

2. Second plea in law, alleging a violation of the tender specifications by taking into account during the evaluation requirements not mentioned in the tender specifications.
3. Third plea in law, alleging manifest errors of assessment and vague and unsubstantiated comments of the evaluation committee.
4. Fourth plea in law, alleging a discriminatory treatment of tenderers, non compliance with exclusion criteria of the winning tenderers, a violation of Articles 93(1)(f); 94 and 96 of Regulation No 1605/2002 and of Article 133a and 134b of Regulation No 2342/2002 ⁽²⁾ as well as a violation of the principle of good administration. According to the applicant, the 2nd winning tenderer should have been excluded.

⁽¹⁾ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, p. 1).

⁽²⁾ Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, p. 1).

Action brought on 8 June 2011 — Italmobiliare v Commission

(Case T-305/11)

(2011/C 232/65)

Language of the case: Italian

Parties

Applicant: Italmobiliare SpA (Milan, Italy) (represented by: M. Siragusa, F. Moretti, L. Nascimbene, G. Rizza and M. Piergiovanni, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

- annul, in whole or in part, the contested decision;
- order the Commission to pay the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on 6 pleas in law.

1. First plea in law, alleging that the choice of addressee for the contested decision was incorrect, in breach of Article 18(1) of Regulation No 1/2003, in that the contested decision was addressed to Italmobiliare, a mere financial holding company — which, moreover, does not hold 100 % of the capital — instead of to Italcementi, which is the operating holding company in the group. The Commission thus acted in breach of the principle of *audi alteram partem* and the principle of the protection of legitimate expectations, selecting the applicant as the addressee of the contested decision when that company has to date remained completely outside the ambit of the investigation.

The applicant pleads, lastly, breach of the principle of non-discrimination, since Italmobiliare is the only company to be involved in the procedure which is purely a financial holding company.

2. Second plea in law, alleging infringement of Article 18(1) of Regulation No 1/2003 in so far as the Commission launched an investigation and adopted a binding measure when it had no power to do so.
3. Third plea in law, alleging breach of the principle of proportionality. First, the means employed are not appropriate for achieving the aims pursued, in that the Commission availed itself of Article 18 of Regulation No 1/2003 in the context of an investigation which was not based on specific evidence and the subject of which had not been defined, in order to gather evidence which it should have obtained through an investigation of the sector, in accordance with Article 17 of Regulation No 1/2003. Moreover, the contested decision has not struck a proper balance between the interest in the investigation and the harm caused to the individual interested parties, in that the Commission unduly placed on the applicant disproportionate and unreasonable obligations relating to the tracing, collating and communication of information.
4. Fourth plea in law, alleging breach of the duty under Article 296 TFEU to state reasons. The Commission failed to indicate in the measure the reasons on the basis of which it chose to use, by way of legal instrument, a decision under Article 18(3) of Regulation No 1/2003. The measure is also flawed for lack of reasons regarding the subject-matter and purpose of the request for information, or the need for the information requested for the purposes of the ongoing investigation. The breach of the duty to state reasons takes the form both of an infringement of essential procedural requirements for the purposes of Article 263 TFEU and of a breach of the applicant's rights of defence.
5. Fifth plea in law, alleging the unlawfulness of the contested decision for breach of the principle of *audi alteram partem*. The few days allowed by the Commission for submitting comments on the questionnaire appended to the Communication of 4 November was manifestly too short a time in which to exercise the right to be heard. Furthermore, the Communication of 4 November contains material which is somewhat different from that of the contested decision: the Commission thus prevented the applicant from defending itself in relation to the various points subsequently inserted in the final measure. Moreover, on a number of points, the Commission took no notice of the comments submitted. As a consequence, the purpose of the *inter partes* element of the procedure was thwarted, narrowing the applicant's prospects for mounting a defence and damaging its position vis-à-vis the proceedings.
6. Sixth plea in law, alleging breach of the principle of sound administration, as reflected by (i) the lack of coordination between the various questionnaires sent from time to time, which underwent re-numbering, re-formatting, methodological adaptation and supplementation; (ii) the remarkable length of the investigation, which extended beyond the limits of reasonableness; and (iii) the way in which the Commission managed the procedure.