



**The President of the General Court dismisses the application to suspend the operation of the decisions of the European Space Agency, acting in the name and on behalf of the European Commission, providing for the exclusion of the German company OHB System from the public contract for the ‘Procurement of Galileo transition satellites’**

*The weighing up of the interests at stake leans towards not granting the suspension sought*

On 29 January 2021, the German satellite company OHB System AG (‘OHB’) brought an action before the General Court of the European Union for annulment of two decisions of the European Space Agency (ESA). By those decisions, the ESA, acting in the name and on behalf of the Commission, following a public procurement procedure, rejected OHB’s tender offer and awarded two contracts for the ‘Procurement of Galileo transition satellites’ to Thales Alenia Space Italia S.p.A. (Italy – ‘Thales Alenia’) and Airbus Defence & Space GmbH (Germany – ‘Airbus’). Along with its action, OHB also lodged with the General Court an **application for interim relief**, seeking **to secure, as an interim measure, the suspension of the ESA’s decisions providing, in essence, for its exclusion from the contract at issue.**

In support of its application, OHB argues in substance that its competitor, Airbus, recruited one of its executives who had played a decisive role in preparing its offer. **OHB suspects that the former employee illegally obtained sensitive information which was capable of giving the new employer (Airbus) undue advantage in connection with the award of the contract.**

As part of the proceedings for interim relief, the President of the General Court, by order of 31 January 2021 – on a provisional basis and without hearing the Commission – granted OHB’s application to suspend the operation of the ESA’s decision which informed it that its tender for the public contract at issue had not been accepted.<sup>1</sup> He subsequently specified, by order of 26 February 2021, that the order of 31 January 2021 concerns only Airbus and not Thales Alenia. Indeed, **OHB submitted arguments only in relation to Airbus.**

**By today’s order, the President of the General Court**, as the judge hearing the application for interim relief, after hearing the Commission, thereby sets aside his previous orders and **dismisses OHB’s application for interim relief.**

The President of the General Court observes that, *prima facie*, OHB’s application is not wholly unfounded<sup>2</sup> and that the damage alleged by OHB is objectively serious.

<sup>1</sup> That order was delivered on the basis of Article 157(2) of the Rules of Procedure of the General Court, by which the President of the General Court may grant an application even before the observations of the opposite party have been submitted. That decision may be varied or cancelled even without any application being made by any party.

<sup>2</sup> The President of the General Court considers, *inter alia*, that, without prejudice to the decision of the Court in the main proceedings, **the Commission’s possible failure to exercise due care and attention in ensuring that the companies taking part in the call for tenders were treated equally** warrants an in-depth examination. In that respect, the President of the General Court notes that **the ESA sent a request for information to Airbus on 29 January 2021** (that is to say, on the day that OHB brought the action) regarding, *inter alia*, **the contribution made by the former OHB employee** to preparing the tender offer as part of his new duties at Airbus. **Airbus provided in that respect a brief, vague reply.** The President of the General Court concludes that it cannot be excluded that those late and incomplete

The President of the General Court holds, however, that it is necessary **to weigh up the risks** connected with each of the possible outcomes in the proceedings for interim relief (being, respectively, the grant or the dismissal of the application for the suspension of operation as an interim measure).

In that regard, the President of the General Court observes, in the first place, that if OHB were to succeed in the substantive proceedings, the damage connected with the irreversible loss of opportunity to secure the contract at issue (because of the dismissal of its application for interim relief) could be assessed, which would allow for the individual loss actually suffered in this respect to be fully remedied. By contrast, if the interim measures applied for were ordered, it would be impossible for the Commission to conclude a contract with one of the successful tenderers, which would have **major technical and financial consequences for the space programme of the European Union. The rapid conclusion of that contract is therefore an important public interest.**

In the second place, the President of the General Court finds that, although the loss in profits expected by OHB and the severance payments to be made to its staff would amount to approximately € 30 million, that sum has to be put alongside the **value of the European satellite navigation programmes**, which is considerable, since **the European Union, in the 2014-2020 period alone, has invested more than € 7 billion** in them, and alongside the **overall value of the satellites to which the procurement procedure at issue relates, amounting to approximately € 1.47 billion.**

In the third place, the President of the General Court notes that the probable merits of OHB's claims are limited to a single factor: **the Commission's possible failure to exercise due care and attention in ensuring that the companies taking part in the call for tenders were treated equally**<sup>3</sup>. However, it should be stated in that regard not only that **no action was taken on OHB's complaint filed with the German public prosecutor's office, but also that the ESA, acting in the name and on behalf of the Commission, took the initiative of sending a request for information to Airbus in order to examine the risk that any illegalities have been committed.**

In view of those considerations, the President of the General Court concludes that **the weighing up of the interests at stake leans towards not granting the interim measures sought.**

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**NOTE:** The General Court will deliver final judgment on the substance of this case at a later date. An order as to interim measures is without prejudice to the outcome of the main proceedings. An appeal, limited to points of law only, may be brought before the President of the Court of Justice against the decision of the President of the General Court within two months of notification of the decision.

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*The [full text](#) of the order is published on the CURIA website.*

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checks by the ESA were insufficient for assessing the extent of the former OHB employee's involvement in the preparation of the award procedure as part of his new duties at Airbus.

<sup>3</sup> See footnote 2 above.