concluded from this, in paragraph 94 of the judgment, that 'neither [European Dynamics Luxembourg and Others] nor the [General] Court are in a position to understand how the contracting authority awarded ... the points available under the first award criterion and its various sub-criteria'. Accordingly, in paragraph 95 of the judgment under appeal, the General Court stated that it was not in a position to carry out a substantive review of the disputed assessments. Moreover, in paragraph 134 of the judgment, the General Court stated that those assessments constituted essential and necessary reasons for the proper understanding of the evaluation of the tenders.

77. Thus, the General Court, whilst assessing each of the contested comments in the application separately, also placed them in the overall context of the evaluation of the bid in question in respect of the first award criterion and concluded therefrom that that evaluation contained insufficient reasons.

78. The appellant did not, moreover, explain in what way, by that line of reasoning, the General Court required the contracting authority to provide a detailed summary of how each detail of that bid

was taken into account and a detailed comparative analysis of that bid and the bids that were ranked higher.

79. Consequently, the first part of the third ground of appeal is unfounded.

2. *Second part of the third ground of appeal*

80. As is clear from points 64 to 71 of this Opinion, I consider that the second part of the third ground of appeal is unfounded.

3. *Third part of the third ground of appeal*

81. In the third part of the third ground of appeal, EUIPO claims, first, that the judgment under appeal contains a contradiction in that, on the one hand, in the examination of the third plea, the General Court, in paragraphs 112 to 115 and 121 of that judgment, did not find any manifest error of assessment or any failure to state reasons vitiating the evaluation of the tender of European Dynamics Luxembourg in respect of the fourth award criterion and, on the other, at the end of the examination of the first plea, the General Court concluded, in paragraphs 134 and 135 of the judgment, that it was unable to carry out an examination of the substantive legality of the contested decision in respect of that evaluation and that that decision is therefore vitiated by a manifest error of assessment.

82. Secondly, the appellant contends that, in any event, the General Court failed to fulfil its obligation to state reasons, in that it held that it was unable to carry out such an examination, although it had done so in paragraphs 112 to 115 of that judgment and concluded from the examination that there was no manifest error of assessment vitiating the evaluation of the tender at issue under the fourth award criterion.

83. The respondents dispute the existence of such a contradiction.

84. In my view, in so far as EUIPO argues, first, that paragraph 135 of the judgment under appeal contradicts other paragraphs of that judgment, in that it finds a manifest error of assessment, that argument is based on a misreading of the judgment. In paragraph 135 of the judgment, the General Court did not point to a manifest error of assessment but, rather, to several instances of failure to state reasons.

85. However, in my view, EUIPO is right to claim, secondly, that the General Court infringed its obligation to state reasons since it ‘recalled’, in paragraph 134 of that judgment, that, in the examination of the third plea, it was unable to examine the substantive legality of the contested decision as regards the evaluation of the tender in question from the viewpoint of the fourth award criterion, even though that conclusion is by no means apparent from the examination of the third plea. On the contrary, in paragraphs 112 to 115 of the judgment, the General Court did indeed carry out such an examination, at the end of which it rejected the complaint alleging a manifest error of assessment vitiating that evaluation. (38)

86. That contradiction stems, in my view, from a simple clerical error that has no bearing on the General Court’s reasoning and cannot seriously affect the understanding of the judgment under appeal or EUIPO’s rights of defence. This is shown by the fact that, in paragraph 134 *in fine* of that judgment, the General Court referred only to paragraphs 81 to 86, 87 to 89 and 90 to 95 of the judgment — which concern the examination of the complaints relating to the first award criterion — but did not cite the paragraphs of the judgment dealing with the part relating to the fourth award criterion. That clerical error does not therefore vitiate the judgment under appeal by a failure to state reasons that would justify it being set aside on that point. (39)

87. In any event, since the failure to state reasons which results from that contradiction has no impact on the operative part of the judgment under appeal, (40) the third part of the third ground of appeal should be rejected as ineffective. (41)

E. Fourth ground of appeal: an error of law and a failure to state reasons in so far as the judgment under appeal upholds the claim for damages

88. The fourth ground of appeal is directed against paragraphs 141, 144, 146 and 150 and against point 2 of the operative part of the judgment under appeal. That ground can be divided into three parts.

1. First part of the fourth ground of appeal

89. In the first part of the fourth ground of appeal, the appellant claims that the General Court erred in considering that the conditions whereby the European Union incurs non-contractual liability were met.

