Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

27 April 2016 *

(Public service contracts — Tendering procedure — Software development and maintenance services — Rejection of a tenderer's bid — Classification of a tenderer in the cascade procedure — Grounds for exclusion — Conflict of interest — Equal treatment — Duty of diligence — Award criteria — Manifest error of assessment — Duty to state reasons — Non-contractual liability — Loss of opportunity)

In Case T-556/11,

European Dynamics Luxembourg SA, established in Ettelbrück (Luxembourg),

European Dynamics Belgium SA, established in Brussels (Belgium),

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece),

represented initially by N. Korogiannakis, M. Dermitzakis and N. Theologou, subsequently by I. Ampazis, and lastly by M. Sfyri, lawyers,

applicants,

v

European Union Intellectual Property Office (EUIPO), represented initially by N. Bambara and M. Paolacci, and subsequently by M. Bambara, acting as Agents, assisted by P. Wytinck and B. Hoorelbeke, lawyers,

defendant,

ACTION, first, for annulment of the decision of EUIPO notified by letter of 11 August 2011 and adopted in tendering procedure AO/029/10 entitled 'Software development and maintenance services' rejecting the tender submitted by European Dynamics Luxembourg and the other related decisions of EUIPO adopted in the context of that procedure, including those awarding the contract to other tenderers, and, second, for damages,

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek, President, I. Labucka and V. Kreuschitz (Rapporteur), Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 July 2015,

* Language of the case: English.

gives the following

Judgment [1]

Background to the dispute

1 The applicants, European Dynamics Luxembourg SA, European Dynamics Belgium SA and Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, are active in the field of information technology and communication and regularly submit tenders in tendering procedures launched by various EU institutions and bodies, including the European Union Intellectual Property Office (EUIPO).

2 By contract notice of 15 January 2011, EUIPO published in the supplement to the *Official Journal of the European Union* (OJ 2011/S 10-013995) a call for tenders under reference AO/029/10, entitled 'Software development and maintenance services'. The contract to be awarded covered the supply to EUIPO of IT services for prototyping, analysis, design, graphic design, development, testing and installation of information systems, as well as the provision of technical documentation, training and maintenance for those systems.

3 Under point II.1.4 of the contract notice, the tender concerned the award of framework agreements for a maximum duration of seven years with three different IT service providers. In that regard, that point of the contract notice, read together with point 14.3 of the tender specifications (Annex I to the tender documentation), stated that the framework contracts had to be concluded separately and in accordance with the 'cascade' procedure for an initial period of three years, with an option for tacit annual renewal up to a maximum duration of four years. That mechanism meant that if the first-ranked tenderer was unable to provide the services required, EUIPO was to turn to the second-ranked tenderer, and so on (see point 14.2 of the tender specifications).

4 Under point IV.2.1 of the contract notice, the contract was to be awarded to the most economically advantageous tender, namely the tender with the best price-to-quality ratio.

…

12 By letter of 11 August 2011 ('the letter at issue'), EUIPO informed the first applicant of the outcome of tendering procedure AO/029/l0 and that its tender had not been successful because it was not the most economically advantageous ('the decision to reject the tender'). That letter also contained a comparative table setting out the number of points awarded to that tender, namely 84.72, and the number of points awarded to the three tenderers which had obtained the highest scores, namely 'Informática El Corte Ingles — Altia' with 90.58 points, 'Everis-Unisys-Fujitsu' with 90.19 points, and 'the Drasis consortium' with 85.65 points.

…

14 By letter of 26 August 2011, EUIPO provided the first applicant with an extract of the evaluation report comprising the qualitative evaluation of its tender on the basis of three criteria: quality of software maintenance, business case, and quality of customer services. In addition, it sent the first applicant, first, the names of the successful tenderers, namely Informática El Corte Ingles, SA — Altia Consultores, S.A. Temporary Association ('IECI'), which was ranked first, Everis SLU, Unisys and Fujitsu Technology Solutions ('the Unisys consortium' or 'Unisys'), which was ranked second, and the Drasis consortium (Siemens IT Solutions and Services SA ('Siemens SA'), Siemens IT Solutions and

1 — Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

Services SL ('Siemens SL')), Intrasoft International SA and Indra Sistemas SA, ('the Drasis consortium' or 'Drasis'), which was ranked third, and, secondly, two tables setting out the scores obtained by the successful tenderers and the first applicant itself for their financial and technical tenders. The two tables are the following: Comparative table of technical tenders:

Qualitative Criteria	IECI…	[Unisys]	Dras[i]s	European Dynamics
Quality Criterion 1	46.81	45.51	51.74	58.21
Quality Criterion 2	15.00	15.00	15.50	18.00
Quality Criterion 3	10.15	10.15	10.81	11.69
Total	71.96	70.66	78.05	87.90
Total over 100	81.86	80.38	88.78	100.00

	IECI…	[Unisys]	Dras[i]s	European Dynamics
Quality Standards (50%)	81.86	80.38	88.78	100.00
Financial evaluation (50%)	99.30	100.00	82.51	69.44
Total points	90.58	90.19	85.65	84.72

18 In a letter dated 15 September 2011 addressed to the first applicant, EUIPO referred to the statement of reasons set out in the letter at issue and in the letter of 26 August 2011, which it deemed to be sufficient. It nonetheless stated that it was prepared to provide further details concerning the financial criteria and provided the following comparative table:

	Criterion 1 (70)	Criterion 2 (30)	Sum points (100)	Financial Points
IECI…	65.77	19.69	85.45	99.30
[Unisys]	70.00	16.06	86.06	100.00
Drasis…	53.47	17.54	71.01	82.52
European Dynamics	29.75	30.00	59.75	69.44

Procedure and forms of order sought

21 By application lodged at the Court Registry on 21 October 2011, the applicants brought the present action.

22 By separate document lodged at the Court Registry on 31 January 2012, EUIPO raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the General Court of 2 May 1991, asking that Court to dismiss the claims for annulment and damages as being manifestly inadmissible and to order the applicants to pay the costs. In their observations, lodged on 26 April 2012, the applicants claim that the plea of inadmissibility should be rejected.

23 By order of 12 September 2013 in *European Dynamics Luxembourg and Others* v *OHIM* (T-556/11, ECR, EU:T:2013:514), the Court dismissed EUIPO's objection of inadmissibility and reserved costs. As EUIPO did not appeal against that order, it became final.

24 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was accordingly allocated.

25 Acting on a proposal from the Judge-Rapporteur, the General Court (Fourth Chamber) decided to open the oral procedure.

…

28 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 10 July 2015.

29 At the hearing, the applicants waived their claims for damages, with the exception of that relating to compensation for loss of opportunity, which was noted in the minutes of the hearing.

30 The applicants claim that the Court should:

— annul the decision to reject the tender and all other related decisions of EUIPO, including those awarding the contract in question to the tenderers ranked first, second and third in the cascade procedure ('the contested decisions');

— order EUIPO to pay compensation of EUR 6 750 000 for the harm suffered by the applicants owing to the loss of an opportunity;

— order EUIPO to pays the costs.

31 EUIPO contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs.

Law

1. *The actions for annulment*

Summary of the pleas in law

32 In support of their applications for annulment, the applicants put forward three pleas in law.

33 The first plea alleges infringement of the duty to state reasons pursuant to 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 General Financial

Regulation'), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1), since the information and explanations provided by EUIPO did not enable the applicants to understand the reasoning which led the contracting authority to adopt the decision to reject the tender.

