

JUDGMENT OF THE GENERAL COURT (First Chamber)

6 September 2023 (*)

(Public supply contracts – Procurement procedure – Organisation of demand aggregation and tendering of gas under the EU Energy Platform – Negotiated procedure without prior publication of a contract notice – Refusal of a request to participate in the procedure – Obligation to state reasons – Article 164(5)(f) of, and point 11.1(c) of Annex I to, Regulation (EU, Euratom) 2018/1046 – Transparency – Equal treatment)

In Case T-1/23,

Enmacc GmbH, established in Munich (Germany), represented by A. von Bonin, A. Pliego Selie and T. van Helfteren, lawyers,

applicant,

v

European Commission, represented by T. Scharf, J. Estrada de Solà, G. Gattinara and S. Romoli, acting as Agents,

defendant,

THE GENERAL COURT (First Chamber),

composed of D. Spielmann, President, R. Mastroianni and M. Brkan (Rapporteur), Judges,

Registrar: V. Di Bucci,

having regard to the written part of the procedure, in particular:

- the order of 5 January 2023 by which, pursuant to Article 157(2) of the Rules of Procedure of the General Court, the President of the General Court ordered the Commission not to sign any contract in relation to procurement procedure ENER/2022/NP/0041;
- the order of 18 January 2023 by which the President of the General Court cancelled his order of 5 January 2023;
- the decision of the General Court of 30 January 2023 granting the applicant's request, without any objection on the part of the Commission, that the case be adjudicated under an expedited procedure pursuant to Article 151(1) of the Rules of Procedure;
- the order of 27 March 2023, *Enmacc v Commission* (T-1/23 R, not published, EU:T:2023:163), dismissing the application for interim relief,

having regard to the fact that the parties have decided not to participate in a hearing and having decided, pursuant to Article 155(1) of the Rules of Procedure, to rule without an oral part of the procedure,

gives the following

Judgment

1 By its action based on Article 263 TFEU, the applicant, Enmacc GmbH, seeks annulment of the decision of the European Commission of 12 December 2022 by which the Commission (i) launched the call for tenders ENER/2022/NP/0041 ‘Service for the organisation of demand aggregation and tendering of gas under the EU Energy Platform’ by way of a negotiated procedure without prior publication of a contract notice, (ii) did not invite the applicant to participate in that procedure, and (iii) expressly refused the applicant’s request to be invited to participate in that procedure (‘the contested decision’).

Background to the dispute

2 The applicant is a company under German law, entered in the commercial register of the Amtsgericht München (Local Court, Munich, Germany), which creates, operates and distributes software in the field of trade in energy products, raw materials and similar products.

3 Following the war of aggression waged by the Russian Federation against Ukraine, in 2022 there was a sudden and significant disruption of gas flows from Russia that gave rise to an urgent need to diversify away from Russian supplies and to ensure the security of supply in the European Union.

4 In that context, on 18 October 2022, the Commission adopted Proposal COM(2022) 549 final for a Council regulation enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks (‘the proposal for a regulation of 18 October 2022’). On 24 November 2022, the Council of the European Union agreed in principle on a draft text. On 19 December 2022, on the basis of Article 122(1) TFEU, the Council adopted Regulation (EU) 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (OJ 2022 L 335, p. 1).

5 As is apparent from recital 11 of Regulation 2022/2576, in order to ensure that gas storage facilities are filled up so as to ensure security of gas supply for winter 2023/2024, the Council considered it necessary to coordinate the purchasing of gas in the spirit of solidarity, in particular through gas demand aggregation and joint purchasing of gas.

6 In that context, Article 5 of Regulation 2022/2576 provided a legal basis to allow the Commission to conclude, following a procurement procedure, a temporary service contract with a service provider entrusted with supplying services for demand aggregation and joint purchasing of gas under the EU Energy Platform, in particular by developing and operating an IT tool allowing those services to be offered.

7 Article 6 of Regulation 2022/2576 lays down criteria for selecting the service provider and Article 7 of that regulation sets out the tasks entrusted to that service provider, which include the aggregation of the demand of natural gas undertakings and undertakings consuming gas and the search for offers from natural gas suppliers or producers, to match the aggregated demand, in each case with the support of an IT tool.

8 Since the Commission was of the view that the filling season for gas storage facilities for winter 2023/2024 would start at the end of March 2023 or the beginning of April 2023 and that the service provider would need a minimum period of between two and a half months and three months for the development of the IT tool, the Commission estimated that the service contract would have to be signed by mid-January 2023 at the latest.

9 Therefore, for the procurement procedure ENER/2022/NP/0041 ‘Service for the organisation of demand aggregation and tendering of gas under the EU Energy Platform’ (‘the procurement procedure at issue’), the Commission decided to use the negotiated procedure without prior publication of a contract notice, provided for in Article 164(5)(f) of, and point 11.1(c) of Annex I to, Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU)

No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1; ‘the Financial Regulation’).

- 10 That procedure was launched on 1 December 2022, after the Council had agreed in principle, on 24 November 2022, on a draft regulation.
- 11 In order to identify the economic operators capable of supplying the services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform, the Commission carried out a market analysis. To that end, the Commission relied on the list of energy exchanges and the list of EU cross-border gas infrastructure capacity allocation marketplaces on the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) portal of the Agency for the Cooperation of Energy Regulators (ACER). In the context of an initial identification of the economic operators potentially capable of supplying the services requested and, following exchanges with ACER, the Commission identified FGSZ Földgázszállító Zrt.’s Regional Booking Platform (RBP) on account of the fact that it was a platform competing with other organised marketplaces acting as capacity allocation operators, and that it was intended for inclusion shortly on the list on ACER’s REMIT portal. Thus, an initial pool of 41 operators (38 energy exchanges and 3 capacity allocation operators) was defined. In accordance with the criteria laid down in Article 6 of Regulation 2022/2576, the Commission sent an invitation to tender to eight operators established in seven different EU Member States.
- 12 By email of 8 December 2022, after becoming aware that the procurement procedure at issue had been launched using a negotiated procedure without prior publication of a contract notice, the applicant informed the Commission that it was capable of supplying a platform satisfying all the conditions and requested that it be invited to participate in that procedure.
- 13 By email of 9 December 2022, the applicant requested an invitation to submit an offer in the procurement procedure at issue and to be given appropriate time to prepare an offer.
- 14 By the contested decision, the Commission, first, informed the applicant of its choice to use the negotiated procedure without prior publication of a contract notice and stated the reasons why it would not have been possible to use an open procedure and, second, notified it that it was not possible to grant the applicant’s request to be invited to participate in the procurement procedure at issue, on the ground that only operators that had received an invitation to tender could participate in a negotiated procedure without prior publication of a contract notice.
- 15 On 19 December 2022, the Council formally adopted Regulation 2022/2576.
- 16 By email of 20 December 2022 addressed to the Commission, the applicant stated that it firmly believed that it fully satisfied the conditions of the call for tenders in question and requested a discussion with it as a matter of urgency.
- 17 By email of 21 December 2022, the Commission reiterated that it was not possible to invite the applicant to submit a tender.