90. First, having regard to the arguments put forward in support of the first to third grounds of the appeal, it is claimed that the finding that the contested decision is vitiated by unlawful conduct is based on errors of law.

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

92. The respondents counter this by saying that that judgment established to the requisite legal standard that the conditions for the European Union to incur non-contractual liability were met.

93. As regards, in the first place, the claim that EUIPO acted unlawfully, I would repeat that, in my view, the first to third grounds of appeal do not affect the findings of the General Court relating, first, to a manifest error of assessment vitiating the assessment of the bid in question under the second award criterion (paragraph 102 of the judgment), and, secondly, the failure to state reasons concerning the assessment of that tender under the first award criterion (paragraphs 86, 89, 95 and 135 of that judgment). Accordingly, the appellant has not shown that the General Court erred in law in finding that the contracting authority acted unlawfully.

94. Secondly, as regards the statement of reasons concerning the existence of a causal link between the manifest errors of assessment found by the General Court and the damage suffered by European Dynamics Luxembourg, EUIPO's line of argument concerns, in essence, the conclusions to be drawn from the fact that the first ground of appeal was upheld. I shall examine them in points 107 to 128 of this Opinion. I should state at this point that that line of argument is, in my view, well founded.

2. Second part of the fourth ground of appeal

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

96. The respondents contend that there is no such a contradiction and that the reference, in the operative part, to the loss of an opportunity to enter into the framework contract as the contractor ranked first reflects the full extent of the loss of opportunity suffered by European Dynamics Luxembourg.

97. In my view, the appellant is right to claim that there is a contradiction between paragraphs 144, 146 and 150 of the grounds of the judgment under appeal and point 2 of the operative part of that judgment. (42)

98. That point of the operative part reflects the extent of the claim for damages brought before the General Court. As is clear from paragraph 137 of the judgment under appeal, apart from compensation for non-material damage, that claim was limited to compensation for the loss of an opportunity to enter into the contract in question as the successful tenderer ranked first.

99. On the other hand, paragraphs 144, 146 and 150 of that judgment refer, incorrectly, to the loss of an opportunity to be awarded that contract as the tenderer ranked first or second under the cascade mechanism, whereas that loss of opportunity exceeds the extent of the damage for which European Dynamics Luxembourg and Others claimed compensation.

100. Furthermore, that contradiction regarding the definition of the damage suffered, has practical consequences, in that, among the considerations to be taken into account in order to determine the extent of compensation, the General Court referred, in paragraph 150 of the judgment under appeal, to the probability of the bid in question being ranked first or second under the cascade mechanism had the various instances of substantive unlawful conduct which it established not occurred. Clearly, the probability of that bid being ranked first or second is higher than of it being ranked first.

101. Consequently, the second part of the fourth ground of appeal is well founded. (43)

3. *Third part of the fourth ground of appeal*

102. The third part of the fourth ground of appeal, put forward in the alternative, alleges a clerical error vitiating point 2 of the operative part of the judgment under appeal, in that it orders the European Union, not EUIPO, to pay compensation for the harm suffered by European Dynamics Luxembourg. The appellant considers that, under Article 115 and Article 118(3) of Regulation No 207/2009, that order should have been made against EUIPO.

103. According to the respondents, the reference to the European Union is not incorrect, since that entity has overall liability for unlawful conduct on the part of its institutions and bodies. In any event, even if that reference constitutes a clerical error, it cannot have the effect of setting aside the judgment under appeal.

104. That part of that ground of appeal seems to me to be unfounded. The second paragraph of Article 340 TFEU provides that the *European Union* is required to make good any damage caused by its institutions or by its servants in the performance of their duties. That liability is not altered by the fact that Article 118(3) of Regulation No 207/2009 also provides that *EUIPO* is required to make good any damage caused by its departments or by its servants in the performance of their duties. The latter provision, in my view, reflects the fact that the institutions and bodies of the European Union, such as EUIPO, represent the Union in their respective fields of competence. (44) Both EUIPO and the European Union, each of which has legal personality, (45) may therefore be held liable for damage caused by EUIPO in the performance of its duties. The General Court did not therefore err in law when, in point 2 of the operative part of the judgment under appeal, it imposed the obligation to make good the damage concerned on the European Union.