34 The second plea in law alleges a number of manifest errors of assessment concerning, in particular, the use of new or unknown award criteria which were contrary to the tender specifications and were not sufficiently clarified during the tender procedure (first part), the use of an incorrect financial assessment formula giving rise to distortions of competition (second part), which formula was manipulated by the successful tenderers (third part), and also a change in the subject matter of the contract (fourth part).

35 The third plea in law alleges infringement of the principle of equal treatment, due in particular to the failure to exclude successful tenderers whose participation involved a conflict of interest, of Article 93(1), Articles 94 and 96 of the General Financial Regulation, of Articles 133a and 134b of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the General Financial Regulation (OJ 2002 L 357, p. 1; 'the implementing rules'), and infringement of the principle of sound administration.

36 Following EUIPO's response to the measures of organisation of procedure and of inquiry of the Court (see paragraphs 26 and 27 above), the applicants raised a new plea in law, alleging that EUIPO infringed the tender specifications by having accepted IECI's financial tender even though it contained a variant and a price range.

37 The Court considers it appropriate to assess, first of all, the third plea in law, which may be subdivided into three parts, followed by the second plea in law, together with the new plea in law referred to in paragraph 36 above, and, finally, the first plea in law.

The third plea in law, alleging breach of the principle of equal treatment, of Article 93(1) and Articles 94 and 96 of the General Financial Regulation, of Articles 133a and 134b of the implementing rules, and of the principle of sound administration

The first part, alleging the existence of a conflict of interest with respect to the Drasis consortium

38 In the first part, the applicants note, in essence, that the third successful tenderer in the cascade procedure, namely the Drasis consortium, included the company that had drafted the tender specifications and which, therefore, was subject to a conflict of interest within the meaning of Article 94(a) of the General Financial Regulation and of the case-law to the effect that, in particular, a person involved in preparatory work relating to the public contract at issue may be at an advantage when formulating its tender on account of the relevance of the information received when carrying out that work. Furthermore, that person could, unintentionally, influence the terms of the public contract in such a way as to strengthen its competitive position with respect to the other tenderers. The serious conflict of interest to which the third successful tenderer was subject was therefore, they argue, sufficient for its tender to be excluded from the tendering procedure.

39 The applicants submit that, by refusing to disclose to them the names of the partners or subcontractors forming part of the consortia of successful tenderers, EUIPO not only infringed its duty to state reasons, but also tried to prevent the disclosure of a major irregularity vitiating the tendering procedure. Moreover, EUIPO failed properly to examine the objections that the applicants raised in that regard, even though several objective and consistent factors should have led it to be particularly vigilant. Since EUIPO failed to investigate whether there was any collusion between EUIPO and the company that prepared the tender specifications, no information was available to it enabling it to exclude with reasonable certainty the possibility that the company had sought to

influence the tendering procedure. EUIPO should also have imposed the sanctions provided for in Article 96 of the General Financial Regulation and in Articles 133a and 134b of the implementing rules. Even assuming that the evaluation committee was not aware of the conflict of interest when assessing the tenders, which was not the case, the applicants informed EUIPO thereof before the contract was signed. With respect to the third successful tenderer, the applicants dispute the contention that EUIPO examined the status of the legal entities concerned and concluded that no conflict of interest could arise, since the mere statement in relation thereto by one of those entities is not sufficient for the purposes of excluding an infringement of the tender specifications and of the General Financial Regulation.

40 EUIPO contends that point 13.1 of Annex I to the tender specifications is consistent with the case-law according to which, first, a potential conflict of interest may arise where a tenderer has participated in the preparation of the call for tenders and, secondly, in such a case, the tenderer concerned must be given the opportunity to explain why, in the particular circumstances of the case, that potential conflict of interest did not confer any undue competitive advantage on him. In any event, the conflict of interest must be real and not hypothetical and the existence of the risk of it materialising must be established following a specific assessment of the tender and of the tenderer's situation. The existence of a potential conflict of interest on the ground that a subcontractor took part in drafting the tender specifications is not sufficient to exclude that tenderer. In the present case, EUIPO took account of the alleged conflict of interest. When EUIPO noted that PricewaterhouseCoopers (PWC) Spain was a subcontractor of the Drasis consortium, it immediately sought clarification from the latter. First, in response to that request, Drasis explained that only PWC UK and PWC Belgium had taken part in the preparation of the tender specifications and that there was no structural link between them, on the one hand, and PWC Spain, on the other. Secondly, pursuant to the duty of confidentiality by which PWC UK and PWC Belgium were bound in the context of the provision of services to EUIPO for the drafting of the tender specifications, they did not disclose any relevant information in that respect, in particular, to the other companies in the same group. Thirdly, Drasis stated that it had contacted PWC Spain only six days before the deadline for the submission of tenders, and its letter of 15 April 2011 confirmed the fact that PWC Spain had not been involved in the preparation, drafting, pricing or sign-off of the technical tender submitted by the consortium. In the light of that information, EUIPO then checked whether PWC Spain's involvement in the Drasis consortium could have conferred an unfair competitive advantage on that consortium vis-à-vis the other tenderers, and concluded that this was not the case. EUIPO therefore submits that it acted in compliance with the tender specifications and the applicable rules and that it correctly found that in the specific circumstances of the case there was no valid reason to exclude the Drasis consortium from the tendering procedure. Finally, in respect of the technical award criteria, the first applicant's bid was awarded a much higher score than that of the Drasis consortium, which in itself proves that it did not enjoy an unfair advantage.

41 The Court observes that, in the light of the information provided by EUIPO in its defence, in the present case, it is common ground that, on the one hand, PWC UK and PWC Belgium, companies fully controlled by PWC International Ltd, had participated in the preparation of the tender specifications of the tendering procedure and that, on the other hand, PWC Spain, another subsidiary of PWC International, was part of the Drasis consortium, the third successful tenderer. In addition, it follows from two letters of 15 April 2011 sent by the Drasis consortium and PWC Spain to EUIPO, the content of which is not as such disputed by the applicants, that that consortium had invited PWC Spain to take part in the tendering procedure as a subcontractor only six days before the deadline for the submission of the tenders.

42 It is therefore necessary to determine, first of all, whether PWC Spain and, accordingly, the Drasis consortium were subject to a conflict of interest within the meaning of Article 94(a) of the General Financial Regulation and of point 13.1, first paragraph, subparagraph (g), second sentence, of the tender specifications, such as might lead to a breach of the principle of equal treatment of tenderers.

43 As is apparent from a combined reading of the judgments of 3 March 2005 in *Fabricom* (C-21/03 and C-34/03, ECR, EU:C:2005:127, paragraphs 26 to 36) and of 19 May 2009 in *Assitur* (C-538/07, ECR, EU:C:2009:317, paragraphs 21 to 32), the existence of structural links between two companies, one of which took part in the drafting of the tender specifications and the other took part in the tendering procedure for the public contract in question, is, in principle, capable of causing such a conflict of interest. However, the risk of a conflict of interest in the light of that case-law appears to be less significant when, as in the present case, the company or companies responsible for the preparation of the tender specifications are not themselves part of the tenderer consortium, but are merely members of the same group of undertakings as that to which the company that is a member of the consortium also belongs.

44 On the assumption that such a situation is in fact capable of causing a conflict of interest, it must be stated that, in the present case, EUIPO checked and demonstrated to the requisite legal standard that such a conflict of interest could not affect the conduct of the tendering procedure and its outcome.

