JUDGMENT OF THE COURT OF FIRST INSTANCE (Sixth Chamber)

9 September 2009 *

In Case T-437/05,

Brink's Security Luxembourg SA, established in Luxembourg (Luxembourg), represented by C. Point and G. Dauphin, lawyers,

applicant,

v

Commission of the European Communities, represented by E. Manhaeve, M. Šimerdová and K. Mojzesowicz, acting as Agents, assisted by J. Stuyck, lawyer,

defendant,

* Language of the case: French.

supported by

G4S Security Services SA, formerly Group 4 Falck — Société de surveillance et de sécurité SA, established in Luxembourg, represented by M. Molitor, P. Lopes Da Silva, N. Cambonie and N. Bogelmann, lawyers,

intervener,

APPLICATION for the annulment (i) of the Commission's decision of 30 November 2005 rejecting the tender submitted by the applicant in response to invitation to tender No 16/2005/OIL (security and surveillance of buildings); (ii) the Commission's decision of 30 November 2005 awarding the contract to another tenderer; (iii) an allegedly implied decision of the Commission refusing to withdraw decisions (i) and (ii); and (iv) two letters of the Commission, dated 7 and 14 December 2005, in reply to the applicant's requests for information, and an action for damages for the harm allegedly suffered by the applicant,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Sixth Chamber),

composed of A.W.H. Meij, President, V. Vadapalas and L. Truchot (Rapporteur), Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2008,

gives the following

Judgment

Legal context

A — *Legislation applying to public procurement contracts of the European Communities*

1 Article 100(2) of 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 2002 L 248, p. 1; 'the Financial Regulation') provides:

'The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.'

2 Article 149(1) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1), as amended by Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 (OJ 2005 L 201, p. 3), ('the Implementing Rules'), provides:

'The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract or framework contract or admission to a dynamic purchasing system, including the grounds for any decision not to award a contract or framework contract, or set up a dynamic purchasing system, for which there has been competitive tendering or to recommence the procedure.'

3 Article 149(3) of the Implementing Rules provides:

'In the case of contracts awarded by the Community institutions on their own account, under Article 105 of the Financial Regulation, the contracting authority shall inform all unsuccessful tenderers or candidates, simultaneously and individually, as soon as possible after the award decision and within the following week at the latest, by mail and fax or email, that their application or tender has not been accepted; specifying in each case the reasons why the tender or application has not been accepted.

The contracting authority shall, at the same time as the unsuccessful candidates or tenderers are informed that their tenders or applications have not been accepted, inform the successful tenderer of the award decision, specifying that the decision notified does not constitute a commitment on the part of the contracting authority.

Unsuccessful tenderers or candidates may request additional information about the reasons for their rejection in writing by mail, fax or email, and all tenderers who have put in an admissible tender may obtain information about the characteristics and relative merits of the tender accepted and the name of the successful tenderer, without prejudice to the second subparagraph of Article 100(2) of the Financial Regulation. The contracting authority shall reply within no more than 15 calendar days from receipt of the request.

The contracting authority may not sign the contract or framework contract with the successful tenderer until two calendar weeks have elapsed from the day after the simultaneous dispatch of the rejection and award decisions. If necessary it may suspend signing of the contract for additional examination if justified by the requests or comments made by unsuccessful tenderers or candidates during the two calendar weeks following the rejection or award decisions or any other relevant information received during that period. In that event all the candidates or tenderers shall be informed within three working days following the suspension decision.'

B — *Legislation relating to the right of access to documents of the institutions*

4 Under Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43):

'1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

…

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

…

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

…'

5 Article 6 of Regulation No 1049/2001 provides:

'1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 [EC] and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.'

6 Article 7 of Regulation No 1049/2001, which lays down detailed rules for the processing of initial applications, provides:

'1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.'

7 Article 8 of Regulation No 1049/2001, concerning the processing of confirmatory applications, provides:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 [EC] and 195 [EC], respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time-limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

C — *Legislation applying to the safeguarding of workers' rights in the event of transfers of undertakings*

8 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) codifies Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

9 Article 1 of Directive 2001/23 defines the scope of that directive:

'1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

…'

10 Article 1(1)(a) and (b) of the Luxembourg Law of 19 December 2003 regulating the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses and implementing Directive 2001/23 (Mém. A 2003, p. 3678; 'the Law of 19 December 2003'), provides:

'(a) This law shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger, a succession, hiving-off, conversion of a business or conversion into a company.

(b) A transfer of an economic entity which retains its identity and which constitutes an organised grouping of resources, in particular human and material resources, permitting the pursuit of an economic activity, whether central or ancillary, shall be deemed to be a transfer within the meaning of this law.'

11 The first subparagraph of Article 3(1) of the Law of 19 December 2003 provides:

'The rights and obligations arising for the transferor of a contract of employment or of an employment relationship existing at the date of the transfer shall, by virtue of that transfer, be transferred to the transferee.'

Background to the dispute

12 Brink's Security Luxembourg SA ('the applicant'), a company whose registered seat is in Luxembourg (Luxembourg), was responsible for the security and surveillance of the Commission's buildings from the mid-1970s.

13 In 2000, the applicant concluded with the Commission a contract for the security and surveillance of the latter's buildings in Luxembourg coming under the responsibility of the Office for Infrastructure and Logistics — Luxembourg (OIL), the Office for Official Publications of the European Union and the Translation Centre for bodies of the European Union. The contract did not provide for renewal after the fifth year and expired on 31 December 2005.

14 By a prior information notice published in the Supplement to the *Official Journal of the European Union* on 19 March 2005 (OJ 2005 S 56), the Commission announced that the scheduled date for launching the award procedure relating to a contract for security and surveillance of the buildings referred to in paragraph 13 above was 15 May 2005.

15 By a contract notice published in the Supplement to the *Official Journal of the European Union* on 1 September 2005 (OJ 2005 S 168), the Commission launched call for tenders 16/2005/OIL for the buildings surveillance and security contract in issue ('the invitation to tender').

16 The final date for the submission of tenders was fixed at 13 October 2005. The opening of the tenders took place on 18 October 2005 and they were evaluated on 11 November 2005.

17 On 30 November 2005, the Commission informed the applicant that the contract had not been awarded to it as its tender had not obtained the best final score in the qualitative and financial evaluation of the tenders. In the same letter ('the rejection decision'), the Commission informed the applicant that it had a right to obtain additional information concerning the grounds for the rejection of the tender.

18 By letter of 1 December 2005, the applicant asked the Commission to inform it of the grounds for the rejection of its tender; the characteristics and relative advantages of the successful tender; and the name of the tenderer to whom the contract had been awarded.

19 By letter of 5 December 2005, the Commission informed the applicant that the successful tenderer was Group 4 Falck — Société de surveillance et de sécurité SA, which had become G4S Security Services SA ('Group 4 Falck' or 'the intervener'), and sent the applicant information for comparing the evaluation of its tender with that of Group 4 Falck's tender.

20 By three letters of 5 December 2005, the applicant asked the Commission to reconsider the award decision of 30 November 2005 ('the award decision') and to award the contract to it, stating the reasons which, in its opinion, ought to have prevented the Commission from selecting the tender submitted by Group 4 Falck.

21 The Commission replied to the applicant's letters of 5 December 2005 by letter of 7 December 2005.

22 By letter of 8 December 2005, the applicant asked the Commission for the full name, grade, length of service and position of the members of the tender evaluation committee and for additional information concerning the grounds, as it considered that the grounds given by the Commission were not sufficient.

23 By letter of 14 December 2005, the Commission refused, on grounds of confidentiality and the protection of privacy and the integrity of the individual, to provide the information requested by the applicant concerning the members of the tender evaluation committee. However, the Commission gave the applicant additional information on the grounds for the rejection of its tender.

24 By letter of 14 December 2005, Group 4 Falck informed the applicant that it intended to recruit some of the applicant's personnel.

Procedure and forms of order sought

25 By application lodged at the Court Registry on 15 December 2005, the applicant brought the present action.

26 By separate document, lodged at the Court Registry on the same day, the applicant applied for interim relief, as well as provisional measures on the basis of Article 105(2) of the Rules of Procedure of the Court of First Instance

27 By order of 16 December 2005, the President of the Court of First Instance ordered that signature of the contract in question, relating to the invitation to tender, be deferred pending an order adjudicating on the application for interim relief.

28 As a consequence of the adoption of the order referred to in paragraph 27 above, the contract between Brink's and the Commission was extended until 31 January 2006 in order to ensure the continued surveillance and security of the buildings in question.

29 By document lodged at the Court Registry on 22 December 2005, Group 4 Falck sought leave to intervene in the present action in support of the form of order sought by the Commission. On 4 January 2006, the principal parties lodged their observations on the application to intervene submitted by Group 4 Falck.

30 By document lodged at the Court Registry on 4 January 2006, the applicant made a request for the confidential treatment of the application for interim relief vis-à-vis Group 4 Falck, which was granted. On 5 January 2006, the applicant lodged at the Court Registry a non-confidential version of the application for interim relief.

31 By order of 9 January 2006, Group 4 Falck was given leave to intervene in the present action.

32 On 11 January 2006, the Commission lodged its observations on the application for interim relief and, at the request of the Court pursuant to Article 64(3) of the Rules of Procedure, produced a non-confidential version of the documents submitted to the Commission by Group 4 Falck in order to comply with paragraph 28 of the contract specifications relating to the contract in issue.

33 By order of 7 February 2006, the President of the Court dismissed the applicant's action for interim relief on the ground that the applicant had not shown that it risked suffering serious and irreparable damage if the interim relief sought was not granted (Case T-437/05 R *Brink's Security Luxembourg* v *Commission* [2009] ECR II-21).