Events subsequent to the initiation of proceedings

- 18 By separate document lodged at the Court Registry on 4 January 2023, the applicant submitted an application for interim relief, in which it claimed, in essence, that the President of the Court should suspend the operation of the contested decision. By order of 5 January 2023, on the basis of Article 157(2) of the Rules of Procedure of the General Court, the President of the General Court ordered the Commission not to sign any contract in relation to the procurement procedure at issue.
- 19 By order of 18 January 2023, in view of the Commission’s observations on the application for interim relief, in which it referred to the extremely exceptional circumstances of the present case and claimed that

maintaining the order of 5 January 2023 would endanger the timely implementation of a very important part of the European Union's response to the energy crisis, the President of the General Court cancelled that order.

20 On 24 January 2023, the Commission awarded the contract to the successful tenderer and, on the same day, the contract was signed electronically by both parties.

21 On 13 February 2023, the contract award notice was published in the *Official Journal of the European Union* (OJ 2023 S 31).

Forms of order sought

22 The applicant claims that the Court should:

- annul the contested decision and, in the alternative, the decision to use the negotiated procedure without prior publication of a contract notice and not to invite the applicant to participate in the procurement procedure at issue;
- order the Commission to pay the costs.

23 The Commission contends that the Court should:

- dismiss the action as inadmissible and, in the alternative, as unfounded;
- order the applicant to pay the costs.

Law

Admissibility

24 Without raising an objection of inadmissibility by separate document on the basis of Article 130 of the Rules of Procedure, the Commission submits, first, that the action is inadmissible in so far as it is directed against the contested decision by which it refused the applicant's request to participate in the procurement procedure at issue. In that regard, it argues that that decision is not a challengeable act and that, in any event, the applicant is not directly and individually concerned by it and has not proved that it has an interest in bringing proceedings against it. Second, it submits that the action is inadmissible in so far as it is directed against the decision to use the negotiated procedure without prior publication of a contract notice. In that regard, according to the Commission, that 'internal decision' is a preparatory act which does not produce binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in its legal position. Furthermore, the Commission argues that that decision is not a regulatory act which does not entail implementing measures within the meaning of the fourth paragraph of Article 263 TFEU and that the applicant is not directly and individually concerned by that decision.

25 The applicant contends that the action is admissible.

26 In that regard, it must be borne in mind that the EU judicature is entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of an action on the merits without first ruling on its admissibility (see, to that effect, judgment of 26 February 2002, *Council v Boehringer*, C-23/00 P, EU:C:2002:118, paragraphs 51 and 52).

27 Since, at the applicant's request and without any objection on the part of the Commission, it was decided that the case would be adjudicated under an expedited procedure, the Court considers that, in the interests of procedural economy, it is necessary to examine at the outset the merits of the action, without first ruling on its admissibility.

Substance

28 In support of its action, the applicant raises three pleas in law. The first alleges infringement of Article 164(5)(f) of, and point 11.1(c) of Annex I to, the Financial Regulation. The second plea in law alleges failure to observe the principles of transparency and equal treatment. The third plea in law alleges failure to comply with the obligation to state reasons.

29 In the context of its claims directed against the contested decision, namely the email of 12 December 2022 referred to in paragraph 14 above, the applicant also challenges, indirectly, the decision to use the negotiated procedure without prior publication of a contract notice. In that regard, by a measure of organisation of procedure of 30 January 2023, the Court requested the Commission to produce the decision to use that procedure. The Commission complied with that request by sending the file note addressed to the Director-General for Energy concerning the procurement of a service contract to develop the IT tool for gas demand aggregation and joint purchase under the EU Energy Platform ('the Directorate-General for Energy's file note').

30 The Court considers it appropriate to rule first on the third plea in law.

The third plea in law, alleging failure to state reasons

31 The applicant claims that the contested decision does not adequately state how the conditions laid down in point 11.1(c) of Annex I to the Financial Regulation were satisfied or the reasons why it was not invited to participate in the procurement procedure at issue.

32 The Commission disputes those arguments.

33 In that regard, it should be borne in mind that the rules governing EU public procurement laid down in the Financial Regulation and in Annex I thereto provide for the contracting authority's obligation to state reasons. That obligation is given specific expression in Article 170(2) of the Financial Regulation, which provides that the contracting authority is to notify all candidates or tenderers whose requests to participate or tenders are rejected of the grounds on which the decision was taken. In addition, in accordance with Article 170(3)(a) of the Financial Regulation, the contracting authority is required to inform tenderers that expressly so request of the characteristics and relative advantages of the successful tender and of the name of the tenderer to which the contract is awarded (see, to that effect, judgment of 26 April 2023, *OHB System v Commission*, T-54/21, EU:T:2023:210, paragraph 41; see also, by analogy, judgment of 17 October 2012, *Evropaïki Dynamiki v Court of Justice*, T-447/10, not published, EU:T:2012:553, paragraph 71).

34 In the present case, in the procurement procedure at issue, the applicant had neither the status of candidate nor of tenderer. The Financial Regulation does not impose on the contracting authority any obligation to state reasons in respect of acts addressed, during an ongoing procedure, to entities that have not participated in a procurement procedure. It follows that the Commission was not required to state the reasons for the contested decision in such a way as to show why the applicant had not been invited to participate in that procedure or those warranting the use of a negotiated procedure without prior publication of a contract notice.

35 In any event, first, it should be stated that, in the contested decision, the Commission informed the applicant that it could not be invited to participate in the procurement procedure at issue on the ground that the procedure was a negotiated procedure without prior publication of a contract notice, in which only the entities invited to tender by the contracting authority could participate. Contrary to what the applicant claims, it should be considered that the Commission stated the reasons why it was not possible to grant its request to participate in the procurement procedure at issue.