45 In that regard, it should be recalled that the mere finding of a relationship of control between PWC International and its various subsidiaries is not sufficient for the contracting authority to be able automatically to exclude one of those companies from the tendering procedure, without checking whether that relationship actually impacted on its conduct in the context of the present procedure (see, to that effect, judgment in *Assitur*, cited in paragraph 43 above, EU:C:2009:317, paragraph 32). The same also applies, *a fortiori*, to the finding that the implementation of certain preparatory work by a company belonging to a group of undertakings, another company of which is taking part, as a member of a tendering consortium, in the tendering procedure, since the latter company must be allowed to demonstrate that that situation involves no risk whatsoever for competition between tenderers (see, to that effect and by analogy, judgments in *Fabricom*, cited in paragraph 43 above, EU:C:2005:127, paragraphs 33 to 36, and of 20 March 2013 in *Nexans France* v *Joint Undertaking Fusion for Energy*, T-415/10, ECR, EU:T:2013:141, paragraph 116).

46 By contrast, the existence of a conflict of interest must lead the contracting authority to exclude the tenderer concerned, where that approach is the only measure available to avoid an infringement of the principles of equal treatment and transparency, which are binding in any procedure for the award of a public contract (see, to that effect and by analogy, judgments in *Assitur*, cited in paragraph 43 above, EU:C:2009:317, paragraph 21, and of 23 December 2009 in *Serrantoni and Consorzio stabile edili*, C-376/08, ECR, EU:C:2009:808, paragraph 31), that is to say, that no less restrictive measures exist in order to ensure compliance with those principles (see, to that effect, judgment in *Nexans France* v *Joint Undertaking Fusion for Energy*, cited in paragraph 45 above, EU:T:2013:141, paragraph 117 and the case-law cited). It must be stated that a conflict of interest is, objectively and in itself, a serious irregularity without there being any need to qualify it by having regard to the intentions of the parties concerned and whether they were acting in good or bad faith (see, to that effect, judgments of 15 June 1999 in *Ismeri Europa* v *Court of Auditors*, T-277/97, ECR, EU:T:1999:124, paragraph 123; *Nexans France* v *Joint Undertaking Fusion for Energy*, cited in paragraph 45 above, EU:T:2013:141, paragraph 115; and of 11 June 2014 in *Communicaid Group* v *Commission*, T-4/13, EU:T:2014:437, paragraph 53).

47 In that regard, it should be noted that on 11 April 2011, that is to say, one month after the deadline for submission had passed and four months before the adoption of the award decision, EUIPO had expressly asked the Drasis consortium to clarify the situation of the PWC group companies in order to establish whether any conflict of interest existed, to which request that consortium and PWC Spain responded on 15 April 2011 by two letters which were in substance identical. It is apparent from those letters, inter alia, that the Drasis consortium had invited PWC Spain to take part in the tendering procedure as a subcontractor only six days before the deadline for the submission. Notwithstanding the fact that PWC UK, PWC Belgium and PWC Spain were ‘sister’ companies belonging to the same group, the applicants did not submit any information capable of calling into question the veracity of that claim, which the contracting authority was therefore legitimately entitled to consider as an

important indication that there was no potential conflict of interest affecting the tendering procedure. Regardless of the duty of confidentiality — relied on by the Drasis consortium, PWC Spain and, finally, EUIPO — prohibiting the disclosure of confidential information between 'sister' companies within the PWC group, it appears unlikely that within the short period of six days PWC Spain could have been able to collect, from PWC UK and PWC Belgium, useful confidential data underlying the formulation of the tender specifications and that, thanks to those data, it could usefully have amended the consortium's tender in order to increase its chances of success. Nor is it plausible that, in those circumstances, at the time of the drafting of the tender specifications, that is to say, long before the decision to involve PWC Spain as a member of the Drasis consortium, PWC UK and PWC Belgium were able to design the award criteria of the contract at issue in such a way as to favour the consortium in the context of the tendering procedure.

48 Moreover, it is apparent from point 13.1, first paragraph, subparagraph (g), second sentence, of the tender specifications that a conflict of interest is said to exist where, in particular, 'a subcontractor of a main tenderer who has participated in the preparation of [the] call for tender is unable to prove that their tender is not capable of distorting competition, i.e., that it does not constitute a risk to competition'. As noted by EUIPO, in the absence of any indications to the contrary, the fact that the Drasis consortium's tender was awarded, in respect of its technical quality, significantly fewer points than those awarded to the first applicant's bid, which received the highest score in that regard (see paragraph 14 above), in itself demonstrates that the indirect structural links between PWC Spain, on the one hand, and PWC UK and PWC Belgium, on the other, which were specifically responsible for the preparation of the technical part of the tender specifications, or the conduct of those companies, had no impact on competition between tenderers and, in particular, to the detriment of the first applicant. It also follows that, in the present case, EUIPO conducted an adequate review of the relevant facts, which allowed it to conclude that the potential conflict of interest had not affected the tendering procedure and its outcome.

49 Accordingly, the applicants have not demonstrated to the requisite legal standard that the possible conflict of interest resulting from the indirect structural links between PWC Spain, PWC UK and PWC Belgium was liable to influence the tendering procedure within the meaning of the case-law cited in paragraph 42 above.

50 Consequently, it is necessary to reject the first part, without it being necessary definitively to establish whether, in the present case, a conflict of interest within the meaning of Article 94(a) of the General Financial Regulation and point 13.1, first paragraph, subparagraph (g), second sentence, of the tender specifications actually existed.

The second part, alleging the existence of a conflict of interest in relation to the Unisys consortium

51 In the second part, the applicants argue that, having regard to point 13.1 of the tender specifications, the second successful tenderer in the cascade procedure, the Unisys consortium, should not have been awarded the framework contract since it was the first contractor under framework contract AO/021/10, entitled 'External service provision for program and project management and technical consultancy in the field of information technologies', for the benefit of EUIPO. That consortium, they submit, was thus in a position of conflict of interest, prohibited by Article 94 of the General Financial Regulation, and should have been excluded from the tendering procedure before its tender was assessed. Unless released from its contractual obligations under framework contract AO/021/10, it could not be awarded a contract under framework contract AO/029/10. Whereas framework contract AO/029/10 concerns the design and development of EUIPO's IT applications, framework contract AO/021/10 concerns project management and technical consultancy relating to framework contract AO/029/10 and, therefore, services provided by the contractor in respect of framework contract AO/029/10, which gives rise to a direct conflict between the respective tasks provided for therein. In other words, the contractor under framework contract AO/021/10 was to participate in the

preparation of the tender specifications and to review the execution of the implementing contracts by the contractor under framework contract AO/029/10. Finally, EUIPO did not properly investigate that possible conflict of interest. The applicants dispute the contention that, in those circumstances, the first applicant's bid should also have been rejected, as no contract was awarded to it following tendering procedure AO/029/10. In the event that the first applicant were to become a party to a contract under that framework contract, the conflict of interest would therefore have to be settled before the contract was signed.

52 First of all, EUIPO maintains that the second part is either inadmissible or ineffective due to lack of interest. As the first applicant was ranked third in the cascade procedure relating to tendering procedure AO/021/10 and had become a contractor under the framework contract at issue, it was in the same situation as the Unisys consortium. Assuming that this part of the plea is upheld, it would follow, first, that the first applicant should also have been excluded from tendering procedure AO/029/10 and, secondly, that the action would become wholly devoid of purpose since, by virtue of its exclusion, the first applicant could not have been awarded the contract in question.

