



INTERNATIONAL ASSOCIATION  
OF YOUNG LAWYERS

# **Public Procurement of infrastructure projects and energy projects**

**Organising Commissions: International Business Law and  
Environmental/Energy Law**

**Prague, 2014 – Working Session 7**

## **General report**

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8<sup>th</sup> of June 2014

## **Introduction**

As general reporters of the above-mentioned Working session of the annual AIJA congress of 2014 in Prague on the topic “Public Procurement of infrastructure projects and energy projects”, under the organizing commissions International Business Law and Environmental/Energy Law, we hereby, after collecting national reports and analyzing them, have the pleasure of submitting the following general report.

Advising public entities on legal issues regarding large infrastructural project has become an important field of work for practitioners around the world. This especially in emerging countries where either the lack of an adequate infrastructure from the beginning is hindering further development or the infrastructure in place is outdated and unable to meet the needs of a developing economy. Also in the more mature economies, this type of advice has become more and more attractive to law firm, due to the fall of private investment in real estate, forcing law firms to look for new markets.

A massive legal framework of rules concerning public procurement is normally facing the public entities when planning and carrying through large infrastructural projects, not to mention the often complex and comprehensive contractual issues. The legal framework for, as an example, European practitioners is, though disguised in national legislation, mostly deriving from EU Directives. In February 2014 three new directives were issued. These are as follows:

- 1) DIRECTIVE 2014/23/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts.
- 2) DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

- 3) DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

The new directives, that are to be implemented in the member states at the latest April 18<sup>th</sup> 2016, might very well affect how procurement of large infrastructural projects, such as roads, railroads, bridges, power plants etc. is procured by the public entities when being implemented in the different member countries. In the existing directives, procedures like the negotiated procedure and specific regulations about Works concessions aims to be applicable to large infrastructural projects (Works = construction contracts). For instance, in the new package of rules on public procurement, Works concessions have been lifted out to a new directive with more detailed rules than before and – as another example – the scope on when the public entities are allowed to use the negotiated procedure under the classic directive has been expanded.

In other jurisdictions, not touched by the EU Directives, the legal framework for public procurement might have a completely different structure and other solutions providing tools for the procuring entities to be able to realize these kinds of projects.

The aim of collecting national reports on the topic was to establish, from a comparative perspective, a perspective of the legal environment practitioners dealing with energy projects and large-scale infrastructure projects are facing on a day-to-day basis. National reports have been submitted from the following countries; Spain, Finland, Sweden, Poland, Lithuania, Brazil and Canada. Though a small number, the spread over Europe and the input from overseas countries, gives an interesting overview of the rules on public procurement in different countries.

We would like to, before the analysis below, thank the national reporters for their great and thorough efforts.

Jan Rolinski

Per-Ola Bergqvist

**Public Procurement of infrastructure projects and energy projects – a comparative study on the legal framework in different countries**

1. The first questions put forward to the national reporters where: *What is the legal framework on public procurement in your country governing public purchases of energy projects and large-scale infrastructure projects? Are the relevant rules to be found in a broad public procurement package or are they found in separate legislation? Are there relevant thresholds obliging to apply public procurement rules to such projects? Are there any exemptions from the application of the public procurement rules provided for in the legislation for such projects?*

From the national reports handed in by the national reporters from countries within the European Union (Spain, Lithuania, Sweden, Poland and Finland) it is clear that there are no specific acts on public procurement exclusively related to the public procurement of energy projects and large-scale infrastructure projects. The EU Directives have been implemented in national legislation. However, the countries differ in their implementation. In Finland, Sweden and Spain, acts have been adopted according to the structure of the EU-directives with three separate acts, one for each directive. In Poland and Lithuania one act is covering public procurement for both the classical sector as well as the utilities and defence and security sectors. Interestingly enough, both Poland and Lithuania have adopted a separate act on the procurement of concessions.

From the national reports handed in by the national reporters from countries outside the European Union (Canada and Brazil) the reports shows a different structure, mainly due to the fact of the federal structure of the countries, which also, but no as decisively in Canada and Brazil applies to Spain.