36 Second, it must be noted that, in the contested decision, the Commission stated that the procurement procedure at issue had been launched with a view to the adoption, in the near future, of its proposal for a

regulation of 18 October 2022 and that the contracting authority, for reasons of extreme urgency, had decided to use the negotiated procedure without prior publication of a contract notice, in accordance with point 11.1(c) of Annex I to the Financial Regulation. The Commission stated that that extreme urgency derived not only from the unexpected current energy crisis linked to the disruption of gas flows from Russia and the ensuing high energy prices, but also from the fact that, in accordance with the proposal for a regulation of 18 October 2022, a service provider had to be in place as soon as that regulation was adopted, in order for it to be properly implemented. The Commission also stated that an open procedure would have implied a delay which would have been impossible to reconcile with the urgency of the matter. It must be stated that those explanations by the Commission were sufficient to substantiate the reasons why it had decided to use the negotiated procedure without prior publication of a contract notice.

37 It follows that the third plea in law, alleging failure to state reasons, must be rejected.

The first plea in law, alleging infringement of Article 164(5)(f) of, and point 11.1(c) of Annex I to, the Financial Regulation

38 By its first plea in law, the applicant argues that the Commission, by using the negotiated procedure without prior publication of a contract notice, infringed Article 164(5)(f) of, and point 11.1(c) of Annex I to, the Financial Regulation. In support of that plea, the applicant puts forward four complaints. The first complaint alleges, in essence, that there were no unforeseeable events. The second complaint alleges that the Commission could have used another procedure, in particular the urgent open procedure. The third complaint alleges that the Commission acted with delay, with the result that the urgency is attributable to it. The fourth complaint alleges that the use of the negotiated procedure without prior publication of a contract notice is not such as to address an immediate shortage of supply.

39 As a preliminary point, it must be borne in mind that, under Article 160(1) of the Financial Regulation, all contracts financed in whole or in part by the budget are to respect the principles of transparency, proportionality, equal treatment and non-discrimination. Therefore, in accordance with Article 160(2) of that regulation, all contracts are to be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in Article 164(1)(d) thereof.

40 It should be noted that the negotiated procedure without prior publication of a contract notice is provided for in Article 164(1)(d) of the Financial Regulation and that the contracting authority may use it, in particular, in accordance with point 11.1(c) of Annex I to the Financial Regulation, in so far as is strictly necessary where, for reasons of extreme urgency brought about by unforeseeable events, it is impossible to comply with the time limits laid down in points 24, 26 and 41 of that annex and where the justification of such extreme urgency is not attributable to the contracting authority.

41 It follows from settled case-law concerning the directives on public procurement that recourse to that derogation is subject to three cumulative conditions, namely the existence, in addition to an unforeseeable event, of extreme urgency, rendering the observance of time limits laid down by other procedures impossible, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom (see, by analogy, judgment of 28 March 1996, *Commission v Germany*, C-318/94, EU:C:1996:149, paragraph 14; order of 20 June 2013, *Consiglio Nazionale degli Ingegneri*, C-352/12, not published, EU:C:2013:416, paragraph 50, and judgment of 13 September 2016, *ENAC v INEA*, T-695/13, not published, EU:T:2016:464, paragraph 96).

42 In view of its nature as a derogation, that provision must be interpreted strictly (see, by analogy, judgment of 4 June 2009, *Commission v Greece*, C-250/07, EU:C:2009:338, paragraph 34, and order of 20 June 2013, *Consiglio Nazionale degli Ingegneri*, C-352/12, not published, EU:C:2013:416, paragraph 51). In addition, the burden of proof lies with the party seeking to rely on such a derogation (see, by analogy, judgment of 15 October 2009, *Commission v Germany*, C-275/08, not published, EU:C:2009:632, paragraph 56 and the case-law cited).

43 It is in the light of those considerations that the complaints raised by the applicant must be examined.

– *The first complaint, alleging that there were no unforeseeable events*

- 44 According to the applicant, as the Russian Federation's invasion of Ukraine took place on 24 February 2022, the disruptions caused by that event cannot objectively be regarded as unforeseeable nine months later. In addition, the Commission initiated various proposals to address the effects of the economic crisis, including the initiation of a plan for a joint gas purchasing platform.
- 45 In that regard, the applicant argues that it was already clear from Communication COM(2022) 108 final of 8 March 2022 from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions entitled 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy' ('the REPowerEU communication') that it would be necessary to find and select a service provider for the creation and operation of a joint gas purchasing platform. Similarly, according to the applicant, the need for a service provider to ensure gas demand aggregation is clear from the proposal for a regulation of 18 October 2022. Thus, the applicant submits that the relevant triggering event for assessing the time frame within which extreme urgency arose occurred in March 2022 or, at the latest, on 18 October 2022, after the proposal for a regulation was put forward.
- 46 The applicant states that extreme urgency should be assessed objectively in relation to the precise circumstances justifying the use of the negotiated procedure without prior publication of a contract notice, that is to say, depending on the moment that the contracting authority became aware of the need for the works or services justifying the subsequent launch of a call for tenders.
- 47 Moreover, the applicant claims that the fact that Regulation 2022/2576 requires, as soon as it is adopted, a specific time frame for the award of the contract in question cannot be regarded as extreme urgency resulting from an unforeseeable event. According to the applicant, it is the Commission, as the contracting authority, that is the originator of that time frame, with the result that it could plan in advance to launch the procurement procedure at issue in order to select a service provider.
- 48 The Commission disputes those arguments.
- 49 In that regard, it is apparent from the wording of point 11.1(c) of Annex I to the Financial Regulation that the extreme urgency warranting the use of a negotiated procedure without prior publication of a contract notice must be brought about by unforeseeable events.
- 50 It must be ascertained whether, in the circumstances of the present case, the Commission was entitled to take the view that it was faced with unforeseeable events such as to warrant the use of a negotiated procedure without prior publication of a contract notice.
- 51 It should be noted that the Financial Regulation does not contain any detailed information making it possible to determine what is covered by the concept of 'unforeseeable events'. It must be stated that, in the absence of such detailed information, the contracting authority has a certain margin of discretion in relation to the assessment of whether such events are present (see, by analogy, judgment of 24 April 2012, *Evropaïki Dynamiki v Commission*, T-554/08, not published, EU:T:2012:194, paragraph 127).
- 52 In the present case, the Commission submits that the energy crisis following the Russian Federation's invasion of Ukraine was an unforeseeable event. In that regard, in the Directorate-General for Energy's file note justifying the use of the negotiated procedure without prior publication of a contract notice, it is stated that, following the invasion of Ukraine, the Russian Federation weaponised the energy trade and manipulated the energy market. That situation led to a sudden and significant disruption of natural gas supplies from Russia to the Member States, making it necessary to diversify supply sources so as to ensure security of gas supply in the European Union. It is also stated in the Directorate-General for Energy's file note that it was in that context that the Commission proposed, on 18 October 2022, on the basis of Article 122 TFEU, a new package of measures, including demand aggregation and joint purchasing of gas to address high energy prices and ensure security of supply.

