



**Twinning project “Implementation of the best European practices with the aim of strengthening the institutional capacity of the apparatus of the Ukrainian Parliament Commissioner for human rights to protect human rights and freedoms (apparatus)”
No. EuropeAid/137673/DD/ACT/UA**

Activity 2.3.5. Developing guidelines for effective monitoring by the Office of the Ombudsperson of the state of compliance by relevant stakeholders with the legislation in the field of access to public information

Document	Recommendations regarding the problematic issues in the area of access to public information in public procurement
Short description of the document	These recommendations are prepared upon the request of the employees of the Apparatus of the Commissioner to elaborate in more detail on the problematic issues in the area of access to public information in public procurement and Commissioner’s role in this area.
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Recommendations regarding the problematic issues in the area of access to public information in public procurement

These recommendations are prepared upon the request of the employees of the Apparatus of the Commissioner to elaborate in more detail on the problematic issues in the area of access to public information in public procurement and the Commissioner's role in this field.

In particular, several issues were chosen for more detailed elaboration:

- Optimal Commissioner's role in the area of public procurement;
- Need to improve monitoring of *edata* portal;
- Data that should be open in public procurement.

I. Overview of the current framework

Annually the volume of public procurement in Ukraine amounts to about 13% of GDP¹. According to statistics on the *bi.Prozorro* portal, over 1 million public procurements were organized in 2017 in Ukraine and total amount of the agreements was close to UAH 900 billion.

The state procurement procedures are coordinated by the Ministry of Economic Development and Trade of Ukraine. It has the Department for State Procurement Regulation, which defines legal policy in this field and coordinates the work of the public procurement system.

1.1. Main legal acts

The main legal act regulating public procurement in Ukraine is the **Law of Ukraine "On Public Procurement"** (Verkhovna Rada Journal (VVR), 2016, No. 9, p. 89²). Another important document in the area of this document is Order No. 477 dated March 18, 2016 "On Approval of the Procedure for Posting Information on Public Procurement"³. In addition, a non-binding document that helps to understand a content of the law and that could be mentioned here is "Guidelines on Public Procurement" for Ukraine that were developed by the experts with the funding of the European Union⁴.

¹ <http://www.me.gov.ua/Documents/Detail?lang=en-GB&id=4f2cb072-bac6-4ded-b564-5a00dd24511a&title=ReformOfStateProcurement>

² <http://zakon2.rada.gov.ua/laws/show/922-19/print1453109859715783>. The commentaty to the Law in English (as of 2016) was drafted by Olexandr Shatkovskiy and Sergii Iaremenko under a Project funded by the European Union and implemented by a Consortium led by Crown Agents Ltd. It is available at: http://eupublicprocurement.org.ua/wp-content/uploads/2017/01/PPL-Commentary_2017_ENG.pdf

³ <http://zakon.rada.gov.ua/laws/show/z0447-16>

⁴ http://eupublicprocurement.org.ua/wp-content/uploads/2017/10/Guidelines_ENG_interactive_pages.pdf. For more general, not Ukraine-tailored guidelines see OECD. Compendium of Good Practices for Integrity in Public Procurement. 2015.

As for international regulation, certain obligations as to public procurement are undertaken under the EU – Ukraine Association Agreement⁵. Moreover, in May 2016 Ukraine acceded to WTO Agreement on Government Procurement⁶.

1.2. Web Portal on Public Procurements in Ukraine

In Ukraine, initially official national web portal on public procurements (Public Procurements web portal) was put into operation in 2008 and was started to be used in 2010. Its link is: <https://tender.me.gov.ua/EDZFrontOffice/menu/uk/>.

According to the information in this web portal, it was the only official state information source on the Internet placing announcements and results of procurements for public funds. The content of announcements on the Public Procurements web portal and the content of announcements in the official national printed publication “Public Procurement Bulletin” coincided completely.

However, this web portal is no longer updated. Its functions are now performed by official e-procurement platform *ProZorro*, the so-called Authorized Agency’s Web Portal.

In accordance with the MEDT Order of 18 March 2016 No. 473, the Authorized Agency’s Web Portal is “*Prozorro*” information and telecommunication system located at the following web address: www.prozorro.gov.ua. In line with the MEDT Order of 23 August 2016 No. 1398, SE “Prozorro” (successor of SE “Zovnishtorhvydav”) is responsible for the Portal operation.