In Canada, the laws relating to public procurement are found in the common law, legislation, and governmental guidelines and policies. From a Canadian perspective, important variables to identify from the outset include: (1) which level of government is involved i.e. federal or sub-federal i.e. provincial or municipal; (2) which government entity (or quasi-governmental entity i.e. a “Crown corporation”) is putting out the procurement call; (3) identity of the supplier; (4) value of the contract; and (5) whether the contract is characterized as a contract for the procurement of goods, services or construction. Also, there are established principles at common law that apply to procurement more generally i.e. private and public procurement. Such principles include non-discrimination, transparency in the tendering process, competitive procurement, and fairness to all participants in the tendering process.

In Brazil, the picture is different. The obligation of the Public Administration to open bid proceedings for all contracting is provided in the Federal Constitution which also determines that the Federal Government would be exclusively responsible for defining the general rules and procedures to be followed in public bidding processes and for issuing specific instructions regarding their implementation. At an infraconstitutional level, public bid proceedings are regulated in a specific law supplemented by act on reverse auctions. Concessions, PPP and differentiated procurement regimes. Practically speaking, however, the vast majority of bids in Brazil is regulated by applicable federal legislation. The legal framework for public purchases of energy projects is based

on federal laws and regulations and the applicable rules are found in separate legislation coming from different public authorities.

It may also be concluded that all countries from which national reports have been collected use the system of thresholds and there are no specific exemptions for the projects concerned in this report. Apart from the specific rules in Brazil, these projects are with few exemptions, regulated within the scope of a broad legislation package. Spain has however added two specific contracts aimed at procurement or energy projects and large-scale infrastructures to the national legislation, namely: (i) the public works concession contract, on public works concession; and (ii) the public-private partnership contract, regulated in the ordinary act on public procurement.

2. The second question put forward to the national reporters was: *Is this legal framework based on international agreements and commitments, like the EU Directives?*

Spain, Lithuania, Sweden, Poland and Finland are, as members of the European Union, obliged to implement the EU-directives and the underlying international and multilateral agreements of the European Union. In Canada the federal government's procurement laws reflect Canada's international obligations, primarily under the WTO AGP, NAFTA and domestically under the AIT. With limited exception, most federal government departments, agencies and enterprises are bound by the WTO AGP, NAFTA, and AIT. The Brazilian national report stresses out that Brazil is not a signatory to the Government Procurement Agreement (GPA) of the World Trade Organization.

3. Third question: *If based on international agreements and commitments, have your country added any specific procedures and tools to the national legislation*

*directed to the procurement of energy projects and large-scale infrastructure projects?*

Most national reports prompt answer the question is “no”. From a Brazilian point of view, the question is irrelevant. In Poland however, in respect of some “priority” investments which are considered as essential to ensure energy security of the state, the legislator decided to adopt special acts, which to some extent modify rules governing public procurement procedures associated to such investments. As mentioned above, Spain has added two specific contracts aimed at procurement of energy projects and large-scale infrastructures to the national legislation, namely: (i) the public works concession contract, on public works concession; and (ii) the public-private partnership contract, regulated in the ordinary act on public procurement.

4. Forth question: *Which, if any, is the procurement procedure envisaged in the legal framework for the procurement of energy projects and large-scale infrastructure projects? What is the most commonly used procurement procedure within the legal framework for the procurement of energy projects and large-scale infrastructure projects? Are conditions for use of various procurement methods clearly established?*

From the national reports from the European Union, it is clear that the open procedure is the most commonly used procurement procedure but negotiated procedure, competitive dialogue and the concessions framework are used, but not on a common basis. This surprisingly enough as most national reports describe that their legislation stresses out that the negotiated procedure (to some extent), competitive dialogue and the concessions framework are envisaged to be used in these kind of projects.

In Canada most large energy and infrastructure projects are procured by way of a call for tender or an RFP process. Sole sourcing is permitted under exceptional circumstances or if the contract value is below a certain threshold.

In Brazil for virtually all large-scale projects, open competitive procurement is adopted. Other methods of procurement, such as competitive negotiation, can only be used in cases where procurement can be waived, such as projects related to national security. Projects which are partially or wholly funded by multilateral bodies can be (and usually are) procured with the adoption of the procurement rules of the respective entity, provided that the main principles of Brazilian public procurement are followed. Still, open competitive procurements are likewise invariably adopted by such multilateral entities in large-scale procurements, albeit with the particularities of their own respective rules. The procurement procedure used for energy projects is the reverse auction, in which the winning bidder is the one that offers the lowest price for selling electricity produced by the power plants participating or the lowest revenue for exploring the transmission line.