- 53 Admittedly, as the applicant claims, the invasion of Ukraine had taken place on 24 February 2022, or approximately nine months before the launch of the negotiated procedure without prior publication of a contract notice. Nevertheless, as the Commission has stated, the energy crisis resulting from that invasion worsened only in the summer of 2022, which was characterised by instances where gas prices were excessive, to the detriment of EU consumers and companies.
- 54 Thus, as is apparent from recital 9 of Regulation 2022/2576, the use of services for the demand aggregation and joint purchasing of gas was decided in a context characterised by a persistent situation entailing severe difficulties in ensuring security of gas supply. According to recital 11 of that regulation, the demand aggregation and joint purchasing of gas was to help fill up gas storage facilities, in particular in the event that the European gas storage facilities were depleted at the end of winter 2022/2023. Therefore, as is apparent from recital 12 of Regulation 2022/2576, it was necessary to establish, urgently and on a temporary basis, demand aggregation and joint purchasing of gas, in particular to enable the rapid designation of a service provider capable of aggregating demand.
- 55 It follows that, in the circumstances of the present case, the Commission was entitled, without exceeding the limits of its discretion, to take the view that the persistent energy crisis following the Russian Federation's invasion of Ukraine constituted an unforeseeable event within the meaning of point 11.1(c) of Annex I to the Financial Regulation.
- 56 As regards the other arguments put forward in support of the first complaint, it must be noted that they do not seek to challenge the existence of an unforeseeable event bringing about extreme urgency. By its other arguments, the applicant, in essence, criticises the Commission for having delayed initiating the negotiated procedure without prior publication of a contract notice. Consequently, those arguments, which concern the causal link between the unforeseeable event and the extreme urgency brought about by that event, will be examined in the context of the third complaint, alleging that the extreme urgency is exclusively attributable to the Commission.
- 57 It follows from the foregoing considerations that the first complaint, alleging, in essence, that there were no unforeseeable events, must be rejected.
- *The second complaint, alleging that the Commission should have used another procurement procedure, in particular the urgent open procedure*
- 58 The applicant submits that, given the exceptional nature of the negotiated procurement procedure without prior publication of a contract notice, that procedure cannot be used if it is possible to use another procedure provided for in Article 164(1) of the Financial Regulation. According to the applicant, in order to use that exceptional procedure, it should be impossible to comply with the time scale by using any of the other urgent procedures provided for in the Financial Regulation.
- 59 In that regard, the applicant states that, in accordance with point 26.1(a) of Annex I to the Financial Regulation, a possibility exists of using an urgent open procedure by which the time limit for the receipt of tenders may be reduced to 15 days from the date of dispatch of the contract notice. It thus claims that it is possible to use the negotiated procedure without prior publication of a contract notice only if it is not possible to adhere to that 15-day time limit.
- 60 In the present case, the applicant argues that, by using the urgent open procedure provided for in point 26.1(a) of Annex I to the Financial Regulation, it would have been possible to award the contract in question on a date much earlier than the one set out in the Commission's time frame, that is to say, by mid-January 2023 at the latest. In that regard, it submits that, even if the reference date could be regarded as being the date on which the procurement procedure at issue was actually launched, by using the urgent open procedure, the Commission could have set a time limit for the receipt of tenders on 15 December 2022, with the result that the contract could have been awarded on the following day.

- 61 Furthermore, the applicant states that the additional formalities arising from the urgent open procedure, such as the publication of a contract notice, the time limit for receipt of tenders, the public opening, and the standstill period before the signature of the contract would not have created substantial delays for the successful tenderer to start providing the services.
- 62 In addition, the applicant submits that the risk of a high number of participants taking part in an urgent open procedure was limited on the ground that the contract concerned a specialised type of services that could not be provided by a significant number of companies. Moreover, with a 15-day time limit for the receipt of tenders, some companies would likely not have been able to submit a tender within the prescribed period. In that regard, the applicant states that, in the present case, only two of the eight operators that had been invited to tender submitted an offer.
- 63 The Commission disputes those arguments.
- 64 In that regard, it is apparent from point 11.1(c) of Annex I to the Financial Regulation that the contracting authority may use a negotiated procedure without prior publication of a contract notice where, for reasons of extreme urgency brought about by unforeseeable events, it is impossible to comply with the time limits laid down in points 24, 26 and 41 of that annex to the Financial Regulation.
- 65 According to the Commission, in the context of the persistent energy crisis, demand aggregation and joint purchasing of gas constitute a measure taken in extreme urgency that is necessary, first, to prevent a new acute gas supply crisis for winter 2023/2024, and second, to prevent excessive gas prices following from the Russian Federation's invasion of Ukraine and the ensuing energy shortages.
- 66 In the present case, the reasons for the use of the negotiated procedure without prior publication of a contract notice were substantiated in the Directorate-General for Energy's file note by reference to the 'extremely tight schedule' arising from the need for the IT tool to be fully operational by the end of March 2023 at the latest. In order to achieve that objective, it is apparent from that note that, so as effectively to ensure the filling of gas storage facilities for winter 2023/2024 and to enhance the security of gas supply in the European Union, the services for demand aggregation and joint purchasing of gas had to be fully operational by the end of the first quarter of 2023 at the latest, so that they could be used to award the first tenders under the EU Energy Platform in the course of the second quarter of 2023. In that regard, in its defence, the Commission stated that the filling season of storage facilities in the industry spanned from April to October, when market operators made net injections of gas volumes in storage facilities in order to accumulate supply reserves that can be used during the winter period.
- 67 As is apparent from the Directorate-General for Energy's file note, since a period of between two and three months was necessary for the development of the IT tool in respect of the mechanism for demand aggregation and joint purchasing of gas, the Commission took the view that the contract for the provision of services had to be signed by the end of January 2023 at the latest. In that context, according to the planning initially envisaged in that note and as is apparent from the technical requirements of the tender specifications annexed to the application, the Commission's objectives were to sign the contract and have the services commence as from the second week of January 2023. In that regard, in its defence, the Commission emphasised the negative effects of any potential delay in the actual commencement of the provision of the services of the contract in question. In particular, it referred to the fact that any delay would be likely seriously to compromise the positive effects of gas demand aggregation, by concentrating demand over a shorter period, which would result in an upward pressure on prices.
- 68 Thus, it should be stated that the schedule set by the Commission for the conduct of the procurement procedure at issue was drawn up by taking account of objective factors, that is to say, the way in which the energy market operates and the need to give the service provider sufficient time to develop the IT tool enabling demand aggregation and joint purchasing of gas.
- 69 Next, it is necessary to examine the Commission's statement that, for the purpose of awarding the contract in question and concluding the contract with the successful tenderer in the second week of January 2023, it

could not have used an open procedure applying the time limit in respect of urgent cases laid down in point 26.1(a) of Annex I to the Financial Regulation.