The official e-procurement platform *ProZorro* was developed in 2015 together with business, public activists, international experts, non-governmental organizations combating corruption and other active participants of the process. The Portal is active since 2016. The simple search into the portal revealed, that almost 40 000 of tenders were announced on the website in October 2018.

The Portal also allows access to documents submitted by bidders, the concluded contracts and amendments to them.

1.3. Public procurement monitoring in Ukraine

Seeking to ensure that transparency and integrity is properly observed and in order to take informed decisions with regard to the development of the public procurement system, the governments in most developed states monitor the system. This is often done by assigning a separate body with such a function. Such body may be part of the State administration (e.g.

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH\(2014\)2/REV1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2014)2/REV1&docLanguage=En)

⁵ https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf

⁶ https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

the Public Procurement Office in Lithuania or Poland) or an independent organisation (e.g. Public Procurement Observatory, *El Observatorio de Contratación Pública*, in Spain).

As defined by SIGMA, monitoring of public procurement usually involves such activities as:

- collection
- analysis
- dissemination of data (concerning various aspects of public procurement, e.g. its transparency, openness, competitiveness and efficiency)⁷.

The role of monitoring in public procurement is to:

- assess the way in which the public procurement system is developing as a whole and the direction in which it is moving and thereby provide meaningful information that is essential for policy making;
- identify the need for any changes in the system;
- set short-term and long-term priorities and evaluate whether they have been achieved;
- analyse the potential effects of alternative solutions;
- provide guidance for procurement policy and implementation of decision making;
- provide information of relevance to decisions made by other policy makers⁸.

As stated by SIGMA, to ensure that monitoring yields meaningful results, a number of conditions must be fulfilled. First, the policy goals and objectives of the public procurement system should be consistent over time, as otherwise it would be difficult to compare the results obtained through the monitoring process. Second, the availability of good, reliable data is essential. Third, effective monitoring requires the staff involved in monitoring activities to possess good analytical and reporting skills. They need to know what kind of information is useful, how to collect this information, how to proceed with data gathered, how to draw conclusions, and how to present the results obtained by the monitoring. Fourth, the effectiveness of monitoring depends on official support, guidance and actions⁹.

The Law of Ukraine “On Public Procurement” defines “procurement monitoring” as the analysis of a contracting authority’s compliance with public procurement laws at all stages of the procurement process through systemic observation and analysis of information using the e-procurement system (Article 1, para 11).

In accordance with Article 7, paragraph 3 of the Law, monitoring shall be carried out by the **State Audit Service** (“*Державна аудиторська служба України*”, SASU)¹⁰ through examination of information, published on the Authorized Agency’s Web Portal. The SASU bodies carry out the independent public financial control on behalf of the State. In line with the Regulation on the State Audit Service of Ukraine, approved by the CMU Resolution of 03 February 2016 No. 43, procurement monitoring is listed among the types of state financial control.

⁷ SIGMA (2016), Performance Measurement, Brief 21, OECD Publishing, Paris.

⁸ SIGMA (2016), Performance Measurement, Brief 21, OECD Publishing, Paris.

⁹ SIGMA (2016), Performance Measurement, Brief 21, OECD Publishing, Paris.

¹⁰ <http://www.dkrs.gov.ua/kru/en/>

Important changes in the area of monitoring of public tenders were brought by law “On Introduction of Changes to the Law of Ukraine ‘On Public Procurement’ and Certain Other Laws of Ukraine Concerning Monitoring of Procurement”, approved in December 2017. Under this law, the SASU, as a body tasked with the function of monitoring of public procurement, received a clear procedure of inspections. Among the tools provided to the SASU is automatic risk-indicators which serve as a sign of suspicious bidding in the system. Auditors replaced “paper” exchange of information with customers for electronic. Information on monitoring results became public. One of the important innovations was the fact that customers are now obliged to eliminate violations found by the auditors or provide a substantiated objection instead. The law also clearly established the term of inspection – 15 days, which can be extended by another 10 days with good reason¹¹.

Certain functions of monitoring are also assigned to the **Accounting Chamber of Ukraine**. See, e.g. its recent report: http://www.ac-rada.gov.ua/doccatalog/document/16756726/R_RP_13-1_2018.pdf?subportal=main. As to critics towards this report by Transparency International see: <https://ti-ukraine.org/en/news/ti-ukraine-and-dozorro-community-accounting-chamber-s-report-on-situation-with-public-procurement-in-2017-is-biased-and-unprofessional/>.