34 On 12 May 2006, the applicant lodged a request for the confidential treatment of certain annexes to the application. Group 4 Falck lodged no observations on the request.

35 Upon hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, put certain questions in writing to the parties, who replied to them within the time allowed.

36 At the hearing on 20 November 2008, the parties presented oral argument and replied to the questions put by the Court.

37 At the hearing, Group 4 Falck requested leave from the Court to produce letters which it had exchanged with the Société nationale de certification et d'homologation ('the SNCH'). The applicant and the Commission submitted their observations on that request.

38 In the context of the present action, the applicant claims that the Court should:

— annul the rejection decision;

— annul the award decision;

— annul the allegedly implied decision of the Commission refusing to withdraw the rejection decision and the award decision;

— annul the two answering letters from the Commission of 7 and 14 December 2005;

— award damages for the material and non-material harm purportedly suffered by the applicant;

— order the Commission to pay the costs.

39 The applicant also asked the Court, by way of measures of organisation of procedure, to order the Commission to provide the following information:

— the composition (name, grade, length of service and position of each member) of the tender evaluation committee;

— the reasons for the discrepancy between the date of the invitation to tender and the date announced in the prior information notice published in the *Official Journal of the European Union*;

— information which would make it possible to verify that Group 4 Falck would perform the contract with the Commission in accordance with the conditions laid down by paragraphs 22 and 28 of the specifications.

40 The Commission, supported by the intervener, contends that the Court should:

— declare that the action for annulment is unfounded;

— declare that the claim for damages is inadmissible;

— in the alternative, declare that the claim for damages is unfounded;

— order the applicant to pay the costs.

Law

A — *The measures of organisation of procedure*

41 With regard to the claim for information in relation to the timing of the invitation to tender, the Commission stated in its rejoinder the reasons for the postponement of the

publication of the contract notice until after the date announced in the prior information notice. Consequently, it is unnecessary to rule on that claim, which is no longer to any purpose.

42 With regard to the claim for information for verifying that Group 4 Falck meets the criterion set out in paragraph 28 of the contract specifications as a condition for the performance of the contract, it has consistently been held that, in the context of an application for annulment under Article 230 EC, the legality of the contested measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraphs 87 and 88).

43 Thus, in so far as considerations relating to the performance of the contract between Group 4 Falck and the Commission are factual matters arising after the adoption of the contested measures, those considerations cannot be relied upon in support of a plea which seeks to call into question the validity of those measures.

44 It follows that the applications for measures of organisation of procedure in relation to the timing of the invitation to tender and to the performance of the contract by Group 4 Falck must be dismissed.

45 A ruling will be given on the application for disclosure of the membership of the evaluation committee when the seventh plea raised in the present action for annulment is examined, which alleges breach of the principle of transparency and of the right of access to documents of the institutions.

B — *Admissibility of the complaint concerning the postponement of publication of the contract notice until after the date announced in the prior information notice*

1. *Arguments of the parties*

46 In its reply, the applicant raised a new argument concerning the postponement of publication of the contract notice relating to the invitation to tender until after the date announced in the prior information notice. That change of date put the applicant in a difficult position in relation to the Luxembourg social legislation, given the periods of notice required thereunder in the event of redundancy. Adherence to the original date would have enabled Brink's to calculate in advance the redundancies or redeployments which would be necessary if it lost the contract.

47 Furthermore, if the timing specified in the prior information notice had been adhered to, Group 4 Falck would not have been able to participate in the tender procedure as otherwise it would have breached its undertaking not to solicit actively clients of the transferred companies for a period of six months from the operation referred to in the Commission's decision of 28 May 2004 (Case COMP/M.3396 — GROUP 4 FALCK/SECURICOR), which authorised the merger between Group 4 Falck A/S and Securicor plc ('the Commission's decision of 28 May 2004').

48 The Commission disputes the admissibility of that argument, which it considers to be a new plea for the purposes of Article 48(2) of the Rules of Procedure.

2. *Findings of the Court*

49 Under the first subparagraph of Article 48(2) of the Rules of Procedure, the introduction of new pleas in law in the course of proceedings is prohibited unless they are based on matters of law or of fact which come to light in the course of the procedure.

50 However, a plea which is an amplification of a plea raised previously, whether directly or by implication, in the application initiating the proceedings and which has a close connection with that plea must be found admissible (Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 29; Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573, paragraph 164). Moreover, arguments which in substance have a close connection with a plea raised in the application initiating the proceedings cannot be considered new pleas and they may be raised at the stage of the reply or the hearing (see, to that effect, Case 2/57 *Compagnie des hauts fourneaux de Chasse* v *High Authority* [1957 and 1958] ECR 199, 206).

51 In the present case, the applicant's argument, which is based on the postponement of publication of the contract notice until after the date announced in the prior information notice, is not based on any new matter of law or of fact which came to light in the course of the procedure.

52 Accordingly, the complaint that the change of date put the applicant in a difficult position in relation to the Luxembourg social legislation applicable to redundancy is inadmissible because that complaint is not an amplification of a plea raised previously in the application and is not closely connected with any such plea.

53 On the other hand, the complaint that adherence to the date announced in the prior information notice would have prevented Group 4 Falck from participating in the invitation to tender is closely connected with the fourth plea raised in the application, alleging failure to comply with the Commission's decision of 28 May 2004. Accordingly,

the submission concerning the postponement of publication of the contract notice until after the date announced in the prior information notice is partly admissible in so far as it supports the applicant's fourth plea and, consequently, it will be examined together with that plea.

C — *The action for annulment*

1. *Admissibility*

54 Since the conditions for the admissibility of an action relate to the question whether there is an absolute bar to proceedings (see the order of the Court of Justice in Case 108/86 *D.M.* v *Council and ESC* [1987] ECR 3933, paragraph 10, and Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark* v *Commission* [2008] ECR II-2935, paragraph 62 and the case-law cited), it is for the Court to consider of its own motion whether those conditions are fulfilled.

(a) Existence of an implied refusal decision on the part of the Commission

55 It is clear from the case-law that, in principle, where there are no express provisions laying down a deadline after which an implied decision will be deemed to have been taken by an institution which has been asked to state its position and prescribing the content of the decision, inaction on the part of an institution cannot be deemed to be equivalent to a decision without calling into question the system of remedies instituted by the Treaty (Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 45; Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* [1999] ECR II-3587, paragraph 27; and Joined Cases T-190/95 and T-45/96 *Sodima* v *Commission* [1999] ECR II-3617, paragraph 32).

56 In certain particular circumstances, that principle may not be applicable, so that an institution's silence or inaction may exceptionally be considered to constitute an implied refusal (*Commission* v *Greencore*, paragraph 55 above, paragraph 45).

57 In the present case, the applicant seeks the annulment of the Commission's implied decision refusing to withdraw the award decision and the rejection decision. However, there is no provision in the Financial Regulation or in the Implementing Rules laying down a deadline after which an implied decision will be deemed to have been taken by a contracting authority which has been asked to reconsider its award decision or rejection decision.

58 Furthermore, the applicant has not pleaded any particular circumstance that justifies, exceptionally, treating the Commission's silence as an implied refusal.

59 It follows that the applicant's submissions are inadmissible in so far as they seek the annulment of the Commission's allegedly implied decision of refusal.

(b) Existence of measures producing binding legal effects

60 It has consistently been held that any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case 346/87 *Bossi* v *Commission* [1989] ECR 303, 332).

61 That is the case here with regard to the award decision.

62 As for the Commission's letters to the applicant of 30 November, 7 December and 14 December 2005, it is necessary to ascertain that they do in fact contain a decision for the purposes of Article 230 EC.

63 According to the case-law, the mere fact that a letter is sent by a Community institution in response to a request made by the addressee is not enough for it to be treated as a decision for the purposes of Article 230 EC thereby entitling the addressee to bring an action for its annulment (order of the Court of Justice of 27 January 1993 in Case C-25/92 *Miethke* v *Parliament* [1993] ECR I-473, paragraph 10; Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 50; and order of the Court of First Instance of 11 December 1998 in Case T-22/98 *Scottish Soft Fruit Growers* v *Commission* [1998] ECR II-4219, paragraph 34). The letter concerned must contain measures meeting the definition set out in paragraph 60 above.

64 In the present case, the letter of 30 November 2005, by which the Commission informed the applicant, precisely and unambiguously, of the rejection of its tender, brings about a distinct change in the applicant's legal position and is therefore a decision which is open to challenge.

65 On the other hand, the Commission's letter of 7 December 2005 informs the applicant that the Commission's legal service is dealing with one of the questions raised in the applicant's previous letter, concerning the alleged breach of the principle of equal treatment of tenderers. Moreover, the Commission rejects some of the arguments put forward by the applicant in its letters of 5 December 2005 in support of a request for the reconsideration of the award decision and the rejection decision, concerning the alleged infringement of the Law of 19 December 2003 implementing Directive 2001/23, and the applicant's allegation that the Commission instructed an employee of the applicant to obtain the curricula vitae of the applicant's personnel and letters from them stating their reasons for seeking employment with the applicant, in order to pass those documents to Group 4 Falck.

66 That letter does no more than convey information. It merely informs the applicant that the matter has been referred to the Commission's legal service, which considers that there can have been no infringement of the Law of 19 December 2003, and denies that any instructions were given to the applicant's personnel. Accordingly, the letter has no binding legal effects capable of affecting the applicant's interests and it in no way brought about a distinct change in the applicant's legal position.

67 With regard to the Commission's letter of 14 December 2005, it should be observed that this letter deals with two separate matters. First, the Commission informs the applicant of its refusal to disclose the exact composition of the evaluation committee and, second, the Commission gives detailed reasons for the rejection decision.