105. In any event, even if that point is based on a clerical error, it is a clerical error which is not capable of seriously affecting the understanding of the judgment under appeal or the appellant's rights of defence, so that it cannot have the effect of setting aside that judgment. (46)

106. The third part of the fourth ground of appeal must therefore be rejected.

F. *Setting aside the judgment under appeal and examination of the substance of the case*

107. At the end of my examination of the first part of the first ground of appeal, I concluded that the General Court erred in law in finding, in its consideration of the application for annulment, that the evaluation of the bid in question in respect of the first award criterion is vitiated by a breach of the principles of equal opportunity and transparency (paragraph 53 of the judgment under appeal) and a manifest error of assessment (paragraph 91 of that judgment). (47) At the end of my examination of the second part of the fourth ground of appeal I concluded that, in its consideration of the claim for damages, the General Court infringed its obligation to state reasons. (48)

108. It is appropriate first of all to determine whether those irregularities have the effect of setting aside that judgment, in so far as it annuls the contested decision and/or in so far as it upholds the claim for damages. If they do have that effect, the next question that arises is whether the state of the proceedings permits final judgment to be given by the Court of Justice or whether the case should be referred back to the General Court.

1. The judgment under appeal must be set aside only in so far as it orders the European Union to pay compensation

109. In my view, the errors of law vitiating paragraphs 53 and 91 of the judgment under appeal do not have the effect of setting aside that judgment in so far as it annuls the contested decision (point 1 of the operative part).

110. That is so because if the grounds of a judgment of the General Court disclose a breach of EU law, but its operative part appears well founded on other grounds given by the General Court, that breach is not such as to require that that judgment be set aside, and therefore the plea that it should be set aside is ineffective. (49)

111. In the present case, in paragraph 136 of that judgment, the General Court justified annulment of the contested decision on the basis of all the irregularities it had found, which vitiate the evaluation of the bid in question from the point of view of the first and second award criteria. The irregularities other than those found in paragraphs 53 and 91 of that judgment, in so far as they concern the evaluation of that bid in respect of both the first award criterion (paragraphs 86, 89, 95 and 135 of the judgment under appeal) and the second award criterion (paragraph 102 of that judgment), are sufficient to justify the General Court's conclusion that that decision should be annulled.

112. Consequently, point 1 of the operative part of the judgment under appeal remains well founded despite the errors of law on the part of the General Court.

113. However, I consider that that judgment should be set aside in so far as it orders compensation to be paid for the harm suffered by European Dynamics Luxembourg as a result of the loss of an opportunity to be awarded the contract as the successful tenderer ranked first under the cascade mechanism (point 2 of the operative part). Consequently, points 4 and 5 of the operative part, which concern the determination of the amount of compensation, will be devoid of purpose and should also be set aside.

114. The same applies, in the first place, to the plea that the General Court failed to comply with its obligation to state reasons in so far as that judgment contains a contradiction between the grounds and the operative part as regards the definition of the damage for which compensation may be awarded. (50)

115. Secondly and in any event, the finding that paragraphs 53 and 91 of the judgment under appeal are vitiated by errors of law has the effect, as the appellant claimed in the first part of the fourth ground of appeal, (51) of depriving of all effect the finding made in paragraph 144 of that judgment of a causal link between the alleged unlawful conduct on the part of EUIPO and the loss of opportunity claimed by European Dynamics Luxembourg and Others.

116. I note in that connection that the General Court concluded, in paragraph 143 of the judgment under appeal, that no causal link can be established between the instances of failures to state reasons (established in paragraphs 86, 89, 95 and 135 of that judgment) and that loss of opportunity. That conclusion is not disputed in the appeal. On the other hand, the General Court held in paragraph 144 of that judgment that a causal link does exist between the substantive unlawful conduct (established in paragraphs 53, 91 and 102 of the judgment) and that damage. However, paragraphs 53 and 91 of the judgment under appeal, in which the General Court pointed to instances of substantive unlawful conduct vitiating the evaluation of the bid in question under the first award criterion, are, in my view, vitiated by an error of law.

117. In those circumstances, in order for the European Union to incur liability, there must be a causal link between the only instance of substantive unlawful conduct vitiating the evaluation of that bid in

respect of the second award criterion (established in paragraph 102 of that judgment) and the loss of an opportunity to be ranked in first position under the cascade mechanism.

118. The judgment under appeal provides no reasons to suggest that there is such a causal link.

119. In paragraph 144 of that judgment, the General Court merely stated, first, that the bid in question received only 22.81 points out of a total of 40 points at the end of the comparative assessment under the first award criterion. The purpose of that statement is simply to establish a causal link between the instances of substantive unlawful conduct relating to the evaluation of that bid in respect of the first award criterion and the loss of opportunity claimed.