53 Secondly, EUIPO disputes the merits of the second part of the plea. On the deadline for submission of the tenders in tendering procedure AO/029/10, namely on 11 March 2011, tendering procedure AO/021/10 was still in progress and no contract had yet been awarded in the context thereof. It would therefore not have been possible to derive any undue advantage from the knowledge acquired in performing the contracts stemming from that procedure. Furthermore, at the stage of the award of the contract under tendering procedure AO/029/10, which is the sole subject of the present dispute, any potential conflicts of interest capable of arising during the performance of the specific contracts under framework contract AO/021/10 would be irrelevant. Thus, in the absence of any potential conflict of interest and, accordingly, of any reason to exclude them, the evaluation committee correctly accepted the first applicant's bid and that of the Unisys consortium. Finally, EUIPO takes issue with the contention that the contractor under framework contract AO/021/10 is supposed to monitor the work carried out pursuant to the contracts relating to the implementation of framework contract AO/029/10.

54 The Court notes that, in the present case, it is common ground that the second successful tenderer, the Unisys consortium, in the context of tendering procedure AO/029/10, is also the first successful tenderer and contractor under framework contract AO/021/10 concerning the contract entitled 'External service provision for program and project management and technical consultancy in the field of information technologies'. Under framework contract AO/021/10, the contractor is responsible for providing, in respect of EUIPO, external services related to program and project management in the field of information technology and for providing technical advice on all types of information systems in all fields of technology. By contrast, tendering procedure AO/029/10 — the subject of the present dispute — relates to the contract entitled 'Software development and maintenance services' with respect to the supply to EUIPO of IT services for prototyping, analysis, design, graphic design, development, testing and installation of information systems, as well as the provision of technical documentation, training and maintenance for those systems.

55 In that regard, EUIPO did not succeed in challenging the applicants' argument that it follows that the Unisys consortium, as the first successful tenderer and contractor under framework contract AO/021/10 and as external IT manager is supposed, in particular, to monitor the supply of services of the first contractor for framework contract AO/029/10 and, therefore, where applicable, its own supply of services if it were to resort to its services as second contractor in the cascade procedure. Such a situation is liable to come within the scope of the ground for exclusion referred to in point 13.1, first paragraph, subparagraph (g), first sentence, of the tender specifications, according to which 'a conflict of interest is deemed to exist, inter alia, when a tenderer … has a valid contract for EUIPO whose purpose is to perform Software Quality Control or Project/Program Management for the software development or maintenance activities carried out by the company awarded the contract …, if such a tenderer … is unable to prove that their tender would not constitute a conflict of interest'. In the light

of its wording, it appears that that ground for exclusion was specifically designed by the contracting authority with the aim of preventing the successful tenderer in tendering procedure AO/021/10 from also becoming the successful tenderer in tendering procedure AO/029/10.

56 However, without it being necessary to rule on the question of admissibility or on the relevance of the present part, it must be stated that, in any event, it has no substantive merit.

57 As EUIPO correctly argues, at the time of the expiry of the deadline for submission under tendering procedure AO/029/10, namely 11 March 2011, tendering procedure AO/021/10 was still ongoing and no contract had yet been awarded or signed in the context thereof. Thus, since, at that stage, there was not yet any 'valid contract' between the Unisys consortium and EUIPO within the meaning of point 13.1, first paragraph, subparagraph (g), first sentence, of the tender specifications, that ground for exclusion could not be applied and, in any event, the alleged conflict of interest was still uncertain and hypothetical (see, to that effect, judgment of 18 April 2007 in *Deloitte Business Advisory* v *Commission*, T-195/05, ECR, EU:T:2007:107, paragraphs 67 and 69). In that regard, it should further be noted that the case-law cited in paragraph 42 above requires the purported conflict of interest to have affected the timing or outcome of the tendering procedure. Given the overlap in time between the two tendering procedures, however, it is impossible to conclude that, in the present case, the Unisys consortium could have derived any benefit from its future position as second successful tenderer in tendering procedure AO/021/10.

58 Moreover, it should be noted, as EUIPO has done, that most of the grievances put forward by the applicants relate to potential conflicts of interest capable of arising only in the course of the implementation of specific contracts to be awarded on the basis of framework contracts AO/021/10 and AO/029/10, that is to say, at a stage subsequent to the adoption of the decision to reject the tender which is the subject of the present dispute. For that reason also, it follows that it is not possible for such a conflict of interest to have had any impact on the conduct or outcome of tendering procedure AO/029/10, to have distorted competition between the tenderers or to have benefited the Unisys consortium to the detriment of the first applicant.

59 In view of the foregoing, the applicants are also not justified in claiming that EUIPO failed to investigate with the requisite diligence whether there was a potential conflict of interest with respect to the Unisys consortium. The fact remains that the contracting authority has, in any event, the duty to and possibility of investigating and preventing such a conflict of interest from arising during the performance of specific contracts coming under framework contract AO/029/10, of which the first successful tenderer is IECI and not the Unisys consortium.

60 In those circumstances, the present part must be rejected, in any event, as being unfounded.

The third part, alleging that the Drasis consortium was involved in illegal activities

61 In the third part, the applicants argue, first of all, in essence, that 'Siemens', as a member of the Drasis consortium, the third successful tenderer in the cascade procedure, should have been subject to the ground for exclusion under Article 93(1)(b) and (e) of the General Financial Regulation because of its established involvement in cases of fraud, corruption and payment of bribes. Not only was Siemens accused by the competent authorities in Germany, it also publicly admitted to having been guilty of such illegal activities in order to secure public contracts, in particular within the European Union. Thus, it agreed to pay fines of EUR 395 million to the German authorities and USD 800 million to the United States authorities in order to settle the case. Accordingly, it is submitted, 'Siemens' should have been excluded from the tendering procedure under Articles 93 and 94 of the General Financial Regulation and Articles 133a and 134b of the implementing rules. The admission of liability by 'Siemens', including in the context of amicable settlements, is sufficient reason to establish its guilt irrevocably, there being no need for a final judicial decision in order to impose a sanction and adopt a

decision excluding Siemens from the tendering procedure pursuant to Article 93(1)(b) and (e) of the General Financial Regulation. In any event, EUIPO failed in its duty to assess with the requisite diligence the involvement of ''Siemens' in such illegal activities and thus also infringed the principles of transparency and equal treatment of tenderers.

62 EUIPO contends, in essence, that there was no reason to exclude the Drasis consortium, as its members — Siemens SA and Siemens SL — had never been convicted of fraud or corruption. In the context of the tendering procedure, Siemens SA made a solemn declaration confirming the lack of any judgment or other pending criminal proceedings concerning charges relating to fraud or corruption. That declaration was intended to replace 'a recent extract from the judicial record' or 'an equivalent document issued by the competent authorities', which, according to the tender specifications and Article 134(3) of the implementing rules, was to be presented only by the successful tenderers at least 15 days before signature of the contract. Furthermore, EUIPO had no reason not to accept that solemn declaration, since, in accordance with the terms of the tender specifications, that declaration was required, in particular, as sufficient proof that the tenderer did not fall within any of the situations of exclusion under Article 93 of the General Financial Regulation. EUIPO also denies not having taken the allegations in question into account. In response to a specific request for clarification on that matter, Siemens SA confirmed that those allegations were wholly unfounded and presented an official supporting document issued by the competent national authorities in support of that position.