68 So far as the refusal to disclose the composition of the evaluation committee is concerned, it should be observed, first, that Regulation No 1049/2001 applies to any written request for access to documents of the institutions and, second, that Article 3(a) of that regulation defines 'document' as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'. The applicant's request, set out in its letter of 8 December 2005, for additional information concerning the composition of the evaluation committee is therefore a request for access to a document in accordance with Article 3(a) of Regulation No 1049/2001.

69 The procedure for gaining access to Commission documents, which is governed by Articles 6 to 8 of Regulation No 1049/2001 and Articles 2 to 4 of the Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001, amending its rules of procedure (OJ 2001 L 345, p. 94), takes place in two stages. First, the applicant must send the Commission an initial request for access to documents. In principle, the Commission must reply to the initial request within 15 working days from registration of the application. Secondly, in the event of a total or partial refusal, the applicant may, within 15 working days of receiving the Commission's initial reply, make a confirmatory application to the Secretary-General of the Commission, to which the latter must in principle reply within 15 working days from the registration of that application. In the event of a total or partial refusal, the applicant may institute court

proceedings against the Commission or make a complaint to the European Ombudsman, in accordance with the conditions laid down in Articles 230 and 195 EC respectively.

70 According to the case-law, it is clear from Articles 3 and 4 of the Annex to Decision 2001/937, read in conjunction with Article 8 of Regulation No 1049/2001, that the response to the initial application is only an initial statement of position, conferring on the applicant the right to request the Secretary-General of the Commission to reconsider that position (see, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 47, and judgment of 5 June 2008 in Case T-141/05 *Internationaler Hilfsfonds* v *Commission*, not published in the ECR, paragraphs 56 and 109).

71 Consequently, only the measure adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, accordingly, capable of being the subject of an action for annulment under Article 230 EC (see, to that effect, *Franchet and Byk* v *Commission*, paragraph 70 above, paragraph 48, and *Internationaler Hilfsfonds* v *Commission*, paragraph 70 above, paragraphs 57 and 109).

72 In the present case, the reply in the letter to the applicant of 14 December 2005 constitutes the Commission's initial reply, within the meaning of Article 7(1) of Regulation No 1049/2001, in which it stated its intention of refusing the application. That initial reply conferred upon the applicant the right, within the time allowed, to request the Secretary-General of the Commission to review the initial statement of position by adopting a definitive decision.

73 However, the applicant did not send the Commission a confirmatory application following that initial reply. Since only the decision of the Secretary-General is open to challenge, an action is not admissible in relation to the letter of 14 December 2005.

74 However, the Commission's letter of 14 December 2005 is vitiated by a procedural flaw: the Commission omitted to inform the applicant, which the Commission is required to do under Article 7(1) of Regulation No 1049/2001, of its right to make a confirmatory application.

75 That irregularity has the consequence of rendering admissible, exceptionally, an action for the annulment of the initial application. If it were otherwise, the Commission could avoid review by the Community judicature of a breach of procedure attributable to it. It is apparent from the case-law that, as the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty, the procedural rules governing actions brought before the Community judicature must be interpreted in such a way as to ensure, as far as possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law (see Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 45 and the case-law cited). The requirement of judicial control reflects a general principle of Community law which flows from the constitutional traditions common to the Member States and which is laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950 (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39). The right to an effective remedy was also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

76 For the rest, the letter of 14 December 2005 merely clarifies the reasons for the rejection decision, while giving additional information concerning the qualitative evaluation of the tenders. In that respect, that letter is not in the nature of a decision at all and is not an actionable measure for the purposes of Article 230 EC.

77 It follows that the claims concerning the Commission's letters of 7 and 14 December 2005 are inadmissible, save with regard to the refusal to disclose the composition of the evaluation committee.

78 Consequently the subject-matter of the present action must be limited to the annulment of the award and rejection decisions and of the Commission's decision, set out in the letter of 14 December 2005, refusing to disclose the composition of the evaluation committee and it must be held that the submissions concerning the Commission's allegedly implied decision refusing to withdraw the award and rejection decisions and concerning the Commission's two letters in reply dated 7 and 14 December 2005 are inadmissible, save with regard to the refusal to disclose the composition of the evaluation committee.

2. *The substance*

79 The applicant relies on seven pleas in law in support of its action for annulment: (i) breach of the principle of equal treatment by reason of the fact that the Commission did not provide in the contract specifications for the employment contracts of the employees assigned by the applicant to carry out the surveillance contract to be taken over; (ii) infringement of the Law of 19 December 2003 and of Directive 2001/23, which it implements; (iii) breach of the principle of equal treatment by reason of the fact that the intervener had possession of confidential information; (iv) failure to comply with the Commission's decision of 28 May 2004 and the competition rules; (v) breach of the obligation to state reasons, the principle of transparency and the right of access to documents of the institutions; (vi) breach of the public procurement rules and failure to comply with the contract documents as regards the evaluation of the criterion relating to giving personnel basic training as first-aid workers or as voluntary firemen, and manifest error of assessment; and (vii) breach of the principle of transparency and of the right of access to documents of the institutions.

80 First of all, it should be observed that, with the exception of the seventh plea, all the applicant's pleas seek — as regards the claims which are admissible — the annulment of

the award and rejection decisions. The seventh plea is put forward in support of the application for the annulment of the Commission's letter of 14 December 2005.

81 With regard to the first six pleas seeking the annulment of the award and rejection decisions, the Court considers it appropriate to examine first the legality of the award decision.

82 The first plea presupposes that, if the Law of 19 December 2003 is not applicable, the Commission ought to have required the new successful tenderer to take over all the employment contracts of the applicant's employees in accordance with the principle of equal treatment. Consequently, that plea is subsidiary to the second plea and, accordingly, the second plea must be examined first.

(a) Second plea: infringement of the Law of 19 December 2003, implementing Directive 2001/23

83 This plea is composed of two parts, the first alleging that Group 4 Falck's tender was irregular and the second that the Commission's tender specifications were unlawful.

First part: irregularity of Group 4 Falck's tender

— Arguments of the parties

84 The applicant claims that, if the Law of 19 December 2003 and Directive 2001/23, which it implements, apply to the present case, Group 4 Falck's tender will be irregular in so far as it did not include an undertaking to take over the employment contracts of the personnel employed by the applicant who were assigned to carry out the surveillance contract with the Commission.

85 The applicant submits that, in a letter to the applicant dated 14 December 2005, Group 4 Falck stated that it did not intend to comply with the Law of 19 December 2003 as it was not prepared first to recruit approximately 40 persons from among the applicant's former employees. The applicant points out that, as at 31 March 2006, Group 4 Falck had taken over 56 of the 173 employees assigned by the applicant to carry out the contract.

86 The applicant maintains, therefore, that Group 4 Falck contravened the Luxembourg legislation and Directive 2001/23, which it implements, by taking over only some of the applicant's former employees without safeguarding their rights. As a consequence, the Commission's refusal to withdraw the award decision, despite the matters of which it was informed by the applicant, is unlawful.

87 The Commission denies that the law relied upon by the applicant is applicable on the ground that there has been no transfer of an undertaking in this case. By way of a subsidiary argument, the Commission contends that, even if there had been such a transfer, the Commission could not have been aware of it when preparing the invitation to tender.

88 Group 4 Falck agrees with the Commission regarding the non-applicability of the Law of 19 December 2003. It also contends that, as taking over most of the personnel is a decisive condition in carrying out the transfer of an undertaking and since it was not required by the specifications, Directive 2001/23 could not apply in principle.

— Findings of the Court

89 Under Article 1(1)(a) of Directive 2001/23, which was transposed into Luxembourg law by Article 1 of the Law of 19 December 2003, relied upon by the applicant, Directive 2001/23 is to 'apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger'.

90 Under Article 1(1)(b) of that directive, 'there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

91 According to the case-law of the Court of Justice, the decisive criterion for establishing the existence of a transfer within the meaning of Directive 2001/23 is whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (see, by analogy, Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12, and Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 10).

92 The mere fact that the previous and the new contractors provide a similar service does not justify the conclusion that there was a transfer of an economic entity between the successive undertakings. Such an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff,

the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 30).

93 Thus, in so far as, in certain labour-intensive sectors such as the security sector, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred where the new contractor does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task (*Hidalgo and Others*, paragraph 92 above, paragraph 32).

94 It follows that, in the present case, a transfer of an undertaking between the previous and the new contractor depended on the latter taking over a major part, in terms of their number and skills, of the employees assigned by the applicant to carry out the contract. Consequently, the Commission could not have known, either when it published the invitation to tender or at the date of the award decision, whether the factual conditions required for a transfer of an undertaking, entailing the application of the Law of 19 December 2003 implementing Directive 2001/23, were met.

95 Furthermore, the letter of 14 December 2005 relied upon by the applicant, in which Group 4 Falck stated that it intended first to recruit 40 additional persons from among the applicant's employees assigned who were to carry out the contract awarded to it, expresses only an intention. That cannot be treated as the taking over, in terms of their number and skills, of a major part of the employees (173) assigned by the applicant to carry out the contract at issue, that is to say, the condition required by the case-law for there to be a transfer of an undertaking (see, to that effect, *Hidalgo and Others*, paragraph 92 above, paragraph 32).

96 In addition, that intention was expressed after Group 4 Falck had submitted its tender and after the award decision. However, in the context of an action for annulment under Article 230 EC, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (*France* v *Commission*, paragraph 42 above, paragraph 7; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81; and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 50) and in the light of the information available to the institution responsible for the measure at the time when it was adopted (see, to that effect, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 168). Thus the applicant cannot plead before the Community judicature elements of fact which arose after the award decision or of which the Commission could not have been aware when it adopted the decision. The same applies to the applicant's allegation, that on 31 March 2006, Group 4 Falck took over 56 of the 173 employees whom the applicant had assigned to carry out the contract at issue.