- 70 In accordance with point 26.1(a) of Annex I to the Financial Regulation, in open procedures, where duly substantiated urgency renders impracticable the minimum time limit for the receipt of tenders of 37 days from the day following dispatch of the contract notice laid down in point 24.2 of that annex, the contracting authority may set a time limit for the receipt of tenders which may not be less than 15 days from the date of dispatch of the contract notice.
- 71 In addition, it is apparent from Article 175(2) of the Financial Regulation, in conjunction with point 35.1(a) of Annex I thereto, that the contracting authority is required to comply with a standstill period which is to run from the day after the simultaneous dispatch of the notifications to successful and unsuccessful tenderers by electronic means. In accordance with Article 175(3) of the Financial Regulation, that standstill period is to have a duration of 10 days when using electronic means, and 15 days when using other means. In that regard, it should be noted that point 35.2 of Annex I to the Financial Regulation does not provide for any derogation from the obligation to comply with that standstill period where, in an open procedure, the time limit in respect of urgent cases laid down in point 26.1(a) of that annex is applied.
- 72 It follows that, where the contracting authority uses an open procedure where there is duly substantiated urgency, it must comply not only with a minimum 15-day time limit for the receipt of tenders, but also with a 10-day time limit representing the standstill period, that is to say, a minimum duration of 25 calendar days.
- 73 Moreover, in order to determine whether it is possible to comply with the time limits of a procedure in which the time limit in respect of urgent cases is applied, in addition to that minimum duration, as the Commission correctly states, account must be taken also of the obligation to organise a tender opening session in which the authorised representatives of the tenderers may participate, in accordance with point 28.1 of Annex I to the Financial Regulation. As is apparent from point 28.2 of that annex, where the value of a contract is equal to or greater than the thresholds referred to in Article 175(1) of the Financial Regulation, the authorising officer responsible is to appoint a committee to open the tenders and it is not possible for that obligation to be waived other than on the basis of a risk analysis when reopening competition within a framework contract and for the cases referred to in the second subparagraph of point 11.1 of Annex I to the Financial Regulation, except points (d) and (g) of that point of that annex. It follows from this that, for the contract in question in the present case, the value of which is greater than the thresholds referred to in Article 175(1) of the Financial Regulation, organising a tender opening committee in which the authorised representatives of the tenderers may participate is mandatory in an open procedure, including where the time limit in respect of urgent cases laid down in point 26.1(a) of Annex I to the Financial Regulation is applied. Consequently, the process of evaluating tenders cannot begin before a tender opening session is organised by a tender opening committee.
- 74 Moreover, as the Commission correctly states, where the contracting authority assesses whether the time limit in an open procedure in which the time limit in respect of urgent cases is applied is compatible with the extreme urgency brought about by an unforeseeable event, it must also take into account the length of time needed to evaluate the tenders. In order to estimate the foreseeable duration of the tender evaluation process, where the most economically advantageous tender is determined in accordance with the best price-quality ratio award method within the meaning of the third subparagraph of Article 167(4) of the Financial Regulation, the contracting authority may, inter alia, take into consideration the technical nature of the contract in question, in particular the requirements relating to the technical offer and the number of tenderers that may submit a tender.
- 75 In the present case, it is apparent from the documents in the file before the Court that the Commission decided to determine the most economically advantageous tender in accordance with the best price-quality ratio award method. It is apparent from point 3.5 of the technical requirements of the tender specifications that the price-quality ratio is determined on the basis of a financial evaluation, representing 30% of the score, and a technical evaluation, making up 70% of that score.

- 76 It should be noted that the quality of the tender had to be evaluated in the light of several technical criteria. The first criterion, divided into two subcriteria, sought to evaluate the quality of the implementation of the services offered (40 points), the second criterion, divided into five subcriteria, sought to evaluate the effectiveness and efficiency of the proposed business process (50 points), and the third criterion sought to evaluate the quality of the information system security, in particular in terms of data protection and IT security (10 points).
- 77 It is apparent from the Directorate-General for Energy's file note and the technical requirements of the tender specifications that the contract in question was technically complex. In particular, it must be noted that, in view of the technical nature of the services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform, in Section 5 of that note, relating to the tender documents, it was stated that the EU Energy Platform Industry Advisory Group would be consulted on the technical part of the service contract in order to ensure that it fitted with best industry practices in terms of the mechanism for demand aggregation and joint purchasing of gas. Similarly, it is apparent from Annex V to the Directorate-General for Energy's file note that the input of that committee was also envisaged in respect of the description of the IT tool and the scope of the work to be carried out by the service provider.
- 78 Furthermore, it must be noted that, in point 1.4.2 of the technical requirements of the tender specifications, relating to the content of the tender, it was required that the technical tender provide all the information needed to assess its compliance with the tasks related to the subject matter of the contract in question and with the provisional schedule and the award criteria. In that regard, it should be noted that point 1.4.2 of the technical requirements listed four main tasks, that is to say, (i) conducting a scoping study, (ii) developing the business process for demand aggregation, tendering process and joint purchasing of gas, (iii) providing access to, operating and maintaining an IT tool for the demand aggregation and joint purchasing of gas, and (iv) running the services of demand aggregation and joint purchasing of gas.
- 79 Furthermore, it is apparent from the market analysis carried out in the Directorate-General for Energy's file note that 41 economic operators had been included in the initial pool of operators capable of supplying the services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform. Therefore, as the Commission correctly argues, instead of the eight operators that received an invitation to tender in the procurement procedure at issue, use of an open procedure would have allowed for the participation of those 41 operators, with the possibility that tenders would have also been submitted by other interested operators that had not been previously identified in the market analysis.
- 80 Thus, the applicant cannot claim that use of an open procedure would not have involved a potentially higher number of participants on the ground that the contract was very specialised and on account of the time limit in respect of urgent cases applicable in such a procedure, which, in the applicant's view, is borne out by the fact that only two of the eight operators invited to tender in the procurement procedure at issue submitted a tender. The Commission could legitimately find that it was likely that, with the use of an open procedure, the number of participants in the procedure would be higher, in so far as it was entitled to conclude that at the very least some of the 41 economic operators identified as being capable of supplying the services requested would be interested in participating in the procurement procedure at issue, similar to other interested operators, like the applicant, that had not been identified as being capable of supplying such services. In that regard, the fact that, in the procurement procedure at issue, only two tenders were submitted even though eight operators had been invited to submit a tender cannot suffice to support the inference that, when it decided to use the negotiated procedure without prior publication of a contract notice, the Commission incorrectly overstated the number of tenderers likely to submit a tender.
- 81 It should be noted that it is apparent from the Directorate-General for Energy's file note that a period of approximately 50 days had been scheduled between the launch of the envisaged procedure on 24 November 2022 and the signature of the contract and commencement of services on 12 January 2023.
- 82 It follows that, having regard to the potentially high number of participants in an open procedure and in the light of the technical award criteria used to evaluate the quality of the technical tenders, the technically complex nature of the contract in question, the technical requirements relating to each tenderer's offer, the