Importantly, monitoring of public procurement is also implemented by the community of civil society organizations united around the **DOZORRO** platform¹². By means of the monitoring portal DoZorro.org, it is possible for anyone to raise questions concerning a procurement procedure, including formal complaints to any of the authorities involved in the monitoring of public procurement.

DOZORRO uses several tools to collect and analyse procurement data in Ukraine developed mostly with assistance of the Transparency International. Such are the tools bi.prozorro.org¹³ and bipro.prozorro.org¹⁴, index.dozorro.org¹⁵, risk.dozorro.org¹⁶. In addition, such systems as acm-ua.org, clarity-project.info, z.texty.org.ua, <https://www.007.org.ua>, youcontrol.com.ua, cep.kse.org.ua enable further analysis of procurement in the system.

1.4. A short glance at EU regulation: EU requirements concerning public procurement monitoring

¹¹ Information of Transparency International Ukraine. <https://ti-ukraine.org/en/news/parliament-voted-for-open-state-monitoring-of-public-procurement-in-the-prozorro-system/>

¹² <https://dozorro.org>. As identified in the website of Transparency International, the Ukrainian chapter of the global anti-corruption network Transparency International has launched the monitoring portal DOZORRO on 1 November 2016 to unite the civil society, to ensure equal rules for all stakeholders of the procurement system. The DOZORRO Portal unites 24 regional civil society organizations, which process about 1500 tenders per month.

¹³ Public business intelligence module (bi.prozorro.org) – a business intelligence module to work with the data of the ProZorro system.

¹⁴ Professional business intelligence module (bipro.prozorro.org) – a business intelligence module to work with the data of the ProZorro system with extended functionality but restricted access.

¹⁵ Best Practices Index (index.dozorro.org) – a ranking of the best procurement organizers.

¹⁶ Risk indicator system (risk.dozorro.org) – ProZorro signals about potential violations in the ProZorro system.

The main EU document in the area of public procurement is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement¹⁷. The directive sets out rules on the use of public contracts for the provision of works, supplies or services by companies or individuals and the exemptions which can be applied. In general, Directive sets minimum harmonised rules that apply to tenders above a certain value. In case of lower value tenders ('below threshold' tenders), national rules apply, however, these have to respect the general principles of EU law.

As to monitoring, Article 83 of the Directive requires that Member States ensure that the application of public procurement rules is monitored. Member States, however, remain free to decide how and by whom this monitoring should be carried out in practice; in so doing, they should also remain free to decide whether the monitoring should be based on a sample-based *ex-post* control or on a systematic, *ex-ante* control of public procurement procedures covered by this Directive. Where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof.

It should also be noted that according to Directive, the results of monitoring activities conducted by monitoring authorities must be made available to the public. The results must also be made available to the European Commission.

II. Commissioner's role in the area of public procurement

At the moment, the role of the Commissioner in the area of public procurements is limited. The main issue that arises in this regard is related to openness of the public procurement data and materials, as this is linked to Commissioner's function to guarantee access to public information. As explained by the employees of the Apparatus, the Commissioner often receives complaints of companies and individuals that argue that purchasing organisations often do not provide them with the opportunity to inspect the contract concluded with their competitor or its annexes and related materials and in this way, limit their access to public information. Moreover, below threshold tenders are often not published in *Prozorro*, and purchasing organisations refuse to provide any information related to such tenders and contracts to interested parties, thus again, complaints are submitted to the Commissioner. Often, the purchasing organisations refer to confidentiality as a ground to refuse access to information.

As discussed above, in Ukraine, in line with the law, monitoring of public procurement shall be carried out by the State Audit Service (SASU). In particular, according to the assigned tasks the SASU, inter alias,

¹⁷ OJ L 94, 28.3.2014, p. 65–242

- carries out the public financial control through performance of the checks of public procurements;
- carries out the control over compliance with the legislation on the public procurement¹⁸.

As a result, the SASU is the main organisation empowered to supervise the area of public procurement. It should also be noted that on 24 September 2018 the State Audit Service of Ukraine started procurement monitoring through their own electronic account in the ProZorro system regulated by amendments to legislation of 27 January 2018. Currently, the monitoring is taking place in pilot mode, but it is expected to cover all the regions very soon¹⁹.