97 It must be held, therefore, that the factual circumstances necessary for there to be a transfer of an undertaking did not exist at the time when Group 4 Falck submitted its tender on 12 October 2005 or at the time of the award decision.

98 Moreover, it is unnecessary to address the applicant's complaint that the Commission's refusal to withdraw its award decision was unlawful, as there was no implied decision of refusal and since the applicant's claim for annulment of the Commission's letters of 7 and 14 December 2005 is inadmissible, save in relation to the refusal to disclose the composition of the evaluation committee.

99 Consequently, it must be held that the applicant's arguments cannot succeed.

100 It follows that this part of the plea must be rejected.

Second part: the Commission's contract specifications were unlawful

— Arguments of the parties

101 The applicant complains that the Commission did not include in the contract specifications delivered to tenderers an inventory of the applicant's employees and the terms of their contracts. Without such an inventory, it was impossible for any of the tenders submitted by the other bidders to include taking over those employees.

102 The Commission contends that, even if a transfer of an undertaking is found to have taken place, it could not be inferred from this that the contracting authority had an obligation to include in the contract specifications a requirement for the employment contracts to be taken over.

— Findings of the Court

103 In accordance with the principles of sound administration and cooperation in good faith between the Community institutions and the Member States, the institutions are required to ensure that the conditions laid down in an invitation to tender do not induce potential tenderers to infringe the national legislation applicable to their business (see, to that effect, Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 41).

104 In the present case, the fact that there is no inventory of the applicant's employees in the contract specifications cannot be regarded as inducing tenderers or the successful tenderer to infringe the national legislation on the safeguarding of workers' rights in the event of a transfer of an undertaking. The Commission did not lay down in its contract specifications a condition which would necessarily entail an offence under the Law of 19 December 2003 by making it impossible to take over any employment contracts in

the event of a transfer of an undertaking. The only conditions in the contract specifications concerning personnel — namely, the requirement of a minimum of one, three or five years' work experience, depending on the job performed, and the requirement that at least 10% of the security officers have basic training as first-aid workers and/or voluntary firemen — did not prevent the fulfilment of an obligation under the Law of 19 December 2003 to take over the employment contracts of employees assigned by Brink's to carry out the surveillance contract.

105 In addition, the contract specifications expressly provided that the successful contractor would have to comply with the law in force in Luxembourg at the time of the signature of the contract, thus calling on the tenderers to ensure that they complied with the national legislation in force.

106 It follows that the applicant's complaint concerning the lack of an inventory in the contract specifications must be rejected.

(b) First plea: breach of the principle of equal treatment as applied to public procurement contracts

Arguments of the parties

107 According to the applicant, the Commission, by requiring a minimum of one year's service, placed the applicant in a disadvantageous position because, having been responsible for the contract since the 1970s, it has many employees whose period of service is more than one year, which represents an undoubted wage and salary cost which the other tenderers did not have to incorporate in their tenders. Although the successful tenderer was not required to take over all the employment contracts of the applicant's employees who had been assigned to the contract at issue, with their rights

safeguarded, the Commission ought to have made that compulsory in order to avoid breach of the principle of equal treatment.

108 The applicant argues that a requirement to take over employment contracts would not have prevented the other tenderers from offering lower prices by improving other aspects of their tenders.

109 The Commission contends that the condition of a minimum of one year's work experience for employees is a realistic requirement which is appropriate to the specific nature of the task of guarding its premises and which has, in addition, contributed to opening up the bidding to the widest competition possible.

110 The Commission adds that to have required a longer minimum period of work experience in order to take into account the pay constraints weighing on the applicant would have discriminated against the other tenderers.

111 The Commission also argues that, under Luxembourg law, it had no power to require the employment contracts to be taken over.

Findings of the Court

112 Under Article 89(1) of the Financial Regulation, all public procurement contracts financed in whole or in part by the budget must comply with the principles of transparency, proportionality, equal treatment and non-discrimination.

113 Accordingly, it has consistently been held that the contracting authority must, at each stage of the tendering procedure, act in accordance with the principle of equal treatment of tenderers and, in consequence, ensure that all tenderers have an equal chance (Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108; Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 85; and judgment of 12 July 2007 in Case T-250/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 45).

114 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (see the judgment of 12 March 2008 in Case T-332/03 *European Network* v *Commission*, not published in the ECR, paragraph 125 and the case-law cited).

115 The principle of transparency, which is its corollary, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents (*Commission* v *CAS Succhi di Frutta*, paragraph 113 above, paragraph 111).

116 In the same way, the first subparagraph of Article 131(1) of the Implementing Rules provides that 'technical specifications must afford equal access for candidates and tenderers and not have the effect of creating unjustified obstacles to competitive tendering'.

117 In the present case, the applicant claims that, as the contract specifications require a minimum of one year's work experience, the invitation to tender precludes equal treatment of tenderers.

118 It should be observed that the requirement of a minimum of one year's work experience for employees in the security sector, laid down in paragraph 21 of the contract specifications, applies to all tenderers alike.

119 In addition, that condition is set out clearly, precisely and unequivocally.

120 Furthermore, the requirement of a minimum of one year's work experience does not appear inappropriate in the light of the security tasks to be performed in carrying out the contract. It should be observed that, for the posts of site manager and team leader, the contract specifications required a minimum of five years' work experience in the security field, including at least two years with responsibility for security teams, and a minimum of three years' work experience for security dispatching operators. Consequently, the contract specifications concerning employees' work experience indicate the contracting authority's intention to adjust the work experience requirements to the specific features of the employment in question.

121 Moreover, the applicant does not dispute that a minimum of one year's work experience is appropriate to the specific nature of the task to be performed.

122 In any case, the Commission would — as it states — have contributed to reducing the number of potential tenderers by requiring more than one year's work experience, and, in that way, would have restricted the development of effective competition, without that appearing justified by the needs of the task. Such a condition would have been an unjustified obstacle to competitive tendering within the meaning of Article 131 of the Implementing Rules.

123 It should also be noted that Directive 2001/23, transposed into Luxembourg law by the Law of 19 December 2003, has a specific scope. It was not for the Commission, since the conditions for a transfer of an undertaking were not met (see paragraphs 89 to 97

above), to require employment contracts to be taken over. The Commission has no power to compel a company to transfer its employment contracts or even to recruit persons whom it has not chosen.

124 It must therefore be held that the Commission was not under a duty, by virtue of the principle of equal treatment of tenderers, to require a minimum of more than one year's work experience or to require the employees assigned by the applicant to carry out the contract to be taken over. The present plea must therefore be rejected.

(c) Third plea: breach of the principle of equal treatment, as applied to public procurement, by reason of the fact that Group 4 Falck was in possession of confidential information when submitting its tender

Arguments of the parties

125 The applicant maintains that Group 4 Falck was in possession of confidential information concerning the applicant which could have assisted Group 4 Falck and given it an advantage in preparing its tender. This gives rise to a breach of the principle of equal treatment and more specifically, of the equal treatment of tenderers.

126 That crucial information was forwarded by Securicor Luxembourg, which has since become Brink's, to its former parent company at the time of the merger of Group 4 Falck A/S and Securicor, in order to reply to the Commission's requests for additional information following notification of the merger. In particular, the information relates to turnover per client and per type of business; data on contracts; lists of clients; information on contact persons; and analyses of prices, costs, margins and profits. Even if the Commission had been legitimately unaware of that fact at the time of the award, it

ought to have withdrawn its award decision as soon as it was informed of that fact by the applicant in a letter of 5 December 2005.

127 The applicant states that the ring fencing provided for by the Commission's decision of 28 May 2004, in order to ensure that Group 4 Falck could not obtain and use business secrets, know-how, commercial information or any other confidential information concerning the assets transferred, was put in place only from the date of the decision.

128 The Commission maintains that the principle of equal treatment of tenderers is not breached merely by reason of the fact that one of the tenderers is in possession of certain information, even if it is confidential, which the other tenderers do not have. The Commission argues that it is not required to ascertain systematically whether the information in the possession of tenderers is confidential.

129 The Commission adds that, when it awarded the contract, it had no reason to believe that the successful tenderer was in possession of such information, because ring fencing had been put in place after the Commission's decision of 28 May 2004. According to the Commission, the applicant has not shown that Group 4 Falck benefited from confidential information.

130 The intervener states that it never obtained information on the applicant or on the contract at issue from its parent company, Group 4 Falck A/S, or from the company formed on the merger of the two groups, Group 4 Securicor plc, whether before or after the merger. The intervener observes that, in any case, the information which, according to the applicant, had been passed on was too general to be useful in connection with the tender because it did not include essential data such as cost details (wages and salaries, rates of absenteeism, supervision and training costs) and the profit margin on the contract at issue. Furthermore, the information was old and out of date because of the changes resulting from the applicant's joining the Brink's Inc. group and the significant

differences between the invitation to tender and the previous one (redefinition of employee categories and their tasks, new training obligations and greater constraints concerning equipment).

Findings of the Court

131 It is necessary to determine whether Group 4 Falck was in possession of confidential information which could have given it a decisive advantage in preparing its tender. Consequently, it must be shown, first, that crucial information of that kind was communicated by the applicant when giving notice of the merger and, second, that the information was then passed to Group 4 Falck by its parent company and used by Group 4 Falck when preparing its tender.