63 At the hearing, following an oral question from the Court referring to the inferences to be drawn from the judgment of 15 October 2013 in *Evropaïki Dynamiki* v *Commission* (T-474/10, EU:T:2013:528, paragraphs 37 to 57), the applicants withdrew their argument that the possible involvement of Siemens AG ('Siemens AG') in illegal activities was attributable to Siemens SA and Siemens SL, members of the Drasis consortium, on the sole ground that they were initially indirectly controlled by Siemens AG before being acquired, on 1 July 2011, by Atos SA, as a result of the acquisition by the latter of 100% of shares of the company controlling them directly, Siemens IT Solutions and Services GmbH, as is apparent from the documents produced by EUIPO following the order for measures of inquiry of 27 March 2015 (see paragraph 26 above). That withdrawal was noted in the minutes of the hearing.

64 Nevertheless, particularly in view of the structural links that existed with Siemens AG before 1 July 2011, the question arises whether, in the present case, the contracting authority checked with the requisite diligence whether Siemens SA and Siemens SL, and, accordingly, the Drasis consortium, should have been subject to the grounds for exclusion referred to in Article 93(1)(b) and (e) of the General Financial Regulation, read in conjunction with point 13.1, third and fourth paragraphs, of the tender specifications (see, to that effect and by analogy, judgment of 17 March 2005 in *AFCon Management Consultants and Others* v *Commission*, T-160/03, ECR, EU:T:2005:107, paragraphs 79 and 90).

65 In that regard, it should be recalled that Article 93(1) of the General Financial Regulation provides as follows:

'Candidates or tenderers shall be excluded from participation in procurement procedures if:

…

(b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*;

(c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify;

(d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed;

(e) they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;

(f) they are currently subject to an administrative penalty referred to in Article 96(1).'

66 Article 94 of the General Financial Regulation provides as follows:

'A contract shall not be awarded to candidates or tenderers who, during the procurement procedure for this contract:

…

(c) find themselves in one of the situations of exclusion, referred to in Article 93(1), for this procurement procedure.'

67 It should also be recalled that, according to Article 134(1) of the implementing rules and point 13.1, second and third paragraphs, of the tender specifications (see paragraph 16 above), Siemens SA provided, at the time of submission of the Drasis consortium's tender, a form known as 'Annex 4' which was duly signed, dated and certified by a Belgian notary, containing a solemn declaration by its directors confirming the absence of any ground for exclusion within the meaning of Articles 93 and 94 of the General Financial Regulation. However, EUIPO failed to provide a similar form from Siemens SL during the proceedings.

68 Furthermore, in the light of the allegations of the involvement of Siemens AG and certain of its foreign subsidiaries in cases involving the payment of bribes which led to civil or criminal judgments, EUIPO had sent to the Drasis consortium, on 25 July 2011, a request for clarification concerning, in particular, the relationship between Siemens AG, on the one hand, and Siemens SA and Siemens SL, on the other, and asked it to produce evidence that Siemens AG and the members of its management board did not find themselves in any of the situations described in Article 93(1)(c) and (d) of the General Financial Regulation.

69 In response to that request, the Drasis consortium, by letter of 3 August 2011, informed EUIPO, inter alia, of the acquisition by Atos of Siemens SA and Siemens SL (see paragraph 63 above), and produced recent certificates showing that Siemens AG was not in any of the situations described in Article 93(1)(d) of the General Financial Regulation and an earlier exchange of correspondence with the Commission resulting from similar concerns expressed by the latter confirming that the consortium did not meet the grounds for exclusion set out in Article 93(1)(b), (c) or (e), and in Article 93(2)(a) of the General Financial Regulation or in Article 134(4) of the implementing rules.

70 Finally, the Drasis consortium was awarded the contract in question as the third successful tenderer according to the cascade procedure and signed a framework contract with EUIPO, a fact which EUIPO confirmed at the hearing.

71 According to the first subparagraph of Article 134(3) of the implementing rules, at the end of the tendering procedure, namely before the contract is awarded, the successful tenderer is expected to submit 'a recent extract from the judicial record or, failing that, an equivalent document recently issued by a judicial or administrative authority in the country of origin or provenance' showing that none of the grounds for exclusion within the meaning of Article 93(1)(a), (b) or (e) of the General

Financial Regulation is met. In addition, in the case mentioned in Article 93(1)(d) of the regulation, the contracting authority is to accept as sufficient evidence 'a recent certificate issued by the competent authority of the State concerned'. Finally, pursuant to the second subparagraph of Article 134(3) of the implementing rules, it is only 'where the document or certificate referred to in the first subparagraph [of that article] is not issued in the country concerned and for the other cases of exclusion referred to in Article 93 of the [General] Financial Regulation, [that] it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in his country of origin or provenance'.

72 In accordance with those requirements, the fourth paragraph of point 13.1 of the tender specifications (see paragraph 16 above) provides, inter alia, that 'at the end of the award procedure, the tenderer to whom the contract is to be awarded must, as an obligation, and to avoid to be excluded from the call for tender, give evidence that it is not in one of the situations referred to above'. The tenderer has a period of 15 calendar days prior to the signature of the contract within which to produce the evidence required. With respect to the grounds for exclusion referred to in point 13.1, first paragraph, subparagraphs (a), (b) and (e), of the tender specifications, the evidence must consist of 'relevant extract(s) from the judicial record or, failing that, equivalent documentation issued by a judicial or administrative authority' of the country in which the tenderer is established (point 13.1, fourth paragraph, first indent, of the tender specifications). Finally, it is stated that, as regards the grounds for exclusion referred to in point 13.1, first paragraph, subparagraphs (c), (f), (g) and (h) of the tender specifications, 'Annex 4', namely the form setting out the solemn declaration, 'is valid' (point 13.1, fourth paragraph, third indent, of the tender specifications).

73 Nonetheless, it must be stated that, notwithstanding the obligations set out in paragraphs 71 and 72 above and even following an express oral question raised by the Court in that respect at the hearing, EUIPO has neither claimed to have requested production of a recent extract from the judicial record of the Drasis consortium and its members, including Siemens SA and Siemens SL, nor claimed that it had not been possible for the countries in which those two companies were established, namely Belgium and Spain, to issue such a document. In those circumstances, pursuant to the second subparagraph of Article 134(3) of the implementing rules, it was not possible to replace that evidence by a solemn declaration or one made under oath before, in particular, a notary of the country of origin or provenance. Moreover, Siemens SA's solemn declaration, submitted jointly with the Drasis consortium's tender, was certified by a Belgian notary, and EUIPO failed to produce, during the proceedings, a similar statement by Siemens SL certified, as appropriate, by a Spanish notary.

74 In any event, in the present case, pursuant to point 13.1, fourth paragraph, third indent, of the tender specifications, such a solemn declaration was capable of being accepted by the contracting authority only for the purpose of proving the lack of any other grounds for exclusion, namely those referred to in point 13.1, first paragraph, subparagraphs (c), (f), (g) and (h) of the tender specifications, which correspond to those provided for under Article 93(1)(c) and (f) and Article 94(a) and (b) of the General Financial Regulation, but not to demonstrate the lack of the ground for exclusion provided for in point 13.1, first paragraph, subparagraph (e) of the tender specifications, read in conjunction with Article 93(1)(e) of the General Financial Regulation.

75 Moreover, it is apparent from EUIPO's letter of 25 July 2011, produced following the order for directions of 27 March 2015 (see paragraph 26 above) that the contracting authority had also not asked the Drasis consortium to produce specific evidence regarding the absence of a ground for exclusion within the meaning of Article 93(1)(d) of the General Financial Regulation with respect to Siemens SA and Siemens SL.