5. Fifth question: *What are the award criteria (in public procurement procedures) most commonly used for energy and large-scale infrastructure projects? Are the Lowest price or the most economically advantageous tender most common? Are circumstances related to quality, time and output evaluated?*

According to most reporters from the European Union the most commonly used award criterion for the procurements of energy and (or) large-scale infrastructure projects is the lowest price, just like when procuring services, works or products, but it is more common in these kind of projects, to use the “most economically advantageous tender”, including also other criteria as a part of the evaluation than price. In Spain the concept of “most economically advantageous tender” is



broader than the concept used in EU-Directive, as it covers the use of multiple parameters in the community norm and the criterion of “lowest price”, which is formally distinguished from the former.

In Spain, the most commonly award criteria used for those procurement procedures is the most economically advantageous tender with the use of multiple parameters linked to the subject-matter of the public contract in question, such as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, delivery date and delivery period. Spanish legislation establishes the obligation to use this award criterion for contracts with a complex performance and for those with a significant environmental impact.

In Poland, in practice contracting entities very rarely limit the award criteria exclusively to the price criterion and hence the criterion “*most economically advantageous tender*” is dominant. Especially in energy investments it is common to award points for quality (technical parameters, cost efficiency), warranty period and/or time required to complete the investment.

In Brazil the award criterion applied in almost all cases is the lowest price. Brazilian law is very restrictive to the adoption of other award criteria.

6. Sixth question: *Do the public procurement rules regulate relations between the investor, the contractors and subcontractors?*

According to most reporters from the European Union there are no rules concerning the relationship between the investor and the contractor in the legislation, except for when a concessions contract – rules deriving from the European Union legal framework. This means that it might be required from a bidder to indicate the subcontractors, sub suppliers or sub providers which it intends to contract, and may be required in tender documents a bidder to indicate

in its tender the part of procurement for which it intends to contract the subcontractors, sub suppliers or sub providers. However, the said instructions does not affect the main bidder's responsibility for the performance of the contract.

In Lithuania legislation concerning investments in Lithuania to some extent adds rules to this relationship. Regarding the relationship between the contractor and its subcontractors the countries follow the European Union legal framework, the directives, In Poland the public procurement act also regulates some areas of relations between the contracting entity, the contractor and subcontractors. Some of these provisions are considered peremptory norms which means they cannot be overridden by provisions of a public contract. An example of such regulation contains comprehensive regulations dedicated to subcontractors, with a specific emphasis on strengthening the contracting entity's supervision over contractual relations between the contractor and its subcontractors, particularly securing subcontractors' claims towards the contractor.

In Brazil the relations are regulated to a certain extent. Contractors are fully liable vis-à-vis the Government for any acts committed by their subcontractors. Investors are given some protections under the Law of Concessions and the Law of PPPs, such as step in rights and the right to receive concession payments directly from the Concession Authority.

In Canada the public procurement rules in Canada are applicable to the public entity and the supplier entity. Private entities are not subject to the public procurement rules as purchasers, though they will be required to comply with the government entity's rules when they are suppliers in the procurement process. The exception to this is when a private entity is procuring on behalf of a government entity, in which case, even as a purchaser, the public procurement rules would apply.

7. Seventh question: *Are there works concession procedures used for the procurement of energy projects and large-scale infrastructure projects? And if so, are there one or several specific procurement procedures envisaged for this in your national legislation?*

The answer from all the national reporters, except from Brazil, is that concessions are rarely used and that the concession contracts are procured according to the ordinary rules of public procurement.

8. Eight question: *According to your experience, how often do foreign bidders participate in award procedures related to energy projects and large-scale infrastructure projects in your country?*

Regarding to the answer of this question, the picture is fragmented. In Sweden and Finland the participation of foreign bidders in energy projects and large-scale infrastructure projects seems to be low, as well as in Spain. In Poland and Lithuania, the interest in participating from foreign bidders seems to be more intense, and increasing. This is also the case in Canada and Brazil. Most often, the foreign companies however, in all countries participate through local subsidiaries.