132 The applicant claims that it forwarded to its former parent company, Securicor, crucial information which was of benefit to Group 4 Falck. It appended to its application a series of emails sent to Securicor between 5 March 2004 and 27 April 2004. They contain, inter alia, information on the security services market in Luxembourg; the turnover from the applicant's 10 biggest contracts (the first place being taken by the security services for the Commission's premises); and on the structure of direct and indirect costs of its security services business. Employee data, such as the average rate of sick leave or the amount of overtime and the margin rate for the applicant's security business are also included in the information forwarded.

133 That information, which relates to the applicant's entire security business and not to the contract at issue, is not such as to have given the successful tenderer a decisive advantage, because it does not make it possible to calculate the applicant's tender price exactly.

134 Furthermore, the applicant adduces no evidence in support of its assertion that the information was passed to Group 4 Falck by its parent company and used by Group 4 Falck when preparing its tender, in breach of the confidentiality declarations signed by the employees of Group 4 Falck pursuant to the Commission's decision of 28 May 2004.

135 It should also be observed that the applicant and the intervener were not the only undertakings to have submitted tenders. Even if the above information was in the possession of the successful tenderer, it would have been risky for it to draw up its tender solely by reference to that of the applicant, which was only one of six tenderers, on the basis of figures dating from 2004, before Securicor Luxembourg — now Brink's — was taken over by the Brink's group, which could in the meantime have made significant changes in the management of the company.

136 It follows that the applicant has not shown that, when giving notice of the merger operation, it transmitted confidential information likely to be of advantage to Group 4 Falck in preparing its tender or that such information was passed to Group 4 Falck by its parent company and used by the successful tenderer in connection with the invitation to tender.

137 This plea must therefore be rejected.

(d) Fourth plea: failure to comply with the Commission's decision of 28 May 2004

Arguments of the parties

138 By this plea, the applicant claims that the award decision is unlawful on the ground that it fails to comply with the Commission's decision of 28 May 2004.

139 The Commission's decision of 28 May 2004 authorised the merger between Group 4 Falck A/S and Securicor, subject to the divestiture of a number of assets, including Securicor Luxembourg, which was transferred to the Brink's group. According to the applicant, the award to Group 4 Falck of the contract at issue, which was previously held by the applicant, will have the effect of enabling Securicor to recover the market shares and assets divested in the context of the merger. It was also enabled to recover them as a result of possessing confidential information obtained by Group 4 Securicor upon the notification of the merger.

140 The Commission denies any infringement of its decision of 28 May 2004, in particular of the commitments entered into by Group 4 Falck A/S and Securicor in order to obtain a decision that the merger was compatible with the common market.

141 The Commission states that commitment 10 in the decision, whereby Group 4 Falck Securicor was not to solicit actively the customers of the divested companies for a period of six months from the disposal, was not breached. Group 4 Falck's tender was submitted on 12 October 2005, that is to say, after the six-month period following the disposal, which took place on 4 March 2005.

142 Pursuant to commitment 9 in the Commission's decision of 28 May 2004, Group 4 Falck was also required not to obtain or use confidential information concerning the applicant. According to the Commission, Group 4 Falck could not have breached that commitment because of the ring fencing put in place at the time of the merger operation, as shown by the report of the trustee responsible for monitoring compliance with the commitments entered into. The Commission considers that the applicant has adduced no evidence to show that the commitments were breached.

143 In the reply, the applicant argues that the ring fencing was not put into place until after the Commission adopted the decision of 28 May 2004 and that it covers only information communicated after that date, whereas the confidential information concerning the contract at issue was communicated before that date.

144 The applicant adds that, if the scheduled date announced in the prior information notice had been adhered to, Group 4 Falck would not have been authorised to take part in the tender procedure, in view of the six-month period laid down by commitment 10.

145 The Commission states that the publication date for the contract notice as announced in the prior information notice is only an estimated date by way of indication. The Commission explains that the preparation of the invitation to tender took more time than originally planned because it involved various Community bodies.

Findings of the Court

146 The applicant's argument that the award of the contract at issue to Group 4 Falck would lead to the group formed as a result of the merger recovering the market shares, hence the assets transferred, must be dismissed. The aim of the transfer, required by the Commission's decision of 28 May 2004, of the assets held by Securicor in the security services market in Luxembourg is to prevent the merger from leading to the creation of

a dominant position in that market. The transfer does not have the object of prohibiting the group formed as a result of the merger from reconstituting its market shares in the market concerned, where the reconstitution of those market shares is the result of free competition, which is the case here. The applicant's interpretation of the asset transfer required by the Commission's decision of 28 May 2004 would lead to the distortion of competition by fixing definitively the market share held by the subsidiary company of the group formed as a result of the merger in the market concerned.

147 With regard to the breach of commitment 9 concerning the ban on obtaining and using confidential information, it should be observed that the applicant has produced no evidence in support of its allegation that the commitment was breached.

148 Commitment 10 of the Commission's decision of 28 May 2004 prohibiting any active solicitation of its former customers (of which the Commission is one) by Group 4 Falck for a period of six months from the transfer, that is to say, until 4 September 2005, has likewise not been breached. Only the formal submission of a tender can be regarded as active solicitation in relation to a contract which is the subject of an invitation to tender. Group 4 Falck's tender was submitted on 12 October 2005, after the expiry of the time-limit. In those circumstances, neither the request of 25 March 2005 by Group 4 Falck to be informed of the date on which the contract documents would be available, nor the request lodged on 1 September 2005 for the specifications of the invitation to tender, can be regarded as active solicitation.

149 In addition, the applicant's argument based on the discrepancy between the date of publication of the invitation to tender and the date announced in the prior information notice must be dismissed. The latter date is only an estimate and is not binding on the contracting authority.

150 It follows that the present plea must be rejected.

(e) Fifth plea: breach of the obligation to state reasons, the principle of transparency and the right of access to documents of the institutions

Arguments of the parties

151 According to the applicant, the Commission breached the obligation to state reasons laid down in Article 253 EC, Article 12(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Article 100(2) of the Financial Regulation and Article 149(3) of the Implementing Rules.

152 The applicant maintains that mere notification of the scores awarded to Group 4 Falck and to itself for each of the award criteria, without a description of the evaluation method used or its practical application, constitutes an insufficient statement of reasons. The applicant states that it clearly indicated to the Commission, in its letter of 8 December 2005, that it considered the Commission's statement of reasons to be insufficient.

153 The applicant maintains that the Commission's reply in its letter of 14 December 2005, which merely informs it that Group 4 Falck had provided sufficient substantiating documents, is not acceptable for an institution bound by an obligation of transparency.

154 In addition, the applicant claims that the Commission breached the right of access to documents of the institutions by not sending the applicant the documents provided by Group 4 Falck to prove the information required by the contract documents. Furthermore, there was no legitimate reason for refusing to do so. The applicant considers that the Commission could have provided it with a version of the documents with the names blacked out.

155 The Commission maintains that it gave sufficient reasons for its award and rejection decisions in the light of the case-law concerning the extent of the obligation to state reasons for measures concerning public procurement contracts.

156 It adds that, as its statement of reasons was sufficient, it did not have to disclose the substantiating documents provided by Group 4 Falck in connection with the submission of its tender.

Findings of the Court

157 First of all, it should be observed that, in reply to a written question from the Court, the applicant confirmed that, in spite of the heading of the plea, it is merely alleging breach of the obligation to state reasons.

158 It has consistently been held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraph 103; and Case T-19/95 *Adia Interim* v *Commission* [1996] ECR II-321, paragraph 32).

159 Contrary to the applicant's argument, the Commission's obligation to state the reasons for the rejection of the applicant's tender does not, in the present case, arise from Directive 92/50. As was stated in paragraphs 1 to 3 above, the Financial Regulation and the Implementing Rules are the relevant provisions applying in the present case and, more specifically, Article 100(2) of the Financial Regulation and Article 149 of the

Implementing Rules, which govern the obligation to state reasons which is incumbent on the competent institution in the context of a procedure for the award of public procurement contracts.

160 It is clear from those provisions and from the case-law that the contracting authority fulfils its obligation to state reasons if, first of all, it immediately informs the unsuccessful tenderers of the reasons for the rejection of their tenders and if, secondly, it informs tenderers who have submitted an admissible tender and who so request of the characteristics and the relative advantages of the selected tender, together with the name of the successful tenderer, within 15 days of receiving a written request (judgment of 10 September 2008 in Case T-465/04 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 47 and the case-law cited).

161 That method is consistent with the purpose of the obligation under Article 253 EC to state reasons.

162 Consequently, in order to determiner whether, in the present case, the Commission fulfilled its obligation to state reasons, it is necessary to examine the award and rejection decisions and the Commission's letters to the applicant of 5, 7 and 14 December 2005 in reply to the applicant's express requests of 1, 5 and 8 December 2005 for additional information on the above decisions.

163 In the rejection decision, the Commission, acting in conformity with Article 100(2) of the Financial Regulation, set out the reasons why the applicant's tender had been rejected, namely, that the tender had not obtained the highest score given on completion of the final evaluation. The Commission also informed the applicant that additional information could be requested on the reasons for the rejection of the tender and, as the tender had been admissible, on the characteristics and advantages of the selected tender, as well as the name of the successful tenderer.

164 With regard to the letters of 5, 7 and 14 December 2005, it should be noted immediately that the Commission replied to the applicant's written requests of 1, 5 and 8 December 2005 within the time-limit of 15 days from receipt of the requests, as laid down in Article 149(3) of the Implementing Rules.

165 The letter of 5 December 2005 stated:

'…

The contract documents provided for the contract to be awarded to the tender which is most advantageous economically, in accordance with the method described therein.