76 Accordingly, for the purposes of awarding the contract at issue, EUIPO was not entitled simply to rely on Siemens SA's solemn declaration as evidence that there was no ground for exclusion concerning the Drasis consortium's situation within the meaning of point 13.1, first paragraph, subparagraph (e), of the

tender specifications and Article 93(1)(e) of the General Financial Regulation. That evidence was even less appropriate for the purposes of demonstrating the absence of that ground for exclusion with respect to Siemens SL, in respect of which EUIPO had neither sought nor produced relevant evidence. However, it must be stated that, firstly, point 13.1, fourth paragraph, first sentence, of the tender specifications lays down an explicit obligation in that regard, non-compliance with which must necessarily lead to the exclusion of the tenderer concerned ('as an obligation, and to avoid to be excluded from the call for tender'), and that, on the other, pursuant to point 13.1, fourth paragraph, first and third indents, of the tender specifications, the documentary evidence 'must relate to entities with legal personality and/or natural persons', that is to say, to all member companies of the consortium in question, including Siemens SL.

77 In view of all of the foregoing considerations, it must be concluded that EUIPO clearly breached its duty of diligence in investigating the existence, in particular, of the ground for exclusion provided for in point 13.1, first paragraph, subparagraph (e) of the tender specifications and in Article 93(1)(e) of the General Financial Regulation. Accordingly, it infringed those provisions and the principle of equal treatment between tenderers which required, in accordance with the duty to exclude provided for in the fourth paragraph of point 13.1 of the tender specifications, the exclusion of Siemens SA and Siemens SL and, therefore, the Drasis consortium from the tendering procedure. In the present case, given the allegations of illegal activities involving Siemens AG — the company which controlled Siemens SA and Siemens SL prior to 1 July 2011 — and several of its foreign subsidiaries, such diligent investigation and a meticulous application of those provisions were all the more necessary.

78 Accordingly, the third part must be upheld and the decision to reject the tender annulled on that sole ground.

The second plea in law: manifest errors of assessment

Preliminary remark

79 The applicants maintain that, notwithstanding EUIPO's failure to comply with its duty to state reasons, the vague information that it provided reveals many manifest errors of assessment in the evaluation of the first applicant's bid, which, once corrected, would lead to a different ranking of the tenderers.

80 The present plea is divided into four parts, the first part of which is, for the most part, expounded in Annex A.14 to the application, which led EUIPO to challenge its admissibility.

The first part of the second plea in law

–The subject of the first part and the admissibility of Annex A.14 to the application

81 In the first part of the present plea, the applicants claim in particular that manifest errors of assessment were made in the evaluation of the tenders having regard to technical quality criteria 1 to 3. As the successful tenderers were awarded points just reaching the minimum threshold, the slightest mistake should have had the immediate effect of making them unsuccessful in the tendering procedure. In that regard, the applicants repeat their request that the Court order the production of the full version of the evaluation report so that it may carry out the judicial review required. Furthermore, they merely provide a summary description in the application and refer to a more detailed analysis of those errors set out in annex A.14 to the application. As a result of EUIPO's failure to provide sufficiently reasoned grounds, the first part of the second plea in law is based on a summary argument which is as precise as possible, in which reference is made on four occasions to Annex A.14 to the application, in which more detailed technical information is provided which the Court should take into account.

82 EUIPO contends, in essence, that, under Article 44(1)(c) of the Rules of Procedure of 2 May 1991, the first part of the plea, which is set out only vaguely and in summary form over two and a half pages in the application, and explained in detail over 48 pages in Annex A.14 to the application, concerning at least 14 examples of alleged manifest errors, must be declared inadmissible on the ground that it lacks clarity and precision, the 'sole intention [of that approach being] apparently to circumvent the page limit imposed by the Rules of Procedure'. At the very least, Annex A.14 to the application should be disregarded.

83 In this regard, it should be recalled that under Article 21 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 thereof, and Article 44(1)(c) of the Rules of Procedure of 2 May 1991, every application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based. The requirement of the 'summary of the pleas in law' entails that the application must set out the nature of the grounds on which the action is based. Thus, it is necessary inter alia, in order for an action before the Court to be admissible, that the basic matters of law and fact relied on are set out, at least in summary form, coherently and intelligibly in the application itself. Although it is true that the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the lack of key legal argument which, in accordance with the abovementioned provisions, must appear in the application. In order to guarantee legal certainty and the sound administration of justice, the summary of the applicant's pleas in law must be sufficiently clear and precise to enable the defendant to prepare its defence and the competent Court to rule on the action. Thus, it is not for the Court to seek or identify, in the annexes, the pleas and arguments capable of forming the basis of the appeal, the annexes having a purely evidential and instrumental function (see judgment of 11 September 2014 in *MasterCard and Others* v *Commission*, C-382/12 P, ECR, EU:C:2014:2201, paragraphs 38 to 41 and the case-law cited; see also, to that effect, judgment of 5 October 2012 in *Evropaïki Dynamiki* v *Commission*, T-591/08, EU:T:2012:522, paragraph 66 and the case-law cited).

84 In the present case, first, it must be stated that paragraphs 66 and 67 of the application indicate clearly that the present plea and, in particular, its first part are based on several manifest errors of assessment which relate to the various award criteria and sub-criteria that are expressly mentioned by the applicants.

85 Secondly, given the technical nature of the award criteria and sub-criteria in issue, the question whether the essential elements of fact and law on which the various complaints, in particular, in the first part of the present plea are based, are apparent — at least briefly or summarily, but coherently and intelligibly — from the wording of the application itself can be decided only in the context of an assessment of the merits of each of those complaints. Such an assessment alone is capable of determining whether either the considerations expounded in Annex A.14 to the application merely support and supplement the body of the application on specific issues, inter alia, by references to specific passages in that annex, or, with respect to some of those complaints, a general reference has been made to the disclosure in that annex which does not offset the lack of key arguments in fact and in law which must be set out in the application itself.

86 Thirdly, the answer to the question whether the summary presentation of the present plea in the application was sufficiently clear and precise as to allow EUIPO to prepare its defence and the Court to rule also depends on an assessment of the merits of the issues of fact and law raised by each of the relevant complaints.

87 Accordingly, it is appropriate to reserve the examination of the admissibility of the considerations set out in Annex A.14 to the application and to proceed to the assessment of the merits of the various complaints raised in the context of the present part, alleging manifest errors of assessment with regard to the application of the technical award criteria, while recognising that that assessment must be based, primarily, on the arguments of fact and law set out in the application itself.

88 Consequently, to the extent that EUIPO is requesting that the present plea, or at least the first part thereof, be declared inadmissible and Annex A.14 to the application set aside in its entirety, the decision on the plea of inadmissibility raised by EUIPO must be reserved.

–The first complaint, relating to Criterion 1, sub-criterion 1.1, point 1.1.2.4, of the tender specifications …

–The second complaint, concerning Criterion 1, sub-criterion No 1.1, point 1.1.3.5 of the tender specifications

98 The purpose of the question raised under Criterion 1, sub-criterion 1.1, point 1.1.3.5 of the tender specifications was to enable the contracting authority to know what would be the 'key measures to [be] consider[ed]' by the tenderer after it had successfully completed the transition phase at the start of its contract, known as the 'in' phase, with respect to a 'particular IT system'.