9. Ninth question: *Are the model contracts for the construction works commonly used (at national as well as international level, like the FIDIC Books)? If so, which are the most commonly used model contracts for the procurement of energy projects and large-scale infrastructure projects? Are the model contracts specifically designed for public procurement?*

A sharp line is clearly visible when it comes to the use of model contracts, where some countries do not use the international model contracts of FIDIC or not.

Spanish contracting authorities don't use model contracts like the FIDIC books. Normally each contracting authority prepares its own contract models according to its own specifications.

In Canada the federal government and provincial governments usually use their own standard form documents. To the extent other forms are used, commonly used forms include: the Canadian Construction Documents Committee (CCDC), a national joint committee that has developed standard form construction documents; the Canadian Construction Association; and the Royal Architectural Institute of Canada. While these standard forms are primarily used in private procurement, there is no reason they could not be used in the public procurement process.

In Brazil model contracts for the construction works are not used for the public procurement itself (or for the administrative contract resultant therefrom), but rather for the winning bidder to subcontract the construction work to be done within the project.

In Poland, for large-scale infrastructure projects, contracting entities commonly use FIDIC template contracts (FIDIC Red and FIDIC Yellow). Template contracts are not commonly used in energy sector – contracting entities usually draft contract provisions designed for a specific project, yet they are often very similar to FIDIC books. Furthermore, on March 2014 Polish Public Procurement Office published “A model contract for construction works on linear structures with a cost-estimated remuneration”. Applying it is not mandatory for contracting entities and at the moment it is rather difficult to assess how commonly this template contract will be used in tenders.

The FIDIC Books as the model contracts for construction works are being used quite commonly in Lithuania. The Red and Yellow FIDIC Books are the most commonly used model contracts in the Lithuania for the procurements of energy and (or) large-scale infrastructure projects, depending on the design of a project issue, i.e. who undertakes to design the project, a customer or contractor. When

the latter projects are financed by the EU funds, Implementing Agencies of the Lithuania (e. g. Transport Investment Directorate (TID), Lithuanian Business Support Agency (LBSA), Central Project Management Agency (CPMA) etc.) recommends using the FIDIC Books.

In Finland and Sweden, it is common to include a model contract already in the invitation to tender so that tenderers get a sense of the most important contract requirements and specific terms, particularly related to overall liabilities, and can conform to them when submitting the tender. Including the contract already in the early phase of the procedure means that the tenderers cannot offer something that deviates from the contract and cannot decline the provisions of the contract after the decision has been made.

In traditional construction and energy industry practice the local contracting practice in Finland and Sweden with national model contracts are most common. FIDIC suites of contract or Orgalime terms are sometimes used, in Sweden particularly in the energy sector. In almost any large-scale project, the case-specific terms means that the contract is subject to careful tailoring, so standard-form model contracts only form the basis for drafting at best, or sometimes are abandoned altogether.

10. Tenth question. *Please briefly describe the how do the model contracts regulate the contractual liability of the contractor. Are models of liability similar to those applied in case of Turn-Key Contracts, design-build contracts or build contracts (where the design is provided by the procuring entity) commonly used?*

The answers from the national reporters shows a great variety when it comes to regulate the contractual liability of the contractor. A very common feature seems to be to insert provisions from national law regarding the liability.

11. Eleventh question: *To what extent are external lawyers engaged to draft, or otherwise involved, contract notices and/or contract documents in the case of procurement of energy projects and large-scale infrastructure projects?*

All the national reporters' states that it is common to use external lawyers for drafting the tender documents, though some indicate that this is often done by in-house lawyers.

12. Twelfth question: *Is it, in your country, common to appeal against award decisions related to procurement of energy projects and large-scale infrastructure projects? What is the authority relevant to recognize the appeal (common court, arbitration court, other)?*

The national reports all show that appeals are common and in some countries, very common and raising (with Canada as an exemption). Some are indicating troubled economic times as the reason for this. The tools for appealing are very much different in the respective countries, some providing courts in a local level, some providing a single court devoted to procurement issues etc. In most countries arbitration is not possible.