In addition to that, the Ukrainian legal framework foresees complaints mechanism for private contractors bidding for public contracts. Under Article 8 of the Law on Public Procurement, Complaint Review Authority (Anti-Monopoly Committee of Ukraine (AMCU)) reviews complaints on violations of legislation in the field of public procurement. Article 18 of the Law foresees rules of filing complaints against procurement procedures.

In this light, one can raise a question why certain functions related to public procurement is covered by the Commissioner. Since the SASU is the main supervising organisation, and AMCU reviews complaints, the involvement of the Ombudsman institution in access to information area in public procurement might be questioned. In particular, this leads to overlapping of functions and overlapping of competences of different institutions. Moreover, in cases where complains as to public procurements reach the Commissioner, but not the SASU/AMCU, this might result that certain breaches of the Law on Public Procurement not duly notified (thus, trigger is not received by proper institution).

It is therefore advisable to consider in more detail (by organising meetings and consultations with stakeholders) whether the involvement of the Commissioner in this area should not be removed. This might also need respective changes in the law to have clear exception of public procurement area from the mandate of the Commissioner.

To give example from Lithuania, in Lithuania, a special body in the area of public procurements is the Public Procurement Office²⁰ which is the body operating under the Ministry of Economy. It implements the public procurement policy and supervises compliance with the Law on Public Procurement²¹ and the implementing legislation. The website of the Public Procurement Office gives a lot of information as to what information should be published in public procurements and what information could be seen as confidential (see also section below). The Lithuanian Parliamentary Ombudsman (Seimo kontrolierius), performs no supervision or monitoring in the area.

In Austria, there is a “procurement control authority” (Federal Procurement Agency (BBG, “Bundesbeschaffung GmbH”). In addition, with respect to public procurement, the Austrian

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<http://www.dkrs.gov.ua/kru/en/publish/article/131910;jsessionid=4BEDEB4D291CC161755D1A171B16431F.a>
pp2

¹⁹ <https://ti-ukraine.org/en/news/public-auditors-started-new-procurement-monitoring-via-prozorro/>

²⁰ <https://vpt.lrv.lt/en/>

²¹ <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=-9dzqnu9t0&documentId=TAIS.406821&category=TAD>

Court of Audit carries out numerous ad-hoc audits and large-scale audits of federal administrations. Furthermore, it expresses general recommendations and key statements related to public procurement. However, as it was already discussed in earlier Twinning reports, in Austria there is no special independent authority concerning access to public information. The latter area is covered by the possibility to complain first, to the authority which allegedly infringed access to public information and then, to the administrative courts.

III. Need to improve monitoring of *edata* portal

Another question that was identified during the research and that was noted by the employees of the Apparatus, is the fact that information regarding public spending is not always properly publicised in E-data portal (<https://spending.gov.ua/edata>). In particular, information on public spending is not always properly reflected in E-data.

Since this issue relates to access to public information, the Commissioner, in theory, should be involved in certain supervision of publication of this information. However, naturally, such supervision is hard to implement without technical support. To assist the Commissioner with this function, we consider that certain technological solutions could be of help. In particular, in the area of public procurement, a platform could be developed to connect the data in the public procurement web portal (*Prozorro*) with the data published in *E-data*. Interoperability of both systems could enable to detect the situations where information on public procurements is not properly publicised.

IV. Data that should be open in public procurement

The Law on Public Procurement of Ukraine in its Article 10 (Publication of Procurement Information) lists the information that the contracting authority should publish on the Authorized Agency's Web Portal in accordance with the procedure established by the Authorized Agency and the Law, at its own discretion and on a free-of-charge basis via the authorized e-platforms. Such information includes:

- announcement of a procuring procedure and tender documents;
- changes in the tender documents and explanations thereto (if any);
- notice of a framework agreement concluded (in case procurement is made under framework agreements);
- minutes on tender consideration;
- notice of intent to award a procurement contract;
- information about rejection of a tender;
- procurement contract;
- notice of amendments to the procurement contract;
- report on the performance of the contract;
- report on the awarded contracts.