…

100 The applicants, first, dispute the contention that the tender does not take account every time of the complexity of the system concerned and, secondly, claim that it is guaranteed that the transition process involves all parties, including EUIPO and the contractor, and is based on a specific check list, the verification of which enables a process by consensus to be achieved. EUIPO contends in essence that the evaluation report correctly criticised the fact that certain criteria were missing in the first applicant's bid, such as the complexity of the system and its critical nature for the proposed criteria, and the fact that both providers had to enter into an agreement regarding the transition-out. In addition, although the tender envisaged the preparation of a check list for quality control, it did not mention that that list had to be completed by consensus. EUIPO was therefore right to consider that an agreement, that is to say, a consensus, between the present provider and the new contractor was necessary in order for the transition-in to be regarded as final, and that that tender did not propose such an agreement. By contrast, the applicants challenge, first, the need for such a 'legal' agreement to be concluded between the two providers, each of which has a contractual relationship only with EUIPO and, secondly, the argument raised *a posteriori* with respect to the 'criticality', which, according to the tender specifications and having regard to the very 'critical' nature of all the EUIPO applications, is a standard element to be taken into account in the event of a transfer.

101 In that regard, it should be noted that the question raised in the context of the present award criterion is particularly vague in that it refers, generally, to 'key measures to be considered'. It follows that the detailed requirements regarding the presentation of certain 'criteria', which, according to the criticism set out in the evaluation report, are absent from the first applicant's bid, do not have a sufficiently clear, precise and unambiguous basis in the wording of that award criterion to enable all reasonably informed tenderers exercising ordinary care to interpret them in the same way and to place the contracting authority in a position to apply them objectively and uniformly by checking whether their tenders meet those requirements (see, to that effect, judgments of 17 February 2011 in *Commission* v *Cyprus*, C-251/09, EU:C:2011:84, paragraphs 39 and 40, and of 25 October 2012 in *Astrim and Elyo Italia* v *Commission*, T-216/09, EU:T:2012:574, paragraphs 35 to 37 and the case-law cited).

102 However, it must be stated that the applicants do not expressly and directly call into question the vagueness or lack of clarity of that award criterion. The Court, which is not entitled to raise of its own motion the legality as such of that criterion, must restrict its review to the express arguments put forward by the applicants, which include, in essence, on the one hand, the purported requirement that an agreement between the current provider and the new contractor be entered into and, on the other, the contention that adequate account was not taken of the complex and critical nature of the system.

103 Regarding the first argument, having regard to the vague and general reference in the award criterion to 'key measures to be considered,' the applicants nevertheless correctly argue that the contracting authority was not entitled to rely on a purported specific requirement for an 'agreement between both providers regarding the end of the transition' to be reached. Furthermore, without it being necessary to assess the legal nature or otherwise of the agreement purportedly required and not defined in the tender specifications, it should be recalled that the first applicant had submitted in its tender 'that a smooth cooperation with EUIPO and the previous contractor [would] greatly facilitate the transfer of knowledge' and that 'therefore, [it would] actively seek to provide any means necessary to facilitate such fruitful cooperation with EUIPO and the previous contractor'.

104 In the light of that statement, the evaluation committee's criticism that the first applicant's bid did not relate to an 'agreement between both providers regarding the end of the transition' is both formalistic and excessive, since the first applicant had offered to take all necessary steps, during the transition phase, to cooperate with the previous contractor in order to enable the transfer of know-how, which largely overlaps with the purpose of the alleged 'agreement' required *a posteriori* by the contracting authority. EUIPO cannot call that conclusion into question by its argument at the hearing that, on that point, the first applicant's bid merely described a process, not the outcome, which was, however, specifically required by the terms ''successfully completed the transition-in phase', since that requirement, in particular the requirement to conclude an 'agreement', did not appear sufficiently clearly from the question at issue. It should be stated that the requirement is not apparent from the first paragraph of point 2.2.1 of the tender specifications, which EUIPO relied on only at the hearing and in the context of the fifth complaint (see paragraph 135 below), that provision stating clearly that it was for EUIPO, and not the new contractor, to produce a specific agreement requiring that contractor to carry out a process of knowledge transfer between the latter, on the one hand, and the previous contractor and EUIPO, on the other, in order to be able to assume responsibility for the maintenance of EUIPO's computer systems. In criticising the first applicant's bid on that point, EUIPO therefore committed a manifest error of assessment.

…

108 It follows that the second argument cannot be upheld and that, in that regard, it is not necessary to rule on the plea of inadmissibility raised by EUIPO in its defence in that regard with respect in particular to the reference to the considerations set out in Annex A.14 to the application.

109 It follows from the foregoing that the second complaint must be partly upheld and partly rejected.

–The third complaint, concerning Criterion 1, sub-criterion 1.1, point 1.1.3.10 of the tender specifications

110 The purpose of the question raised in respect of Criterion 1, sub-criterion 1.1, point 1.1.3.10, of the tender specifications was to enable the contracting authority to know what the 'other key aspects' were that the tenderer considered essential during the transition phase at the start of the contract — the 'in' phase — with respect to a 'particular IT system'.

111 On that point, the relevant extract from the evaluation report stated the following with respect to the technical quality of the first applicant's bid:

'Formally, the answer is too long. A large part is repetition of answers from the previous questions (thus missing the point of "other key aspects"). Important aspects are missing: scalable process (small applications do not require the full transition-in process), control of ongoing developments and deployments during the transitions and geographical constraints.'

112 The applicants complain that EUIPO incorrectly criticised the length and what it claims to be the repetitive and incomplete nature of the answer in the first applicant's bid, which covers both the scalability of the process and the geographical constraints. Furthermore, contrary to EUIPO's submissions during the proceedings, that tender proposed a methodology corresponding to the actual definition of scalability — and not to a 'one size fits all' model — in that it sought each time to take the existing situation into account and was thus, in each situation, tailor-made to the needs of each task.

113 EUIPO contends, in essence, that the tender specifications also provided that the tenders should be clear, concise and specific to the question. In particular, the introduction to the response to question 1.1.3.10 merely reproduced the introductory part of the response to question 1.1.3.3. In addition, the applicants failed to show that the first applicant's bid had taken the scalability of the project or the geographical constraints into account. In accordance with the evaluation committee's criticism, that tender failed to take account of the use of different software programmes within EUIPO, as set out in the documents attached to Annex II to the tender specifications. Furthermore, as in the transition OUT phase, that tender failed to address the risks associated with the geographical constraints arising during the transition-in phase.

114 Like Criterion 1, sub-criterion 1.1, point 1.1.3.5 of the tender specifications (see paragraph 101 above), the present criterion suffers, admittedly, from a lack of clarity and precision in that it essentially boils down to the general question of knowing what are the 'other key aspects' considered essential by the tenderers during the transition-in phase. However, although the applicants dispute, as part of their account of the facts in Annex A.14 to the application, the lack of precision of that criterion, which EUIPO did not clarify further despite express questions raised during the tendering procedure, they fail to advance that argument in the application as such. Accordingly, in the light of the case-law cited in paragraph 83 above, since there is no trace of that challenge in the wording of the application, it must be considered inadmissible under Article 44(1)(c) of the Rules of Procedure of 2 May 1991, in accordance with the plea of inadmissibility raised by EUIPO in its defence in that regard.

115 With respect to the first argument — which was raised in an admissible manner in the application itself — that the contracting authority incorrectly identified the length and repetitiveness of the response provided in the first applicant's bid, EUIPO stated at the hearing that, 'from a formal point of view', that finding implied a negative judgment indicating that the response was not sufficiently concise, clear and specific in relation to the question posed. That information, provided only during the proceedings, does not alter the scope of the purely formal criticism, set out in the evaluation report, relating to the length and repetitiveness of the response provided by the first applicant. Similarly, the extent to which such a judgment is warranted is not apparent either from the tender specifications or from the grounds of the evaluation report, since the introductory part of Annex 17 of the tender specifications states, on the contrary, that the length of the responses to each individual question must be one to two pages, a formal limit with which the first applicant's answer complied in the present case. Consequently, the first argument must be upheld and the plea of inadmissibility raised by EUIPO in its defence in that regard must be rejected.