The relevant authorities are as follows:

In Sweden, the local administrative courts are in charge of appeals at first. Their decision may be appealed to, as second instance, chamber court, and the – eventually to the High Administrative court.

Poland: The authority responsible for recognizing appeals against contracting entities decisions is the National Chamber of Appeal. It is a *quasi*-judicial body (in many ways similar to an arbitration court), composed of arbitrators (mostly

persons with a degree in law) appointed by the Prime Minister. The NCA is empowered to nullify unlawful acts of the contracting entity and order them to be repeated. Parties are entitled to question the NCA's judgment by means of a complaint lodged with a district court, which may result in such judgment being set aside.

In Finland, the relevant authority to appeal against the procurement procedure is the Market Court. The parties involved in the procedure may appeal against the award decisions or other measures taken by the procuring entity during the procedure that has affected their position and the outcome of the procurement procedure. The Market Court is a special administrative court hearing market law, competition law, public procurement and civil IPR cases in Finland. It is the first instance for procurement cases. There is also the possibility for a *correction procedure*, in which the contracting entity corrects an incorrect decision either on its own initiative or at the request of a party involved. The correction procedure can be used in cases when there has been a defect in the application of law during the procurement procedure.

In Spain the Law determines two jurisdictions (civil and contentious-administrative) that may rule on review remedies depending on the nature of the contracts. The competent authority to recognize the administrative remedies depends on the kind of contract and its value:

Special appeals for procurement and annulment appeals in Spain are resolved by the Central Administrative Court of Procurement Appeals or its equivalent in the Regions.

The remaining remedies must in Spain be sought before the competent administrative body (the contracting authority or another body with greater authority)

The decisions of the Spanish Administrative Courts and authorities can be reviewed in a later stage by the Judicial Courts of Contentious-administrative

jurisdiction. The Judicial Courts of the civil jurisdiction are competent to recognize appeals against award decisions when the contracting authority is a body or entity different than the Administration. Arbitration is only possible for those claims related to the performance of the contract and when the contracting authority is a body or entity different than the Administration.

In Lithuania the bidders who believe that the contracting authority has not complied with the requirements of the Law on Public Procurement and violated or will violate their legitimate interests have the right to refer to a regional court of the Republic of Lithuania as a court of first instance for annulment or amendment of the decisions of the contracting authority etc. The disputes regarding annulment or amendment of the decisions of the contracting authority are heard by regional courts (as a court of first instance), which belongs to the court system of general (common) jurisdiction. According to the national court practice the public procurement disputes are not arbitrable.

In Brazil appeals can be made administratively, i.e. to the procuring entity itself through higher levels of authority, and to the Judicial Courts. Within the energy projects, the competent authority to recognize the appeal could be either the public official in charge of the bid (if the appeal is addressed to the administrative bodies) or the regular court.

In Canada a losing bidder may appeal an award to the Canadian International Trade Tribunal (CITT) for matters relating to the compliance of federal government entities with the relevant trade agreements. A further appeal of the CITT's decision may be made to the Federal Court of Appeal. The provinces have similar appeal processes in place. With respect to appeals on the basis of common law grounds, any federal or provincial court of inherent jurisdiction may undertake judicial review of the award.

13. Thirteenth question: From your experience – *what would you indicate as the most problematic issue while awarding public procurement for such projects*



*and on the other hand what would you call the biggest achievement/improvement made of the legislation implemented during last years for such projects.*

Again the image is fragmented. From Sweden, Lithuania and Poland complaints are put forward over the formal requirements imposed by law or the very formal approach of the tribunals dealing with public procurement issues, such as supplementing tenders. The lack of efficiency, with lingering pending decisions from the courts are also recognized as a problem. From Spain the most problematic issue faced when awarding public procurement projects on energy and infrastructure, the present economic scenario restrains access to financial resources. In Brazil, one of the most problematic issues over the last couple of decades has been litigation delaying the procedure. Part of the problem has been minimized by changes in law which allowed inversion of phases, i.e. having the proposal phase taking place before qualification (eligibility). The most problematic issue when awarding energy projects In Brazil is the environmental issue, since several of the new projects are located in environmentally sensitive areas, especially in the North and Amazon regions. There is often delay in obtaining the permits.