120. Secondly, the General Court stated that ‘the mere fact that [European Dynamics Luxembourg] was ranked third in the cascade mechanism and was thus accepted as a potential contractor, renders the premiss that the contracting authority could not be in a position to award it the contract in question implausible’. That consideration is insufficient, in my view, for the purpose of enabling EUIPO to understand the reasons why the General Court found that the substantive unlawfulness vitiating the evaluation of that bid in respect of the second award criterion resulted in that loss of opportunity, or enabling the Court of Justice to review this point, as required by that Court’s case-law. (52)

121. Whether there is a causal link between that substantive unlawfulness and the loss of opportunity suffered by European Dynamics Luxembourg, a question calling for assessments of a factual nature, must therefore be determined in the context of an examination of the substance of the case.

2. The claim for damages must be rejected following an examination of the substance of the case

122. In my view, the Court of Justice has sufficient information for the purpose of undertaking such an examination itself in order to dispose of the case under the first paragraph of Article 61 of the Statute.

123. It can be inferred from the figures given in paragraphs 12 and 20 of the judgment under appeal that, even if the bid of European Dynamics Luxembourg had obtained the total number of available points (30) under the second award criterion, it would not have been ranked higher, all other things being equal, than the bids ranked first and second under the cascade mechanism in the contested decision.

124. I would point out in that connection that if that bid had gained the 30 points available under that criterion, it would have obtained a ‘Sum of points (100)’ score (shown in the penultimate line of the table in paragraph 12 of the judgment under appeal) of 72.81. Since the coefficient applied to the ‘Sum of points (100)’ score in order to obtain the ‘Total technical points’ score (shown in the last line of that table) of the successful tenders was 1.09736, that bid would have obtained a ‘Total technical points’ score of 79.90.

125. The bid in question obtained, in addition, 83.69 finance points (as shown in the last column of the table in paragraph 20 of that judgment). As is clear from paragraph 150 of the judgment, the total number of technical points and the total number of finance points each count for 50% in the evaluation of the bids.

126. Hence, if that bid had been awarded 30 points under the second award criterion, it would, all other things being equal, have obtained a final score of 81.79/100. That score is lower than the final scores obtained by the bids ranked first and second, which were 87.99/100 and 83.40/100, respectively.

127. Consequently, there is no causal link between the manifest error of assessment found in paragraph 102 of that judgment and the loss of an opportunity for the bid of European Dynamics Luxembourg to be ranked in first position.

128. I conclude from this, given the cumulative nature of the conditions to be satisfied in order for the European Union to incur non-contractual liability, (53) that the claim for damages brought by European Dynamics Luxembourg and Others must be rejected. (54)

G. Costs

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

130. According to Article 138(1) of those rules, applicable to appeal proceedings under Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, the appellant claims that the respondents should be ordered to pay the costs and the respondents contend that the appellant should be ordered to pay the costs.

131. Article 138(3) of those rules states that, where each party succeeds on some and fails on other heads, each party is to bear its own costs. However, in the light of the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

132. In the present case, each party has succeeded on some and failed on other heads in the appeal and in the proceedings at first instance. However, in the light of the circumstances of the case, EUIPO, in addition to bearing its own costs, should pay two thirds of the costs incurred by European Dynamics Luxembourg and Others in both set of proceedings. European Dynamics Luxembourg and Others should bear one third of their own costs relating to both sets of proceedings. Such a division of the costs appears to me to be fair since European Dynamics Luxembourg and Others have, according to my proposal, succeeded in their application for annulment both at first instance and on appeal.

VI. Conclusions

133. In the light of the above considerations, I propose that the Court should:

- set aside points 2, 4 and 5 of the operative part of the judgment of the General Court of the European Union of 7 October 2015, *European Dynamics Luxembourg and Others v OHIM* (T-299/11, EU:T:2015:757);
- reject the claim for damages brought by European Dynamics Luxembourg SA, Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE and European Dynamics Belgium SA; and
- dismiss the appeal as to the reminder;
- order the European Union Intellectual Property Office (EUIPO) to bear its own costs and to pay two thirds of the costs incurred by those companies, and order those companies to bear one third of their own costs.

¹ Original language: French.

² Formerly known as the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), EUIPO has been known under its present name since 23 March 2016, the date of entry into force of Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (OJ 2015 L 341, p. 21), Article 1(7) of which provided for that name change.