The successful tenderer for the contract relating to the invitation to tender … is the company:

[Group 4 Falck]

…

A detailed comparison of the evaluation of your tender with that of the successful tenderer is shown in the table below:

	Group Falck 4	[Brink's]
Qualitative evaluation	30/30	30/30
Financial evaluation	70/70	68.67/70
Final evaluation	100/100	98.67/100
RANKING	1	2

…'

166 The letter of 14 December 2005, which contained several items of information in response to the applicant's request for details, stated inter alia:

'…

Further to our previous letter, please find below the additional information on the qualitative evaluation of the tenders:

Qualitative evaluation	Group 4 Falck	[Brink's]
Criterion 26: Organisation put in place for providing the services which are the subject of the contract	10/10	10/10
Criterion 27: Organisation put in place — deadlines for putting in place effective arrangements on the occurrence of various manifestations or unforeseen events or any change in the security arrangements	10/10	10/10
Criterion 28: Basic training as first-aid workers and/or voluntary firemen	10/10	10/10
TOTAL	30/30	30/30

With regard to criteria 26 and 27, the descriptions given by both Brink's and Group 4 Falck were judged very full and very satisfactory. They therefore deserve the maximum points in accordance with the method of which details are given in the specifications.

With regard to criterion 28, Group 4 Falck provided sufficient substantiating documents which justify the 10 points obtained for that criterion.

For reasons of the confidentiality of your competitor's tender, we are not authorised to give you more details of the contents.

…'

167 It must be held that, by giving in those letters the name of the successful tenderer and the characteristics and relative advantages of the selected tender, as compared with that of the applicant, in the light of the award criteria specified in the contract documents, the Commission's reasons for rejecting the applicant's tender meet the requisite legal standard.

168 First, the tables provided enabled the applicant to compare directly, for each criterion, the points it received with those obtained by the successful bidder as the Commission did not confine itself to informing the applicant of the total scores obtained by the two tenders in question. In particular, the first table enabled the applicant to identify immediately the precise reasons why its tender was not chosen, namely the fact that its score for the financial evaluation was lower than that of Group 4 Falck (see, to that effect, Case T-169/00 *Esedra* v *Commission* [2002] ECR II-609, paragraphs 191 to 193; Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 57; and Case T-4/01 *Renco* v *Council* [2003] ECR II-171, paragraph 95).

169 Second, the letter of 14 December 2005 also showed that the applicant's tender had not been classified in a better position than the selected tender in relation to any of the three quality criteria specified in the contract documents. In addition, the general comments in the letter supplementing the scores gave the detailed reasons which led the Commission to award the maximum points to the two tenders in question.

170 Lastly, the applicant cannot cogently maintain that the Commission did not inform it of the evaluation method chosen for each criterion and its practical application.

171 In fact, since it received the contract documents relating to the invitation to tender, the applicant had precise knowledge of the evaluation method used by the Commission

even before the Commission awarded the contract at issue to the intervener. The Commission's letter of 14 December 2005 then gave the applicant the requisite details of how the method was applied.

172 With regard to the criteria laid down in paragraphs 26 and 27 of the contract specifications, that document described the evaluation method followed, pointing out in particular that a very satisfactory description of the organisation put into place in order, first, to provide the services at different sites in the most effective way and, second, to minimise the periods for putting into place effective arrangements on the occurrence of various manifestations or unforeseen events or any alteration to guarding arrangements would lead to obtaining the maximum score, that is to say, 10 points, for each of those two criteria. In its letter of 14 December 2005, the Commission explained how it had applied that method by informing the applicant that the descriptions given by the applicant and by Group 4 Falck in relation to those two criteria were judged very satisfactory and that they were awarded the maximum points in accordance with the method set out in the contract specifications.

173 With regard to the criterion laid down in paragraph 28 of the contract specifications, that document describes the evaluation method used, pointing out that the tender with the highest percentage of employees who had received basic training as first-aid workers or as voluntary firemen would be awarded the maximum points, the other tenders obtaining a lower score in proportion to the difference from the highest percentage. The award of the maximum score to the tenders of the applicant and of the successful tenderer, of which the applicant was informed by the letter of 14 December 2005, meant, therefore, that those two companies had quoted the same percentage. Consequently, the application of the method provided for in the specifications did not call for any particular explanation by the Commission by virtue of the obligation to state reasons, over and above the details given to the applicant in reply to its request for clarification relating to the substantiating documents produced by the intervener.

174 With regard to the financial evaluation of the tenders, paragraph 29 of the specifications stated that the tender offering the lowest price would be awarded the maximum points, the score for the other tenders being inversely proportionate. This means that the

scores awarded to the applicant's tender and to that of the selected bidder are based on mathematical reasoning, which requires no further explanation from the Commission.

175 Consequently, it must be found that the Commission discharged its obligation to state reasons, as interpreted by the case-law.

176 It should also be observed that the Commission was not required to disclose to the applicant, by way of giving the reasons for the award and the rejection decisions, the documents produced by Group 4 Falck. Article 100(2) of the Financial Regulation provides only that the contracting authority must, upon receipt of a request in writing, state the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

177 Accordingly, the present plea must be rejected as the Commission is not in breach of the obligation to state reasons.

(f) Sixth plea: breach of the public procurement rules, failure to comply with the contract documents as regards the evaluation of the qualitative criterion relating to giving personnel basic training as first-aid workers and/or as voluntary firemen, and manifest error of assessment

Arguments of the parties

178 The applicant asserts that, at the time when Group 4 Falck submitted its tender and even at the time when the application initiating the present proceedings was lodged, Group 4 Falck did not have the security employees necessary for carrying out the

contract at issue. The applicant submits that the intervener was therefore unable to produce the substantiating documents required by paragraph 28 of the specifications, namely copies of the employee training certificates, in order to prove that 100% of the security employees concerned had training as first-aid workers and/or as voluntary firemen, as it stated in its tender. According to the applicant, the fact that a percentage figure has been quoted which is not proved means that the tender is irregular and the decision awarding the contract to that tender is also irregular. Consequently, Group 4 Falck's tender should have been rejected.

179 The applicant maintains that the percentage quoted by the intervener in its tender ought to have been reduced by at least the ratio between the number of certificates produced by Group 4 Falck and those produced by the applicant, that is to say, it should have been approximately 45% instead of 100%.

180 The applicant stresses that the criterion in paragraph 28 of the specifications is an award criterion, not a contractual commitment, and that the percentage quoted should be verified and verifiable at the date of submission of the tender.

181 In the reply and in its observations on the statement in intervention, the applicant also disputes the probative force of the SNCH letter of 11 October 2005. According to the applicant, the letter cannot prove that 100% of the security employees of Group 4 Falck had received the training required, because it is only a certification of a quality management system conforming to the reference system ISO 9001:2000 ('ISO 9001'), which is based on surveys and is therefore subject to the risks entailed by sampling.

182 The applicant disputes the probative force of that letter also on the ground that it does not show an addressee and does not mention the exact purpose for which it was written. The applicant also argues that the signatory of the letter was not authorised to bind the SNCH, of which he is neither a director nor a manager. The applicant asserts that Group 4 Falck brought pressure to bear on the SNCH inspectors to write the letter of 11 October 2005.

183 The applicant appended several documents to its observations on the statement in intervention, including an email of 18 December 2006 from the SNCH inspector who signed the letter of 11 October 2005. The applicant also appended to its observations five certificates produced by its employees, seeking to confirm that, at a meeting in the applicant's offices on 6 December 2006, the SNCH representatives had stated that they wrote the letter of 11 October 2005 at the insistence of Group 4 Falck. The applicant also suggested that the Court should hear a number of its employees who had attended the meeting, as well as two employees of the SNCH.

184 The Commission contends that the score is not determined according to the number of certificates produced, but solely by reference to the percentage quoted, one of the reasons being that the adjudicator cannot determine beforehand the number of employees necessary to carry out the contract.

185 According to the Commission, the 78 certificates produced by Group 4 Falck prove that 100% of the employees which that tenderer already intended to assign to the contract had received the requisite training by the time the tender was evaluated. The SNCH certification, for its part, proves that 100% of the employees of Group 4 Falck must have received training as first-aid workers and/or as voluntary firemen by the time the contract is performed because it certifies that training is given to every new employee who is recruited.

186 The Commission argues that the applicant's interpretation of the criterion relating to employee training would mean that tenderers would have to have already in their workforce all the employees necessary for carrying out the contract. That would result in unequal treatment of tenderers and the contract at issue would inevitably go to the outgoing contractor.

187 The intervener submits that, by providing 78 training certificates, it produced as many certificates as there were employees referred to in paragraph 22 of the specifications. Regarding the other employees who may be assigned to the contract, and not referred to

in paragraph 22 of the specifications, Group 4 Falck provided the SNCH certificate proving overall their training in first aid and firefighting.

188 According to the intervener, the SNCH certification which it provided proves that the operational personnel are given initial training in the fields of first aid and firefighting, in accordance with standard ISO 9001, compliance with which is attested to by a first certificate which was itself issued by the SNCH following several checks carried out at Group 4 Falck premises.

189 On the basis of Article 48 of the Rules of Procedure, the intervener contended that the new documents produced by the applicant in its observations on the statement in intervention were not admissible. By way of an alternative, it lodged at the hearing new documents in response to those lodged by the applicant.

Findings of the Court

— Admissibility of the new evidence produced by the applicant and by the intervener

190 Under Article 48(1) of the Rules of Procedure, in reply or rejoinder the parties may offer further evidence, but they must give reasons for the delay in offering it. However, according to the case-law, evidence in rebuttal and the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party in his defence are not covered by the time-bar laid down in Article 48(1) of the Rules of Procedure. That provision concerns offers of fresh evidence and must be read in the light of Article 66(2) of those rules, which expressly provides that evidence may be

submitted in rebuttal and previous evidence may be amplified (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 71 and 72, and the judgment of 12 September 2007 in Case T-448/04 *Commission* v *Trends*, not published in the ECR, paragraph 52).