14. Fourteenth question: *What are the most commonly used/provided by the public procurement laws instruments for securing of the performance of the contracts?*

In Finland and Sweden typical instruments, not regulated in the acts on public procurement, in obtaining sureties for the performances under the contracts, performance bonds range from bank guarantees (a common instrument) to parent company guarantees as for their own debt, and on demand guarantees. Contractual instruments such as liquidated damages are also commonly used to secure due performance of the contract.

In Poland performance bond (usually a bank guarantee or an insurance guarantee) are commonly used. The value of a performance bond shall be between 2% and 10% of the total price quoted in a bid or of the maximum nominal value of the contracting entity's contractual liability. Contractual instruments such as liquidated damages are also commonly used to secure due performance of the contract.

In Spain the public procurement legislation provides the contracting authorities with the necessary instruments to oblige the contractor to comply with the contract. These are:

Guarantees to secure the performance of the contract. They are normally granted by banks or insurance companies. According to Act 14/2013, the withholding of an amount equal to the price of the contract can be used as a guarantee in works, services, supply and public service management concession, the establishment of penalties.

In Lithuania the right of a contracting authority to choose the way of securing the performance of a contract is not limited by the provisions of the Law on Public Procurement. The performance of a contract may be secured by the application of the following instruments: fine, interests, pledge, mortgage, guarantee etc. The most commonly used instruments for securing the performance of a contract are a bank guarantee or suretyship issued by an insurance company.

In Brazil, the most common instrument is the performance bond that contractors must provide when executing the contract. Performance bonds in administrative contracts are legally limited to ten percent of the total value of the contract. However, in large-scale projects, it is common that the contractor is contractually required to top up the bond shortly after it is collected, each time it is collected, if at all, thus circumventing the legal limitation, in practice.

Performance bonds can be presented in cash, as a bank guarantee or as insurance bond.

In Canada, at both the federal and provincial levels, it is common for performance to be secured by a bid bond and a performance bond. The federal and provincial governments use standard form templates, which are available on their respective websites.

15. Fifteenth question: *Is it possible to sign the contract for the procurement of energy projects and large-scale infrastructure projects in other than national language?*

In Sweden and Finland the contract may be concluded in any language that is other languages than Finnish or Swedish.

In Poland and Lithuania one of the languages of the contract should be always the national language. A contract may be concluded and signed in other than Lithuanian or Polish language as well; however, the text of the contract should be bilingual and in case of discrepancies between the texts in the Lithuanian/Polish and other foreign language, the text in Lithuanian/Polish should prevail.

In Spain public contracts have to be signed in any of the languages recognized as official in the region where the contract is formalized and has to be executed.

In Brazil the use of national language (i.e. Portuguese) is mandatory.

Canada has two official languages, French and English. Federal government agencies must comply with the *Official Languages Act*, which provides that members of the public may communicate with and receive services in either official language. Relating to procurement, this generally means that in relation to procurement by the federal government, a supplier may receive solicitation documents and bid in either official language. Public procurement by the

Quebec provincial entities requires documents to be in French under the *Charte de la langue française*. Public procurement by other provinces in Canada, are usually in English.

16. Is there a legal or regulatory requirement for public disclosure of the information related to the award procedure?

According to the EU-directives, calls for completion must be put forward to TED when the value of the procurement is over the thresholds. Below the thresholds, there are rules to secure openness, for instance in Finland and Sweden. In Brazil, all information is public, except under very exceptional circumstances, e.g. where national security or a trade secret might be in question. In Canada, The federal government's Guidelines on the Proactive Disclosure of Contracts requires disclosure of all new contracts awarded over \$10,000. It maintains and updates the list on a quarterly basis. The provincial governments have in place similar disclosure requirements. The federal government must also comply with the advance contract award notice (ACAN), whenever the government wishes to sole source a contract. Although both the federal government and the provinces have in place access to information laws, the government is generally not required to disclose its entire procurement file due to the potential harm it could cause to third parties. If an access to information request is made, the government may redact commercially sensitive information to protect third parties e.g. pricing information that would be harmful in the hands of a competitor.