Tender documents

Tender documents are key documents prepared by the contracting authority in the course of organization of procurement procedures. Tender documents contain such key elements as: technical specifications of the procurement item, qualification requirements to potential tenderers with the list of supporting documents, principal (material) terms of the procurement contract. Basic requirements to the content of tender documents are set forth in Article 22 of the Law and in the Order of MEDT No. 680 of 13.04.2016 “On approval of standard tender documents”. As noted, tender documents and changes thereto are subject to mandatory publishing on the Web Portal of the Authorized Agency (“*Prozorro*”) within the periods specified in Article 10 of the Law.

Documents from competitors

The scope of access to information submitted by other tenderers depends on whether the selection of supplier has already been made.

Exemptions from access to information in case of public procurement documents may be made in respect of tenders and minutes until a choice of supplier has been made. This is a natural exception seeking to maintain fair competition.

Information of confidential nature is as a rule exempted from access at all stages, i.e. even after the choice of supplier has been made. Typically, information concerning technical devices and procedures, as well as operational or business matters which for competition reasons it is important to keep secret in the interests of the person whom the information concerns, is considered to be confidential.

It should be, however, noted that protection of confidential information should not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes²².

Confidentiality exception

Under the Law on Public Procurements, certain exceptions as to confidentiality in publishing public procurement related data are set.

Under paragraph 3 of Article 12 (Procurement Procedures), e-procurement system shall be public, guarantee non-discrimination and equal rights of all interested parties in the process of registration, as well as equal access of all tenderers to information. However, as is noted in this article, exchange and storage of information and documents shall be arranged in a way that secures integrity of data on tenderers and their tenders during a procurement procedure, and *confidentiality* thereof before opening the tenders.

²² Such rule is, for example, clearly established in EU Directive 2014/24/EU on public procurement.

Paragraph 2 of the Article 27 (Tender Opening) sets that while opening tenders, full information contained in the tenders shall be disclosed automatically, and the list of tenderers shall be created and sorted from minimum to maximum price/adjusted price. *Information that is reasonably classified by the tenderer as confidential shall not be subject to disclosure. Confidential information shall not include information on proposed price, other evaluation criteria, technical conditions, technical specifications and documents confirming compliance with the qualification criteria* under Article 16 and requirements established by Article 17 of this Law.

Under Article 34 (Competitive Dialogue Procedure), in the course of negotiations, the contracting authority shall not apply a discriminating approach to different tenderers, *nor disclose the proposed solutions or other confidential information* to other tenderers that was received from the tenderer participating in the negotiations, without the consent of the latter.

There is, however, no special article on confidentiality.

In comparison, the Law on Public Procurements of Lithuania, has a special article designated to cover the question of confidentiality:

Article 6. Confidentiality

1. Without prejudice to the requirements set forth by laws, in particular those concerning the obligations relating to the publication of awarded contracts and to the information to candidates and tenderers set out in Articles 41, 74, 79 and paragraph 4 of Article 86 of this Law, the contracting authority, the Public Procurement Commission, the members or experts thereof and other persons shall not disclose to third parties information forwarded to it by suppliers which they have designated as confidential. Such information includes, in particular, technical or trade secrets and the confidential aspects of tenders. At the request of the tenderers, the contracting authority must provide them with access to other tenderers' tenders, with the exception of the information which the tenderers have designated as confidential.

2. The contracting authority referred to in subparagraph 4 of paragraph 1 of this Law may, in providing technical specifications to suppliers, assessing their qualification, performing pre-qualification selection of candidates and concluding contracts, set forth the requirements which would protect the confidential nature of the information provided by it.

Specific article on confidentiality is also present in the EU Directive 2014/24/EU on public procurement:

Article 21. Confidentiality

1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded

to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

In addition, it should be noted that under the Civil Code of the Republic of Lithuania (Article 1.116), information is considered to be commercial (industrial) secret if it has a genuine or potential commercial (production) value because it is not known to third parties and it cannot be freely accessible due to the reasonable effort of the owner of this information or other person to whom the owner has entrusted it to preserve its secrecy.

It should be considered whether respective provision on confidentiality would not benefit Ukrainian Law on Public Procurement. Also, in order to align Ukrainian law with EU law, the information that is defined as confidential should correspond to the definition in the directive.

Explanation of content of confidentiality exception in Lithuania

Certain guidelines as to confidentiality exception and its use in Lithuania are given by Public Procurement Office of Lithuania. Those guidelines could be found on the website of the Public Procurement Office of Lithuania under FAQs²³.