³ T-299/11, EU:T:2015:757.

[4](#) Council Regulation of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1). That regulation was repealed, with effect from 1 January 2013, by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1). The facts that gave rise to the present proceedings continue, however, to be governed by Regulation No 1605/2002.

[5](#) Commission Regulation of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1), as amended by Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13).

[6](#) Council Regulation of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), as amended by Regulation (EU) No 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21).

[7](#) See points 38 to 43 and 47 to 50 of this Opinion.

[8](#) See points 64 to 71 and 75 to 79 of this Opinion.

[9](#) See points 109 to 121 of this Opinion.

[10](#) See points 97 to 101 of this Opinion.

[11](#) See points 122 to 128 of this Opinion.

[12](#) Judgment of 24 November 2005 (C-331/04, EU:C:2005:718, paragraph 32).

[13](#) Judgments of 24 January 2008, *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 43), and of 21 July 2011, *Evropaïki Dynamiki v EMSA* (C-252/10 P, not published, EU:C:2011:512, paragraph 33).

[14](#) See, in that regard, judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others v Commission* (C-176/06 P, not published, EU:C:2007:730, paragraph 17).

[15](#) See, inter alia, judgment of 21 September 2010, *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 126 and the case-law cited).

[16](#) In any event, that finding is based on factual appraisals, contained in paragraphs 49 to 52 of that judgment, which, save where the clear sense of the evidence on the file is distorted (which has not been claimed here), do not come within the jurisdiction of the Court in an appeal (see judgment of 30 November 2016, *Commission v France and Orange* (C-486/15 P, EU:C:2016:912, paragraph 98 and the case-law cited)).

[17](#) Judgment of 24 January 2008 (C-532/06, EU:C:2008:40). Paragraph 38 of that judgment reads: ‘a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers’ attention’.

[18](#) Judgment of 24 November 2005 (C-331/04, EU:C:2005:718, paragraph 32).

[19](#) Judgment of 24 January 2008 (C-532/06, EU:C:2008:40, paragraph 43).

[20](#) Judgment of 21 July 2011 (C-252/10 P, not published, EU:C:2011:512, paragraph 33).

[21](#) Judgment of 14 July 2016 (C-6/15, EU:C:2016:555, paragraph 26).

[22](#) See, to that effect, judgment of 2 March 2010, *Evropaïki Dynamiki v EMSA* (T-70/05, EU:T:2010:55, paragraph 155), upheld by the judgment of 21 July 2011, *Evropaïki Dynamiki v EMSA* (C-252/10 P, not published, EU:C:2011:512, paragraph 34).

[23](#) Judgment of 24 November 2005 (C-331/04, EU:C:2005:718, paragraph 32).

[24](#) See point 41 of this Opinion.

[25](#) The General Court reiterated that finding, moreover, in paragraphs 95 and 96 of the judgment under appeal.

[26](#) In particular, in its second ground of appeal the appellant does not criticise the General Court’s finding in paragraphs 91 and 102 of the judgment under appeal that the contested decision is vitiated by manifest errors of assessment, but rather the conclusions that the General Court drew from that finding (see points 57 and 58 of this Opinion).

[27](#) Judgment of 11 April 2013, *Mindo v Commission* (C-652/11 P, EU:C:2013:229, paragraphs 30 and 31). See also in that regard Opinion of Advocate General Mengozzi in *Commission v Scott* (C-290/07 P, EU:C:2010:78, paragraphs 36 to 45).

[28](#) See points 75 to 79 of this Opinion.

[29](#) See points 107 to 121 of this Opinion.

[30](#) Judgment of 24 November 2005 (C-331/04, EU:C:2005:718, paragraph 32).

[31](#) See, inter alia, judgment of 2 April 2009, *France Télécom v Commission* (C-202/07 P, EU:C:2009:214, paragraph 29 and the case-law cited), and order of 29 November 2011, *Evropaïki Dynamiki v Commission*

(C-235/11 P, not published, EU:C:2011:791, paragraph 30).

[32](#) Judgment of 10 April 2014, *Evropaiki Dynamiki v Commission* (T-340/09, not published, EU:T:2014:208, paragraphs 115 and 116).

[33](#) Judgment of 26 September 2014, *Evropaiki Dynamiki v Commission* (T-498/11, not published, EU:T:2014:831, paragraphs 196 and 197).