foreseeable duration of the process of evaluating the tenders, and compliance with the standstill period, the Commission was entitled to take the view that use of an open procedure could not ensure compliance with the provisional schedule envisaged.

83 Thus, it must be stated that the Commission duly substantiated the argument that the extreme urgency brought about by an unforeseeable event made it impossible to comply with the time limits in an urgent procedure in which the time limit in respect of urgent cases laid down in point 26.1(a) of Annex I to the Financial Regulation would apply.

84 Furthermore, it must be noted that those time limits are shorter than those in a restricted procedure in which the time limits in respect of urgent cases laid down in point 26.1 of Annex I to the Financial Regulation are applied. They are also shorter than those in a competitive procedure with negotiation provided for in points 24.3 and 24.4 of that annex, for which there are no time limits in respect of urgent cases. Consequently, the Commission was entitled to take the view that the extreme urgency made it impossible to comply with the time limits laid down in points 24 and 26 of Annex I to the Financial Regulation.

85 It follows that the second complaint, alleging that the Commission should have used another procurement procedure, must be rejected.

– *The third complaint, alleging that the extreme urgency is attributable to the Commission*

86 The applicant submits that the urgency is attributable to the Commission for three reasons. First, in the applicant's view, the Commission delayed the launch of the procedure for the award of the contract in question even though the REPowerEU communication had already included a proposal to create an EU energy platform.

87 Second, the applicant states that, in the proposal for a regulation of 18 October 2022, the Commission referred to the need to engage a service provider for the purposes of the process for demand aggregation and joint purchasing of gas. The Commission launched the procurement procedure at issue several weeks after that proposal was put forward.

88 Third, according to the applicant, the procurement procedure at issue was launched one week after the Council had agreed in principle, on 24 November 2022, to the draft regulation put forward on 18 October 2022.

89 The Commission disputes those arguments.

90 In that regard, it is apparent from point 11.1(c) of Annex I to the Financial Regulation that, in order to use the negotiated procedure without prior publication of a contract notice, the justification of the extreme urgency must not be attributable to the contracting authority.

91 It follows from this that, if the contracting authority unduly delayed launching the procurement procedure, the extreme urgency is attributable to it at least in part, with the result that the use of the negotiated procedure without prior publication of a contract notice is precluded (see, by analogy, judgment of 15 October 2009, *Commission v Germany*, C-275/08, not published, EU:C:2009:632, paragraph 72).

92 It must be ascertained whether the Commission unduly delayed launching the procurement procedure at issue in the present case, with the result that the causal link between the unforeseeable event and the extreme urgency would be broken.

93 As a preliminary point, it should be borne in mind that the decision to use services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform is taken in the context of an energy crisis that follows an armed conflict and is characterised by the persistence of serious difficulties for the security of gas supply.

- 94 In the first place, it must be noted that Regulation 2022/2576, which provides for the use of a service provider in respect of the services for demand aggregation and joint purchasing of gas, was adopted on the basis of Article 122(1) TFEU. It is apparent from the wording of that provision that the Commission has only a power of proposal and that it is for the Council to decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
- 95 Thus, since the Commission did not have the powers, in the context of an energy crisis, to decide to implement services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform, the applicant cannot criticise it for failing to launch the procurement procedure at issue after the publication of the REPowerEU communication by relying on the fact that the Commission was aware that such a mechanism could be useful in the energy crisis. As the Commission correctly claims, that communication cannot constitute a sufficient legal basis enabling it to launch a call for tenders, especially since, at that date, the objectives of gas demand aggregation had not been clearly defined.
- 96 In the second place, as the Commission correctly maintains, it would have been premature for it to launch the procurement procedure at issue before the text of its proposal, put forward on 18 October 2022, had been the subject of political agreement on the part of the Council in respect of a sufficiently stabilised version. As the Commission submits, until such an agreement was reached on 24 November 2022, the Council could, *inter alia*, decide to make significant changes which would have affected the deliverables required in the call for tenders.
- 97 In that regard, it must be noted that the selection criteria in the call for tenders in question and the tasks entrusted to the service provider, which are laid down in Article 6 and Article 7 of Regulation 2022/2576 respectively, were among the aspects that could be subject to change in the process of that regulation's adoption.
- 98 It is apparent from the Directorate-General for Energy's file note that, in so far as the selection criterion relating to the requirement of experience in cross-border transactions was still under discussion, the final pre-selection of tenderers was to be formalised in a subsequent document to be prepared and signed once the proposal for a regulation was adopted by the Council.
- 99 Furthermore, it must be stated that it is apparent from the documents in the file that the service provider's task of allocating access rights to the supply of gas, laid down in Article 7(1)(c) of Regulation 2022/2576, evolved during the procedure for that regulation's adoption. As regards that task, in the Directorate-General for Energy's file note, which was based, in respect of the tasks entrusted to the service provider, on the draft regulation's version of 31 October 2022, it was stated only that the service provider would 'allocate access rights to supply'. In the final version of Regulation 2022/2576 and in the technical requirements of the tender specifications, significant clarifications as regards that task were made in Article 7(1)(c) of that regulation.
- 100 Thus, since potentially significant changes could be made by the Council during the adoption of Regulation 2022/2576 as regards the selection criteria or by entrusting to the service provider additional tasks that had not been provided for in the proposal for a regulation of 18 October 2022, the Commission was entitled to decide not to launch the procurement procedure at issue before a sufficiently stabilised version of the regulation being adopted had been the subject of political agreement. In the event that considerable changes had been made to the selection criteria or to the tasks entrusted to the service provider, it would have been necessary to make substantial changes to the procurement documents. If such changes had been made to the procurement documents during the tender submission phase, in accordance with point 25.3(b) of Annex I to the Financial Regulation, the Commission would have been required to extend the time limit for receipt of tenders. In addition, in the event that such changes had been made after the date of submission of the tenders, those tenders would no longer have been in line with the conditions laid down in the tender specifications, with the result that it cannot be ruled out that the Commission would have had to re-launch the procedure.