In general, it is explained that confidentiality of information could be established only in justified cases. The supplier is required to prove confidentiality of information and do this not formally but actually.

The entire offer and application of the supplier cannot be considered as confidential. Moreover, the following information is not considered as confidential:

- the price of goods, services or works;
- prices of units (unit costs of goods, services or works);
- documents confirming that there no grounds for the elimination of suppliers, their compliance with qualification requirements, quality management system and environmental management system standards;
- information on the use of other economic subjects (whose capacity is used by the supplier), and information on subcontractors (with certain exceptions under the law).

On the website of the Public Procurement Office of Lithuania once can also find the references to the case law relevant to the area of public procurement, including case law where questions of confidential information in public procurements was analysed²⁴.

V. CJEU case law on access to information in public procurements

²³ [https://klausk.vpt.lt/hc/lt/articles/115005730625-Kaip-turi-būti-suprantamas-konfidencialumas-viešuosiuose-pirkimuose-](https://klausk.vpt.lt/hc/lt/articles/115005730625-Kaip-turi-būti-suprantamas-konfidencialumas-viešuosiuose-pirkimuose)

²⁴ <https://klausk.vpt.lt/hc/lt/articles/360001546840-Aukščiausiojo-teismo-praktika>

As already noted, the EU law (EU Directive 2014/24/EU on public procurement) to a certain extent regulates public procurement in the EU. There are, thus, certain general rules and practices that are formed in the EU documents and later developed through their interpretation by the Court of Justice of the European Union (CJEU). To exemplify and to provide more extensive explanation, several examples from the case law of the CJEU should be brought²⁵.

Contracting authority should provide detailed information about the tender evaluation process

The CJEU's approach as to the contracting authority's duty to disclose evaluation documentation to disappointed bidders is shortly and clearly summarised by Sanchez-Graells in his scientific article²⁶:

“In their recent decisions interpreting this duty to disclose evaluation documentation to disappointed bidders in order to allow them to effectively challenge award decisions, the CJEU and the [General Court] have reinforced very strict debriefing standards that require contracting authorities to provide substantial information concerning other tenderers' offers (notably, at least, the winning tenderer's) to all participating tenderers.

The EU Courts²⁷ have considered that this obligation is sufficiently discharged only when the contracting authority provides very detailed information about the tender evaluation process and, in particular, gives information that enables the disappointed tenderer to perform a relative comparison of its offer vis-à-vis the tender of the winning bidder—with the only limits that the contracting authority is not obliged to provide a full copy of the evaluation report²⁸, nor a detailed comparative analysis of the successful tender and of the unsuccessful tender²⁹ (but, in principle, could do either of those things if the authority so wished). In particular, the CJEU has considered appropriate that the contracting authority (in that case, the European Commission) provided the disappointed tenderer with extracts of the evaluation report

²⁵ As for the negative impact that the excessive levels of transparency imposed by public procurement rules can have on competition for public contracts (in particular, on possibility of forming bid rigging cartels), see Sanchez-Graells, Albert, *The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives* (November 2013). University of Leicester School of Law Research Paper No. 13-11. <https://ssrn.com/abstract=2353005>. Also see OECD, 'Competition and Procurement: Key Findings' 19. <http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48315205.pdf>

²⁶ Sanchez-Graells, Albert, *The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives* (November 2013). University of Leicester School of Law Research Paper No. 13-11. <https://ssrn.com/abstract=2353005>.

²⁷ Case C-629/11 P *Evropaïki Dynamiki v European Commission*, ECLI:EU:C:2012:617; Case T-183/10 *Sviluppo Globale GEIE v Commission*, ECLI:EU:T:2012:534.

²⁸ Case C-561/10 P *Evropaïki Dynamiki v European Commission*, ECLI:EU:C:2011:598.

²⁹ Case C-235/11 P *Evropaïki Dynamiki v European Commission*, ECLI:EU:C:2011:791.

that ‘contained tables relating, in particular, to the technical evaluation of the tenders [...] and indicating, for each award criterion, the number of points obtained by [the disappointed tenderer] in comparison with the successful tenderer, broken down each time into sub-criteria, as well as the maximum number of points attainable per sub-criterion and the weighting of each of those sub-criteria in the overall evaluation’³⁰.”

Protection of business secrets is a general principle applicable in the context of public procurement

In *Varec SA* case (C-450/06)³¹ the CJEU has recognised that the protection of business secrets is a general principle³² applicable in the context of public procurement. The contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers. As a result, in the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, the EU law gives the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.