[34](#) See, to that effect, judgment of 2 February 2017, *European Dynamics Luxembourg and Evropaiki Dynamiki v Commission* (T-74/15, not published, EU:T:2017:55, paragraphs 69 and 81). In addition, in the judgment of 10 April 2014, *Evropaiki Dynamiki v Commission* (T-340/09, not published, EU:T:2014:208, paragraph 115), the General Court referred, by analogy, to the case-law of the Court relating to the concept of an ineffective plea in the context of an appeal (judgment of 12 July 2001, *Commission and France v TFI* (C-302/99 P and C-308/99 P, EU:C:2001:408, paragraphs 26 to 29).

[35](#) Judgments of 10 April 2014, *Evropaiki Dynamiki v Commission* (T-340/09, not published, EU:T:2014:208, paragraph 116); of 9 September 2010, *Evropaiki Dynamiki v Commission* (T-387/08, not published, EU:T:2010:377, paragraph 60); and of 12 July 2012, *Evropaiki Dynamiki v Frontex* (T-476/07, not published, EU:T:2012:366, paragraph 72).

[36](#) The appellant cites the judgment of 4 October 2012, *Evropaiki Dynamiki v Commission* (C-629/11 P, not published, EU:C:2012:617, paragraph 21).

[37](#) This is the comment that a senior project manager and a project manager were not needed for each project referred to in the tender in question (paragraph 81 of the judgment under appeal); the comment that ‘the whole [of that] offer is very operational instead of strategic and focuses on a different kind of project manager from that envisaged by [EUIPO]’ (paragraph 87 of that judgment), and EUIPO’s reply, in its letter of 2 May 2011, regarding the scoring and comparative evaluation of that bid, under the first award criterion, vis-à-vis the bids of the other successful tenderers (paragraph 90 of the judgment).

[38](#) I should like to point out that the question whether the grounds of a judgment of the General Court are contradictory is a question of law which is amenable, as such, to judicial review on appeal (see, inter alia, order of 29 November 2011, *Evropaiki Dynamiki v Commission* (C-235/11 P, not published, EU:C:2011:791, paragraph 29 and the case-law cited)).

[39](#) See, inter alia, order of 26 January 2007, *Righini v Commission* (C-57/06 P, EU:C:2007:65, paragraph 56).

[40](#) In so far as it finds that the contested decision must be annulled, the judgment under appeal is based on a series of irregularities vitiating the evaluation of the bid in question (see points 111 and 112 of this Opinion). The defective reasoning relating to paragraph 134 of that judgment does not affect that finding. Nor does such a defect affect the General Court’s finding in respect of the claim for damages: first, the finding of unlawful conduct on the part of EUIPO is based on that series of irregularities; secondly, the causal link was established only between the damage suffered and the instances of substantive unlawful

conduct (and not the instances of failure to state reasons) vitiating the contested decision (see point 116 of this Opinion).

[41](#) See, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others v Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 65 and 137).

[42](#) Again, whether or not the General Court's grounds are contradictory is a question of law which is amenable, as such, to judicial review on appeal (see footnote 38 of this Opinion).

[43](#) There is no need to contemplate a possible substitution of grounds on that point, since, for the reasons I shall give in points 113 to 120 of this Opinion, the judgment under appeal must in any event be set aside in so far as it orders the European Union to pay compensation for the harm suffered by European Dynamics Luxembourg.

[44](#) See, in that regard, Article 335 TFEU.

[45](#) Article 47 TEU and Article 115(1) of Regulation No 207/2009.

[46](#) See, to that effect, order of the President of the Court of 12 February 2003, *Marcuccio v Commission* (C-399/02 P(R), EU:C:2003:90, paragraph 17) and order of 8 September 2016, *Real Express v EUIPO* (C-309/15 P, not published, EU:C:2016:671, paragraph 81).

[47](#) See points 38 to 43 and 47 to 50 of this Opinion.

[48](#) See point 101 of this Opinion.

[49](#) See, inter alia, judgment of 26 April 2007, *Alcon v OHIM* (C-412/05 P, EU:C:2007:252, paragraph 41 and the case-law cited).

[50](#) See points 97 to 101 of this Opinion.

[51](#) See point 91 of this Opinion.

[52](#) See point 54 of this Opinion.

[53](#) See, inter alia, judgment of 10 July 2014, *Nikolaou v Court of Auditors* (C-220/13 P, EU:C:2014:2057, paragraph 52 and the case-law cited).

[54](#) It follows from this that the Court could economise by not examining the second and third parts of the fourth ground of appeal, which I undertook for the sake of completeness.