- 101 Consequently, the applicant cannot criticise the Commission for having delayed launching the procurement procedure at issue on the ground that it unduly waited until the Council had agreed on a sufficiently stabilised version of its proposal for a regulation of 18 October 2022.
- 102 In the third place, as regards the fact that the procurement procedure at issue was not launched until one week after a sufficiently stabilised version of the draft regulation had been the subject of political agreement on the part of the Council, contrary to what the applicant claims, it should be stated that that length of time is not unreasonable to enable the Commission to take the steps necessary to launch the procedure. In any event, as is apparent from the examination of the second complaint above, even by launching the procurement procedure on 24 November 2022, as anticipated in the initial planning set out in the Directorate-General for Energy's file note, the Commission was entitled, without exceeding the limits of its discretion, to take the view that the time limits in respect of urgent cases in an open procedure were not compatible with the extreme urgency.
- 103 In the fourth place, as regards the applicant's argument set out in the context of the first complaint (see paragraph 47 above), according to which, in essence, there cannot be extreme urgency brought about by an unforeseeable event where the award of the contract requires a specific schedule determined by the contracting authority, it should be noted that that argument is based on an analogy made with the case that gave rise to the judgment of 2 June 2005, *Commission v Greece* (C-394/02, EU:C:2005:336). It is true that, in that judgment, the Court of Justice held that the need to carry out works within the time limits imposed by an authority competent for the assessment of the environmental impact risks of a project cannot be regarded as extreme urgency brought about by an unforeseeable event, on the ground that the fact that a supervisory authority sets a time limit is a foreseeable part of the procedure for approving that project (paragraphs 42 and 43 of that judgment). Nevertheless, it must be stated that the context of that case cannot be compared to that of the present case. The case relied on by the applicant concerned a contract that had been concluded outside any context of a crisis that was unforeseeable for the contracting authority.
- 104 In the present case, the relevant contract is considered, in a context of a persistent energy crisis following an armed conflict, to be an aspect that is necessary to prevent a new acute gas supply crisis for winter 2023/2024 and prevent excessive gas prices following the Russian Federation's invasion of Ukraine and the ensuing energy shortages. Therefore, in the circumstances of the present case, the fact that the schedule for the procurement procedure was drawn up by the Commission cannot preclude a finding that there was an unforeseeable event bringing about extreme urgency within the meaning of point 11.1(c) of Annex I to the Financial Regulation. Moreover, as is apparent from paragraphs 66 to 68 above, that schedule was drawn up on the basis of objective factors, taking into account the way in which the energy market operates, in order to ensure gas supply, and the time needed by the service provider to be selected for the development of the IT tool for demand aggregation and joint purchasing of gas.
- 105 In the fifth place, the applicant cannot rely on the judgment of 2 August 1993, *Commission v Italy* (C-107/92, EU:C:1993:344), in order to claim, in essence, that the contracting authority was required to launch a negotiated procedure without prior publication of a contract notice as soon as it became aware of the need for the works or services on which such a procedure is based. In paragraph 13 of that judgment, the Court of Justice merely found that it would have been possible for the contracting authority to comply with the time limits of an accelerated procedure laid down by Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682).
- 106 Similarly, in order to establish that the Commission delayed launching the procurement procedure at issue, the applicant cannot rely on the case that gave rise to the judgment of 15 October 2009, *Commission v Germany* (C-275/08, not published, EU:C:2009:632). The subject matter of the contract in question and the circumstances of that case cannot be compared to the present case. First, whereas the present case concerns a contract considered to be necessary to overcome an energy crisis that follows an armed conflict and is characterised by serious difficulties for the security of gas supply, the contract in question in the case that gave rise to the judgment of 15 October 2009, *Commission v Germany* (C-275/08, not published,

EU:C:2009:632), concerned the replacement of software necessary for the day-to-day management of an administration responsible for motor vehicle registration. Second, in that case, the contracting authority was entitled, as is apparent from paragraph 9 of that judgment, to take decisions concerning the replacement of the software used for motor vehicle registration on a legislative basis. As is apparent from paragraph 94 above, the Commission does not have the powers to decide on the implementation of services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform.

107 It follows from the foregoing considerations that the third complaint, alleging that the extreme urgency is attributable to the Commission, must be rejected.

– *The fourth complaint, alleging that the negotiated procedure without prior publication of a contract notice is not such as to address an immediate shortage of supply*

108 The applicant claims that the objectives of the EU Energy Platform would not have been prejudiced or precluded if an award procedure other than the negotiated procedure without prior publication of a contract notice had been used. According to the applicant, there was no sudden, immediate issue of supply which the Commission was required to resolve by selecting a service provider to be in place by using that procedure. The applicant submits that it is apparent from the case-law that the negotiated procedure without prior publication of a contract notice cannot be relied upon merely to ensure security of supply in order to prevent future shortages, but only when a shortage actually occurs.

109 The Commission disputes those arguments.

110 In that regard, it must be noted that none of the conditions laid down in point 11.1(c) of Annex I to the Financial Regulation can be interpreted as limiting the use of the negotiated procedure without prior publication of a contract notice solely to cases in which the award of a contract is intended to address an immediate shortage of supply.

111 In the present case, it must be borne in mind that the use of services for the organisation of demand aggregation and joint tendering of gas under the EU Energy Platform was decided in the context of an energy crisis characterised by the persistence of serious difficulties for the security of gas supply. In addition, the use of those services was deemed necessary in order to avoid the occurrence of a new acute gas supply crisis for winter 2023/2024. As the Commission correctly submits, the possibility of using the negotiated procedure without prior publication of a contract notice cannot be ruled out on the sole ground that the objective of a measure, which must be adopted and implemented without waiting, is to avoid a worsening of the energy crisis in the future. Otherwise, in an ongoing energy crisis, where the needs of the contracting authorities cannot be met, as in the present case, by a solution that is immediately available, those authorities would be deprived of the possibility of implementing in good time measures that they consider appropriate to avoid the foreseeable worsening of that crisis.