191 In the present case, the applicant's production of the SNCH email of 18 December 2006, the email from the applicant's legal manager of the same date, the testimony of its employees who attended the meeting of 6 December 2006 and documents, K1 to K4 relating to standard ISO 9001 and to the SNCH, constitutes evidence in rebuttal intended to reply to the documents produced by the intervener in the statement in intervention in order to demonstrate the probative force of the document of 11 October 2005 drawn up by the SNCH, namely the articles of association of the SNCH and of the Société nationale de contrôle technique, the grand-ducal regulation of 28 December 2001 establishing an accreditation system for certification and inspection bodies and test laboratories and creating the Office luxembourgeois d'accréditation et de surveillance, an accreditation committee and a national compendium of quality and technical controllers (Mém. A 2002, p. 94), and the Group 4 Falck's ISO 9001 certificate of 14 February 2005. Consequently, the time-bar laid down in Article 48(1) of the Rules of Procedure does not apply to it and it must be declared admissible.

192 The documents produced by the intervener at the hearing consist of correspondence between the intervener and the SNCH concerning the probative force of the letter of 11 October 2005 and the applicant's allegation that it was written as a result of pressure from Group 4 Falck on the SNCH inspectors. These documents also constitute evidence in rebuttal, intended to reply to the observations and documents lodged by the applicant in its observations on the statement in intervention. They must therefore be declared admissible.

— Substance

193 First of all, it should be borne in mind that the Commission has a broad margin of discretion with regard to the factors to be taken into account for the purpose of a decision awarding a contract following an invitation to tender, and that review by the

Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and to ascertaining that there has been no manifest error of assessment or misuse of powers (see, to that effect, Case 56/77 *Agence européenne d'intérims* v *Commission* [1978] ECR 2215, paragraph 20; Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 147; and Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 47).

194 The parties give different interpretations of the criterion laid down in paragraph 28 of the specifications. It is therefore necessary to set out the content of paragraph 28, before clarifying its meaning and, lastly, it is necessary to examine the probative force of the SNCH letter of 11 October 2005.

195 Paragraph 28 of the specifications stated:

'Basic training as a first-aid worker and/or as a voluntary firemen

The specific conditions for providing the services provide that at least 10% of the security employees must have basic training as first-aid workers and/or as voluntary firemen.

— Please indicate here the percentage of employees with such training: …%

— Please enclose substantiating documents enabling the contracting authority to verify the percentage quoted (copies of certificates).

The tender with the highest percentage will be awarded the highest points. The other tenders will be given an inversely proportionate score.'

196 The applicant and the intervener stated that 100% of their security employees had such training and they each obtained 10 points. The applicant produced 173 training certificates in support of that figure, while the intervener produced 78 training books for the employees whom it already intended to assign to the contract at issue and whose curricula vitae had already been provided in accordance with paragraph 22 of the specifications, together with a letter from the SNCH dated 11 October 2005 certifying that, in relation to the ISO 9001 certification of Group 4 Falck, initial training in first aid and firefighting is given to all personnel, that training programmes and programmes for updating knowledge are available and that the checks carried out in 2004 and 2005 show that the procedures put in place are actually applied.

197 According to the applicant, only tenderers who can show — as the applicant itself did — that, on the date of the tender, they have all the security employees necessary for carrying out the contract and that all those employees have received training as first-aid workers and/or as voluntary firemen were entitled to quote a figure of 100%.

198 That interpretation cannot be accepted. As the Commission states, it would lead to a breach of the principle of equal treatment of tenderers because it would favour the current contractor who alone has all the necessary employees. It is clear from the case-law that to require the tenderer to have the requisite number of employees at the time it lodges its tender would be tantamount to favouring the tenderer holding the existing contract (*TQ3 Travel Solutions Belgium* v *Commission*, paragraph 193 above, paragraph 90). In addition, it is impossible for the contracting authority to determine in advance the number of employees necessary as it may vary from one tenderer to another by reason of the organisational arrangements which are chosen.

199 The percentage required under paragraph 28 of the specifications must therefore be understood to relate to the security employees who will be assigned to carrying out the contract. As that percentage must be proved at the stage of submitting the tender, it is legitimate to accept documents proving, first, that the percentage quoted is the percentage of employees possessing the requisite training among the employees whom the tenderer was already required to identify under paragraph 22 of the specifications and, second, that a training policy has been put in place to ensure that every new employee recruited will have the requisite training.

200 With regard to the probative force of the SNCH letter of 11 October 2005, it should be observed that the applicant appended to its observations on the statement in intervention an email of 18 December 2006 from the SNCH inspector who had signed the letter of 11 October 2005. The signatory of that letter states that the letter of 11 October 2005 is not to be regarded as a certificate or an attestation and that it cannot prove that 100% of the personnel concerned received training as first-aid workers and/or as voluntary firemen. According to its signatory, the letter of 11 October 2005 therefore does no more than note that the existence of a training policy and its actual implementation were verified and certified in conformity with standard ISO 9001.

201 It must be held that the SNCH letter of 11 October 2005 was not interpreted by the Commission, when evaluating the bid from the successful tenderer, as meaning that 100% of the employees of Group 4 Falck had received the requisite training by the date of submission of the tender. The letter merely served to show that a training policy existed and was actually put into effect. In conjunction with the 78 training certificates attesting to the fact that all the employees whom Group 4 Falck already intended to assign to carrying out the contract at issue had such training, that circumstance could rightly be regarded as capable of proving that 100% of the Group 4 Falck security employees would have the requisite training when the contract was carried out.

202 With regard to the fact that there is no addressee and no mention of a subject in the letter of 11 October 2005, it should be observed that the specifications required the

percentage quoted by tenderers to be proved by substantiating documents and referred to copies of certificates, but did not require any particular formality. Consequently, those submissions must be dismissed.

203 Regarding the capacity of the signatory, it must be held that there was no manifest error of assessment on the Commission's part in considering that a SNCH inspector was authorised to issue that kind of certificate. In a letter of 27 February 2007 produced by the intervener at the hearing, the SNCH representative confirmed that the inspector concerned was authorised to sign that type of document by virtue of the signing powers delegated to SNCH experts.

204 The applicant's argument relating to pressure from Group 4 Falck must also be dismissed because the delivery of a letter attesting to the fact that the ISO 9001 certification for Group 4 Falck includes the existence of a training policy, as laid down by that standard, forms part of the usual services that a certification organisation offers to any company certified by it, on request, as confirmed by the SNCH representative in the abovementioned letter of 27 February 2007.

205 In that connection, it appears that the Court has been able to give an appropriate ruling on that complaint on the basis of the arguments put forward in the course of the written and the oral procedure and on sight of the documents produced. In those circumstances, the applicant's request that witnesses presented by it be given a hearing must be dismissed.

206 It follows that the present plea must be rejected.

(g) Seventh plea: breach of the principle of transparency and of the right of access to documents of the institutions

207 This plea is composed of two parts, the first part alleging breach of the right of access to documents of the institutions and the second part alleging conflict of interests in the case of one of the members of the evaluation committee.

First part: breach of the right of access to documents of the institutions

— Arguments of the parties

208 The applicant maintains that, by refusing to disclose to it the exact composition of the evaluation committee, the Commission has rendered the citizens' right of access to documents of the institutions meaningless. The applicant adds that the refusal cannot be justified on the ground of the protection of privacy and the integrity of the individual.

209 On the basis of Article 4 of Regulation No 1049/2001, the Commission contends that the information cannot be disclosed. It argues that disclosure of the composition of the evaluation committee would be inimical to the protection of privacy and the integrity of the individual.

— Findings of the Court

210 As was shown in paragraphs 72 to 75 above, although the Commission's letter of 14 December 2005, relied upon by the present plea, is a reply to an initial application, it must be regarded as a measure which is open to an action for annulment in view of the procedural flaw consisting in the failure to inform the applicant of the right to make a confirmatory application.

211 It is necessary, therefore, to determine whether the Commission could have based its reply on the exception provided for in Article 4(1)(b) of Regulation No 1049/2001, relating to the protection of privacy and the integrity of the individual.

212 It has consistently been held that any exception to the right of access to documents of the institutions must be interpreted strictly (Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 27; Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 55; and *Franchet and Byk* v *Commission*, paragraph 70 above, paragraph 84).

213 According to settled case-law, the examination required for the purposes of processing a request for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69; see also, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 75). In principle, the exception can be justified only if the institution has considered beforehand whether access to the document would be likely to undermine, specifically and actually, the protected interest. In addition, the risk of undermining that interest must be reasonably foreseeable and not purely hypothetical (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 43).

214 In order to determine whether the exception provided for in Article 4(1)(b) of Regulation No 1049/2001 applies, it is necessary, therefore, to ascertain whether the applicant's access to the information concerning the composition (full name, grade, length of service and position of the members) of the evaluation committee is likely, specifically and actually, to undermine the protection of privacy and the integrity of the members of that committee.

215 It must be found that the members of the evaluation committee were appointed in the capacity of representatives of the services concerned and not in a personal capacity. Accordingly, disclosure of the composition of the committee does not put at risk the privacy of the persons concerned.

216 In any case, disclosure of the composition of the committee is not likely, specifically and actually, to undermine the protection of privacy and the integrity of the persons concerned. The mere fact of belonging to the committee on behalf of the entity which the persons concerned represented is not of an undermining nature and the privacy and integrity of the persons concerned is not compromised.