The Court ruled that in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets. It added that it is for the body responsible for the reviews to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and <...> so as to ensure that the proceedings as a whole accord with the right to a fair trial.

There is no necessity to disclose economic and technical information contained in bids

In *Cosepuri Soc. Coop. pA* case (Joined Cases T-339/10 and T-532/10)³³, the applicant (referring to the principle of transparency) challenged, inter alia, the refusal to grant access to the tenderers’ technical and financial bids, in particular those of the successful tenderer.

The CJEU referred to business interests and fair competition. It noted that the principle of transparency must be reconciled with the requirements of protection of the public interest, of the legitimate business interests of public or private undertakings and of fair competition. The

³⁰ Case C-629/11 P *Evropaïki Dynamiki v European Commission*, ECLI:EU:C:2012:617.

³¹ Case C-450/06, *Varec*, EU:C:2008:91.

³² See Case 53/85 *AKZO Chemie and AKZO Chemie UK v Commission* [1986] ECR 1965, paragraph 28, and Case C-36/92 P *SEP v Commission* [1994] ECR I-1911, paragraph 37.

³³ *Cosepuri v EFSA*, T-339/10 and T-532/10, ECLI:EU:T:2013:38.

Court referred to the EU Financial Regulation (which was applicable in this case) which provides that, where appropriate, only the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded are to be disclosed. The Financial Regulation does not provide that all the details of the successful tender are to be disclosed.

The CJEU considered it was enough that the purchasing authority in this case informed the applicant of the reasons for the rejection of its tender, the characteristics and advantages of the successful tenderer's bid and the name of that tenderer and provided a copy of the evaluation report and a copy of the contract signed with the successful tenderer.

The fact that access to certain information would reveal the contracting authority's profile as a buyer in the market is not an argument for non-disclosure

In *Evropaiki Dynamiki v Parliament* case (T-136/15)³⁴, *Evropaiki Dynamiki* did not seek access to the tenders submitted by its competitors, but to "all available information concerning all the requests for quotation which were issued by the [European Parliament] for all lots". The reason for such a request could be that the requests for quotations may have been different between themselves, and that *Evropaiki Dynamiki* wanted to ascertain whether they represented a proper split of the contract into lots³⁵.

Parliament refused access to such information. As one of the arguments, it claimed that "the documents requested contain information of an economic and technical nature, the presentation of which could reveal the Parliament's profile as a buyer in the market. In addition, the requests for quotation could contain information on the particular skills of the suppliers selected for each lot as well as details of their commercial strategy and alliances or links with third parties. The protection of commercial interests, namely those of the economic actors involved and of the Parliament, also justified, in the view of the Parliament, refusing all access to the documents requested".

Evropaiki Dynamiki challenged refusal to access documents before the CJEU. The CJEU considered that the Parliament cannot argue that the disclosure of the requests for quotation will undermine its own interests, in that disclosure could reveal its 'purchasing profile' on the market. The Court stated that if disclosure of information could enable the tenderers, in future public procurement procedures, to unveil the Parliament's costing technique, the fact that tenderers could know the prices quoted in the past for a corresponding service seems more likely to lead to a situation of genuine competition than to a situation where competition would be distorted.

Interestingly, despite excluding the possibility for the Parliament to rely on the presumptions, the Court recognised the validity of the rejection of the request to access the documents on

³⁴ *Evropaiki Dynamiki v Parliament*, T-136/15, EU:T:2017:915.

³⁵ For more detailed analysis of the case see "Two Recent Cases on Transparency & Access To Documents in EU Institutional Procurement (I) (T-136/15)". <http://www.howtocrackanut.com/blog/2018/1/19/two-recent-cases-on-transparency-and-access-to-documents-in-eu-institutional-procurement-t-13615-t-16415>

the grounds that complying with it would have generated an excessive workload for the Parliament. Therefore, the documents were not disclosed³⁶.

³⁶ For more detailed analysis of the case see “Two Recent Cases on Transparency & Access To Documents in EU Institutional Procurement (I) (T-136/15)”. <http://www.howtocrackanut.com/blog/2018/1/19/two-recent-cases-on-transparency-and-access-to-documents-in-eu-institutional-procurement-t-13615-t-16415>