112 It should be noted that the applicant cannot rely on the judgment of 3 May 1994, *Commission v Spain* (C-328/92, EU:C:1994:178), to claim that the Commission was not entitled to use the negotiated procedure without prior publication of a contract notice on the ground that the gas shortage had not actually occurred. It must be stated that the measure and the context at issue in that case cannot be compared to the present case. In the present case, the services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform were implemented in the context of a persistent energy crisis. The same is not true for the case that gave rise to the judgment of 3 May 1994, *Commission v Spain* (C-328/92, EU:C:1994:178). Furthermore, in the present case, the Court is not faced with a measure seeking to authorise the EU institutions systematically to use the negotiated procedure without prior publication of a contract notice for all contracts concerned by the energy crisis. In the present case, the Court has before it only the procedure relating to the selection of the provider of services for the organisation of demand aggregation and tendering of gas under the EU Energy Platform, which, for the reasons relied on by the Commission, set out in paragraphs 66 and 67 above, had to be selected as soon as possible in order for the services to be fully operational in good time.

- 113 It follows that the fourth complaint, alleging that the negotiated procedure without prior publication of a contract notice is not such as to address an immediate shortage of supply, must be rejected.
- 114 Accordingly, the first plea in law, alleging infringement of Article 164(5)(f) of, and point 11.1(c) of Annex I to, the Financial Regulation, must be rejected.

The second plea in law, alleging failure to observe the principles of transparency and equal treatment

- 115 The applicant claims that the negotiated procedure without prior publication of a contract notice, which comes within the scope of Article 160 of the Financial Regulation, is not exempt from the application of the principles of transparency and equal treatment. Although the applicant acknowledges that the negotiated procedure without prior publication of a contract notice by definition implies a departure from the principles of transparency and equal treatment, in its view, extreme urgency warrants a limitation of those principles only to a certain extent.
- 116 According to the applicant, the principle of equal treatment should be observed at every stage of the procedure for the award of a public contract and that principle, applicable to the selection of candidates in a restricted procedure, should be applied by analogy to the negotiated procedure without prior publication of a contract notice.
- 117 The applicant submits that a preliminary market consultation would have ensured observance of the principles of transparency and equal treatment, especially since Article 166 of the Financial Regulation allows the contracting authority to carry out a market consultation. In the present case, in so far as such a market study was not carried out, the applicant states that it was not invited to tender even though it possessed all the required expertise and knowledge to provide the services described in Article 7 of Regulation 2022/2576. The applicant thus argues that the selection of undertakings that were invited to tender was arbitrary.
- 118 The Commission disputes those arguments.
- 119 As regards the principle of transparency, it must be borne in mind that, where a derogation from the public procurement provisions is expressly authorised, if the conditions for that derogation are satisfied and a negotiated procedure without prior publication of an invitation to tender is thus justified, there can be no obligation to advertise. Accordingly, the principles which flow from the Treaty cannot impose a requirement of prior publicity where the applicable provisions expressly provide for a derogation, or that derogation would be nugatory (judgment of 14 July 2016, *Alesa v Commission*, T-99/14, not published, EU:T:2016:413, paragraph 69; see also, to that effect, judgment of 20 May 2010, *Germany v Commission*, T-258/06, EU:T:2010:214, paragraph 141).
- 120 For the same reasons, where the contracting authority has legitimately established that the conditions for using the negotiated procedure without prior publication are satisfied, it cannot be criticised for having failed to observe the principle of equal treatment by not sending an invitation to tender to certain undertakings operating on the market concerned by that procedure.
- 121 It follows that the applicant cannot claim that the principle of equal treatment had to be observed at every stage of the procedure for the award of the contract in question in the procurement procedure at issue. In that regard, it should be noted that that assertion of the applicant is not in any way borne out by the case-law to which it refers.
- 122 As regards the judgment of 7 June 2017, *Blaž Jamnik and Blaž v Parliament* (T-726/15, EU:T:2017:376), it must be stated that that judgment concerned both a procedure and a context that are different from the present case, in so far as what was at issue was a negotiated procedure without prior publication concerning a building contract, in which the applicant had participated. Furthermore, contrary to what the applicant claims, the General Court did not rule that the principles of transparency and equal treatment had to be applied to negotiated procedures without prior publication of a contract notice. The Court found only

that the phase of prospecting the local market, and not the negotiated procedure as such, enabled the contracting authority better to prepare for possible negotiations, in accordance with the principles of transparency, equal treatment and non-discrimination.

- 123 As regards the judgments of 5 October 2000, *Commission v France* (C-16/98, EU:C:2000:541), and of 12 November 2009, *Commission v Greece* (C-199/07, EU:C:2009:693), it must be stated that the cases that gave rise to those judgments did not concern the use of a negotiated procedure without prior publication of a contract notice.
- 124 Furthermore, as the Commission correctly argues, it must be noted that point 11.1(c) of Annex I to the Financial Regulation does not require the contracting authority to carry out, prior to the launch of the procedure, a preliminary market consultation or a market study in order to determine which economic operators will be invited to submit a tender. Such a requirement appears only in point 11.1(g) of that annex in respect of building contracts, an area which is not at issue in the present case.
- 125 In any event, as is apparent from Section 4 of the Directorate-General for Energy's file note, the Commission defined an initial pool comprising 41 operators capable of supplying the services in respect of the contract in question, by carrying out a market analysis based on the lists available on ACER's REMIT portal. In delimiting that pool, the Commission relied on the list of energy exchanges and the list of marketplaces allocating cross-border gas infrastructure capacity in the European Union. In addition, it consulted ACER in order to include FGSZ Földgázszállító's RBP platform in the initial pool. It must be stated that the applicant was not included on the list of energy exchanges or marketplaces allocating cross-border gas infrastructure capacity in the European Union. Thus, since the Commission defined an initial pool of operators capable of supplying the services in respect of the contract in question on the basis of objective data, it cannot be criticised for having selected the operators invited to tender without having first carried out a market analysis.
- 126 It follows from the foregoing considerations that the second plea in law, alleging failure to observe the principles of transparency and equal treatment, must be rejected.
- 127 Accordingly, it follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

- 128 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission, including those relating to the proceedings for interim relief, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Enmacc GmbH to pay the costs, including those relating to the proceedings for interim relief.**

Spielmann

Mastroianni

Brkan

Delivered in open court in Luxembourg on 6 September 2023.

V. Di Bucci

M. van der Woude

Registrar

President

* Language of the case: English.