

**EUIPO escapes liability in public procurement case as ECJ partially sets aside
General Court judgment**
European Union - **Granrut Avocats**

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- **EUIPO may incur non-contractual liability**
- **EUIPO must make good any damage caused by its departments or servants in performance of their duties**
- **Unsuccessful tenderer failed to establish causal link between alleged damage and EUIPO's conduct**

The decision of the Court of Justice of the European Union (ECJ) in *European Union Intellectual Property Office v European Dynamics Luxembourg SA* (Case C-376/16 P, May 3 2018) confirms that the European Union Intellectual Property Office (EUIPO) may incur non-contractual liability in cases involving calls for tenders in public procurement.

Background

In August 2011 EUIPO notified its decision in a tendering procedure entitled "Software development and maintenance services", rejecting the tender submitted by the company European Dynamics Luxembourg. It also notified other related decisions that it adopted in the same procedure, including those granting the contract to three other competitors.

In October 2011 European Dynamics Luxembourg, European Dynamics Belgium SA and Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (collectively, European Dynamics and others) brought an action for annulment of the decisions at issue before the General Court. The EUIPO should have known that European Dynamics is a serial litigant which knows its way to the General Court very well. European Dynamics and others also requested an award of €6,750,000 as compensation for the damage suffered because of the loss of opportunity to be awarded the contract at issue. In support of the action before the General Court, European Dynamics and others put forward three pleas in law, alleging:

1. infringement of the duty to state reasons;
2. several manifest errors of assessment; and
3. infringement of the principle of equal treatment.

General Court decision

The General Court examined the third plea in law and upheld only the third part of it. It considered that the EUIPO had clearly breached its duty of diligence when investigating the existence of the ground for exclusion provided for in Point 13.1, Paragraph 1, Subparagraph (e) of the tender specifications and in Article 93(1)(e) of the European Financial Regulation (Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Council Regulation (EC, Euratom) 1995/2006, sets out the basic rules governing the entire budgetary sphere in matters such as public procurement). Indeed, the EUIPO should not rely only on one competitor's solemn declaration in order to prove that there was no ground for exclusion.

The General Court also upheld a part of the second plea in law. It found that the existence of manifest errors of assessment or inadequate reasoning that vitiated the lawfulness of the evaluation of the tender of European Dynamics and others had been established. Those illegalities, by themselves, justified the annulment of the decision rejecting the tender.

Finally, the General Court upheld the claim for damages brought by European Dynamics and others inasmuch as it concerned the compensation for loss of opportunity.

The EUIPO appealed this decision to the ECJ. It claimed that the court should set aside the judgment under appeal in its entirety and dismiss the claim for annulment of the decisions at issue and the claim for damages brought by European Dynamics and others. The EUIPO raised four grounds in support of its appeal:

1. The General Court had erred in law by ruling *ultra petita*, misinterpreting and misapplying the

- principles of equal opportunities and due diligence and, in any event, distorting the facts.
2. It had erred in law when interpreting and applying the test relating to manifest errors of assessment.
 3. It had erred in law in stating that the EUIPO's decision was not sufficiently motivated.
 4. It had failed to provide an adequate statement of reasons concerning the award of damages for loss of opportunity.

ECJ decision

In the first ground of appeal, the EUIPO complained that the General Court had ruled *ultra petita*, as it had ruled on the third part of the third plea in law of European Dynamics and others (concerning notably the potential economic link between companies belonging to a consortium, the third competitor and its unlawful activity), but that part had been withdrawn and was no longer disputed by the parties.

The ECJ stated that, under the rules governing the procedure before the Courts of the European Union and, in particular Articles 76 and 84(1) of the Rules of Procedure of the General Court, the dispute is circumscribed by the parties and the Courts of the European Union may not rule *ultra petita*. Therefore, the General Court should have refrained from examining that part of the plea. Consequently, the ECJ upheld the EUIPO's claim and set aside this part of the judgment.

In the first part of the second ground of appeal, the EUIPO considered that the mere fact that it had allegedly made errors of assessment concerning several sub-criteria of technical award cannot in itself be considered as a sufficient reason to annul the decision rejecting the tender. It argued that the General Court did not follow its settled case law in that regard, and did not examine whether those errors of assessment had a concrete effect on the final outcome of that decision. The principle stemming from its case law is that, if the score for a given award criterion is based on several comments which are not contested, the General Court should examine whether those other comments still sufficed to support the score given by the contracting authority for that award criterion. In the present case, the scores for technical award criteria 1 to 3 were based on several negative and positive comments. They were not contested by European Dynamics and others. As the General Court did not examine whether those other comments were sufficient to justify the score given by the contracting authority for the award criterion concerned, it was a sufficient reason to appeal its judgment.

Secondly, the EUIPO stated that the General Court had substituted its own assessment for the EUIPO's assessment of the facts, distorting those facts in order to find that there were manifest errors of assessment.

According to the ECJ, it was for the EUIPO to explain how, and establish that, the decision rejecting the tender could not have been more favourable to European Dynamics and others even if those errors had not been made. The EUIPO had not adduced the necessary evidence in that regard. Consequently, the ECJ rejected the first part of the EUIPO's second ground of appeal.

In the third ground of appeal, the EUIPO argued that, according to Article 100(2) of the Financial Regulation, read in combination with Article 296 of the Treaty on the Functioning of the European Union, there is no legal obligation to give a detailed overview of all the negative comments which were taken into consideration while rating the tender of an unsuccessful tenderer. In contrast, the ECJ considered that the EUIPO had not entirely met the requirements concerning the obligation to state the reasons for the outcome of the evaluation of the tender submitted by European Dynamics and others. Consequently, the ECJ rejected the third ground of appeal.

In the fourth ground of appeal, the EUIPO complained that the General Court had awarded European Dynamics damages on an inadequate legal basis, namely the loss of an opportunity to obtain the contract at issue. According to the EUIPO, in accordance with the court's case law, this must be set aside as one of the cumulative conditions giving rise to such an award, namely the existence of unlawful conduct, was not satisfied. Moreover, the EUIPO stated that there was no causal link between the unlawful conduct and the damage claimed.

The ECJ considered that the General Court had not established the existence of such a causal link to the requisite legal standard. In particular, the General Court had failed to ascertain whether and to what extent, in the light of the facts of the case and if the EUIPO had made no errors, European Dynamics and others would have been awarded a better ranking in the cascade procedure. Similarly, regarding the causal link between the errors made by the evaluation committee and the damage allegedly suffered, European Dynamics and others confined themselves merely to asserting that there was such a link, without specifying what that link consisted of.

Therefore, the ECJ stated that the claim for damages brought by European Dynamics and others must be rejected, and cancelled the General Court's judgment on that point.

Comment

In a nutshell, the ECJ partially maintained the judgment of the General Court, but partially cancelled the part having consequences for the EUIPO, since no damages were awarded.

This decision confirms that the EUIPO, like any other agency, can be subject to non-contractual liability. In order for the EUIPO to incur liability, the following conditions must be met:

- the existence and extent of the alleged damage must be established;
- the existence of a sufficiently direct causal nexus between the conduct of the institution concerned and the damage alleged must be established; and
- the damage must be real and certain, and must stem from such unlawful conduct.

In this case, the EUIPO escaped liability because the unsuccessful tenderer failed to prove the link between the EUIPO's decision to reject its tender and the damage that it pretended to have suffered. However, to avoid risks in the future, the EUIPO may have to revise its process as far as public procurement is concerned.

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