217 Consequently, it has not been shown that disclosure of the composition of the evaluation committee would have been likely to undermine the protection of the privacy and integrity of the persons concerned within the meaning of Article 4(1)(b) of Regulation No 1049/2001.

218 The Commission's decision of 14 December 2005 refusing to disclose the composition of the evaluation committee to the applicant must therefore be annulled.

Second part: conflict of interests in the case of one of the members of the evaluation committee

— Arguments of the parties

219 The applicant claims that a member of the evaluation committee is related by marriage to an employee of Group 4 Falck and that there is therefore a conflict of interests in the case of that member of the committee.

220 The Commission states that the evaluation committee was constituted in accordance with the requirements laid down in Article 146 of the Implementing Rules and that the members of the committee signed a declaration that there was no conflict of interests and, in reply to a question put to them following the applicant's allegation, that they were not related by marriage to a person employed by Group 4 Falck.

221 The Commission adds that the applicant has adduced no evidence that the impartial performance of his duties by a member of the evaluation committee was compromised by financial interests or by any other interest shared with the successful tenderer.

— Findings of the Court

222 The applicant asserts that 'the Commission's refusal merely reinforces [the applicant's] doubts as to the equal treatment of its tender and as to examination of the tender in conformity with criteria laid down in the specifications in accordance with the requirements thereof' and that 'those doubts have been reinforced quite recently by having become aware fortuitously of a disturbing report since it would seem that one of

the members of those committees is related by marriage to a person employed by the lucky recipient of the contract'.

223 The applicant, who uses mere factual allegations in a way expressing nothing but doubt, adduces not the slightest evidence capable of calling into question the impartiality of the members of the evaluation committee. Consequently, this complaint must be dismissed.

224 With regard to the application for a measure of organisation of the procedure in relation to the disclosure of the composition of the evaluation committee, it should be observed that, even if the measure were ordered, the composition of the committee could be disclosed only to the Court and not to the applicant, by virtue of the third subparagraph of Article 67(3) of the Rules of Procedure, which provides that 'where a document to which access has been denied by a Community institution has been produced before the Court of First Instance in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties'. The measure sought is not, therefore, such as to enable the applicant to show that its allegation relating to the existence of a conflict of interests concerning one of the members of the evaluation committee is well founded. Nor can that measure provide the Court with information, as the Court would not be in a position to verify the existence of a conflict of interests from a list of the members of the committee, given the vagueness of that allegation.

225 In those circumstances, it must be found that the applicant has not shown in what way the measure sought would contribute to ensuring that the case is prepared for hearing, that the procedure is carried out or that the dispute is resolved, as required by Article 64(1) of the Rules of Procedure. The applicant's application for a measure of organisation of the procedure must therefore be rejected.

226 It follows from all the foregoing that the Commission's letter of 14 December 2005 must be annulled in that it refused to disclose the composition of the tender evaluation committee and that the claim for annulment of the award decision must be dismissed.

227 With regard to the application for annulment of the rejection decision, it must inevitably be dismissed as a consequence of the dismissal of the application for annulment of the award decision, with which it is closely connected (see, to that effect, Case T-195/05 *Deloitte Business Advisory* v *Commission* [2007] ECR II-871, paragraph 113, and the judgment of 12 November 2008 in Case T-406/06 *Evropaïki Dynamiki* v *Commission,* not published in the ECR, paragraph 120).

228 It follows that the action for annulment must be dismissed, save in relation to the application for annulment of the Commission's letter of 14 December 2005 in that it refused disclosure of the composition of the tender evaluation committee.

D — *The claim for damages*

1. *Admissibility*

(a) Arguments of the parties

229 The Commission maintains that the applicant's action for damages is inadmissible because the action for annulment is unfounded. According to the Commission, a claim for damages on the ground that an award of a public procurement contract is unlawful necessarily presupposes that the award decision be found to be unlawful.

230 The applicant submits that the action for damages is admissible irrespective of whether the action for annulment is well founded. The applicant argues that complaints such as the discrepancy in relation to the timetable of the refusal to grant access to certain documents give rise, independently, to liability on the part of the Commission.

(b) Findings of the Court

231 According to settled case-law, the action for damages provided for in the second paragraph of Article 288 EC is an autonomous form of action, with a particular purpose to fulfil within the system of remedies and subject to conditions on its use dictated by its specific nature (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 3; Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 26; and Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 14). It differs from an action for annulment in that its end is not the abolition of a particular measure, but compensation for damage caused by an institution (*Zuckerfabrik Schöppenstedt* v *Council*, paragraph 3; *Krohn* v *Commission*, paragraph 32; and *Sonito and Others* v *Commission*, paragraph 14). The principle of the independent character of the action for damages is thus explained by the fact that the purpose of such an action differs from that of an action for annulment (Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 45, and Case T-47/02 *Danzer* v *Council* [2006] ECR II-1779, paragraph 27).

232 An action for damages is available to any natural or legal person who considers that he has suffered damage because of the Community. The limitation period for an action for damages is five years from the occurrence of the damage.

233 In view of the foregoing, the dismissal of the application for annulment of the award and rejection decisions does not automatically render the action for damages inadmissible

(see, to that effect and by analogy, the order of 21 June 1993 in Case C-257/93 *Van Parijs and Others* v *Council* [1993] ECR I-3335, paragraph 14; Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 31). Consequently, the action for damages must be found admissible.

2. *Substance*

(a) Arguments of the parties

234 According to the applicant, the Commission's unlawful conduct, which is such as to give rise to non-contractual liability on its part, arises from the necessary annulment of the Commission's decisions contested by the action for annulment. The applicant alleges that, by exceeding the limits of its discretion, the Commission erred manifestly and seriously and failed to observe certain rules of Community law, as well as rules which it had itself laid down in the preparation of its contract specifications.

235 The applicant claims that the harm suffered consists in substantial commercial damage connected with the loss of a large procurement contract, without prejudice to other damage such as the potential obligation to implement a far-reaching and costly collective redundancy scheme for its employees. The applicant submits that the causal link is manifest.

236 In the application initiating proceedings, the applicant sought provisional damages of EUR 1 million. It increased this to EUR 3 191 702.58 in the reply. That figure reflects the net margin of the business division over five years, namely EUR 3 084 702.58, as well as part of the training costs for the 106 employees remaining with the applicant, namely EUR 107 000, which the applicant reserves the right to adjust according to the actual costs involved. The applicant explains that it is not pleading that its damage is the loss of a chance of gaining the contract, but that it has sustained certain damage. It claims that, without the Commission's unlawful conduct, it would have obtained the contract. The causal link is thus established.

237 With regard to the allegedly unlawful conduct, the Commission contends that the unfounded nature of the application for annulment shows that the Commission did not breach any rule of Community law. Furthermore, even assuming that the Commission acted unlawfully, the applicant has not shown a sufficiently serious breach of the provisions relied on.

238 With regard to the purported damage, the Commission observes that the burden of proof rests with the applicant. The Commission states that the Court of Justice refuses to award damages for the loss of a chance. In addition, and according to the terms of the application itself, the damage linked to the applicant's obligation to make its personnel redundant is not certain.

239 The Commission contends that the applicant has not proved the existence of a causal link and merely asserts that the causal link is 'manifest'. The Commission argues that the action for annulment and the action for damages based on non-contractual liability are two different actions and that the applicant does not make it clear on what basis it is seeking to hold the Commission liable, which seems to be indistinguishable from its action for annulment.

(b) Findings of the Court

240 It should be borne in mind that, as has consistently been held, in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct on the part of its institutions, a number of conditions must be satisfied: the institutions' conduct must be unlawful; actual damage must have been suffered; and there must be a causal link between the conduct and the damage pleaded (see Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission* [2005] ECR II-5393, paragraph 85 and the case-law cited).

241 Since those three conditions for the incurring of liability are cumulative, failure to meet one of them is sufficient for an action for damages to be dismissed, without it being necessary to examine the other conditions (see Case T-226/01 *CAS Succhi di Frutta* v *Commission* [2006] ECR II-2763, paragraph 27 and the case-law cited).

242 So far as unlawful conduct is concerned, the case-law requires proof of a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). The decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced discretion, or even none at all, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

243 In the present case, all the arguments put forward by the applicant in order to show that the award and the rejection decisions are unlawful have been examined and rejected (see paragraphs 84 to 228 above). The Community cannot be found liable, therefore, on the basis of the alleged unlawfulness of those decisions.

244 With regard to the unlawfulness of the Commission's decision of 14 December 2005 refusing the request for disclosure of the composition of the evaluation committee, it must be found that the applicant has not established the existence of a causal link between the refusal of the information requested and the purported harm, which is said to result from the loss of the contract at issue.

245 It follows that the claim for damages must be dismissed.

Costs

246 Under the first subparagraph of Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs.

247 In the circumstances of the present case, in view of the fact that the applicant has failed on most of its heads of claim, the matter will be fairly assessed by ordering the applicant to bear its own costs and one half of those incurred by the Commission and by Group 4 Falck, including the costs relating to the application for interim relief.

On those grounds,

THE COURT OF FIRST INSTANCE (Sixth Chamber)

hereby:

1. **Annuls the Commission's decision of 14 December 2005 refusing a request for the disclosure of the composition of the evaluation committee for invitation to tender 16/2005/OIL;**

2. **Dismisses the action for annulment as to the remainder;**

3. **Dismisses the action for damages;**

4. **Orders Brink's Security Luxembourg SA to bear its own costs and, in addition, to pay one half of the costs incurred by the Commission of the European Communities and by G4S Security Services SA, including the costs relating to the application for interim relief;**

5. **Orders the Commission to bear one half of its own costs;**

6. **Orders G4S Security Services to bear one half of its own costs.**

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 9 September 2009.

[Signatures]

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