116 With respect to the second argument, it is sufficient to note that it is set out in an intelligible manner only in Annex A.14 to the application, with the result that, according to the case-law cited in paragraph 83 above, that argument must be declared inadmissible. Moreover, even taking into account the arguments set out in that annex, those arguments are not sufficient to act as a basis for the complaint that EUIPO made a manifest error of assessment on the questions at issue.

…

121 It follows from the foregoing that EUIPO did not make a manifest error in finding that the first applicant's bid did not cover the 'scalability of the process', the 'control of ongoing developments', the 'deployments during the transitions' and the 'geographical constraints' as 'other key aspects' within the meaning of Criterion 1, sub-criterion 1.1, point 1.1.3.10, of the tender specifications.

122 Consequently, the third complaint must be partly upheld — and the plea of inadmissibility raised by EUIPO in its defence in that regard rejected — and partly rejected.

–The fourth complaint, concerning Criterion 1, sub-criterion 1.1, point 1.1.4.3, of the tender specifications …

– The fifth complaint, concerning Criterion 1, sub-criterion 1.1, point 1.1.4.4, of the tender specifications …

– The sixth complaint, concerning Criterion 1, sub-criterion 1.1, point 1.1.4.5, of the tender specifications

140 The purpose of the question raised in respect of Criterion 1, sub-criterion 1.1, point 1.1.4.5, of the tender specifications was to enable the contracting authority to ascertain which would be the 'key measures [making it possible] to consider [that] a transition OUT [had been successfully completed] for a particular IT system'.

141 In that regard, the relevant extract of the evaluation report noted the following about the technical quality of the first applicant's bid:

'The answer is too long. Only the last 25% is related to the question. The answer does not list criteria to assess completeness of the transition-out. Important criteria are missing: planned tasks are closed, risks are closed, the transition-in provider signed off the transition.'

142 The applicants essentially contest the finding that the response in that tender is too long, that it does not list the criteria making it possible to judge the completeness of the transition-out and that important criteria are lacking. In EUIPO's submission, in essence, the first applicant's bid failed to list the criteria used to assess the completeness of the transition-out, as tenderers were required to provide 'key measures' and concrete figures in support in order to make it possible to check whether that transition phase had indeed been completed. The first applicant's bid gave details only of processes enabling those figures to be obtained.

143 As a preliminary point, it must be stated that, even if, like the previous award criteria, the award criterion at issue lacks clarity and precision in that it merely refers, generally, to 'key measures', that issue was not expressly and separately challenged by the applicants either in the application or in Annex A.14, with the result that it cannot be raised by the Court of its own motion. Only a limited review in search of a manifest error of assessment in the light of each of the arguments put forward by the applicants may therefore be conducted.

144 First, with respect to the criticism concerning the excessive length of the first applicant's response, it is sufficient to note, in accordance with what has been set out in the third complaint, that Annex 17 to the tender specifications indicates clearly that the length of the answers to each individual question must be one to two pages long and that the answer must not exceed that limit. As is stated in paragraph 115 above, it is therefore appropriate to conclude that that assessment is vitiated by a manifest error and that the plea of inadmissibility raised by EUIPO in its defence in that regard must be rejected.

145 Secondly, neither EUIPO nor the evaluation report, even following an oral question from the Court at the hearing, have explained, to the requisite legal standard, the reasons why the contracting authority estimated that only 25% of the wording of the first applicant's response was relevant in relation to the question asked. In any event, the fact that the last part of that response, which corresponds to about a quarter of the text, is preceded by the title '3. Assessment of the effectiveness and completeness of the transition OUT' did not, of itself, warrant the other parts of that response, set out under the titles '2. Quality measures to ensure the success of the transition OUT for the system' and '2.1 Key quality measures', being considered irrelevant for that purpose. To the extent that the reasons given in support of the decision to reject the tender prevent both the applicants and the Court from making an assessment of the merits of the contracting authority's evaluation in that regard, that assessment is vitiated by inadequate reasoning that the Court must raise of its own motion as a matter of public policy (see, to that effect, judgment of 20 May 2009 in *VIP Car Solutions* v *Parliament*, T-89/07, ECR, EU:T:2009:163, paragraph 65 and the case-law cited) and that EUIPO may no longer remedy in the course of the proceedings (see, to that effect, judgment of 21 February 2013 in *Evropaiki Dynamiki* v *Commission*, T-9/10, EU:T:2013:88, paragraph 27 and the case-law cited).

…

148 Accordingly, the present complaint must be in part rejected and in part upheld, by finding a manifest error of assessment and an inadequate statement of reasons with respect to the length of the first applicant's bid.

– The seventh complaint, concerning Criterion 1, sub-criterion 1.3, point 1.3.1.12, of the tender specifications …

– The eighth complaint, concerning Criterion 1, sub-criterion 1.4, point 1.4.2.4, of the tender specifications …

– The ninth complaint, concerning Criterion 1, sub-criterion 1.4, point 1.4.4.10, of the tender specifications …

– The tenth complaint, relating to Criterion 1, sub-criterion 1.4, point 1.4.4.12, of the tender specifications …

– The eleventh complaint, concerning Criterion 1, sub-criteria 1.5 and 1.6, of the tender specifications …

– The twelfth complaint concerning Criterion 2 of the tender specifications …

– The thirteenth complaint, relating to Criterion 3, sub-criterion No 3.1, point 3.1.1.2, of the tender specifications

189 Under the question raised in respect of Criterion 3, sub-criterion 3.1, point 3.1.1.2, of the tender specifications, the tenderers were invited to describe the main points of their client relationship model.

190 On that point, the relevant extract of the evaluation report noted in particular the following with respect to the technical quality of the first applicant's bid having regard to Criterion 3 of the tender specifications, in general, and to point 3.1.1.2 in particular:

'In general, European Dynamics' answers are in line with the tender specifications. Some weak points were identified in the following points:

3.1.1.2:
The organisation proposed does not specifically address tactical or operational levels. Communication plan not clearly defined. It does not follow a standard governance method.'

191 According to the applicants, in that context, the awarding authority relied on new award sub-criteria not provided for in the tender specifications. They deny that the first applicant's bid did not specifically address tactical or operational levels. That tender also described an efficient communications mechanism as part of client relations, although the tender specifications required only a general client relationship methodology and not a 'communication plan'. In addition, EUIPO did not demonstrate that the tender specifications required a 'standard governance method', which was purportedly not applied by the first applicant, and did not explain its content or explain to what extent the tender did not meet that new requirement.

192 EUIPO contends that the comment relating to the lack of a standard governance method was not intended to state that the first applicant's bid ought to have made use of that method, but that certain essential aspects of that methodology, commonly used at EUIPO, '[had] not [been] covered because the offer could have been more specific'. Thus, the applicants claimed to have addressed 'tactical and operational levels' in 'section 6', although that document does not exist. A further example of incongruity in the first applicant's answer relates to 'Organisation of the supplier-client relationships', where the first applicant claimed that it would designate an account manager to address the client's

requests and listed a series of activities to be entrusted to that manager for that purpose, including 'organising meetings' or 'ensur[ing] that service level requirements are met'. Furthermore, although the first applicant itself asserted that communication was crucial for a good client relationship, it did not present a communications plan, an omission which the evaluation committee properly noted.

193 It must be stated that the present award criterion, according to which the tenderers are invited to describe the 'main points' of their client relationship model, is particularly vague and therefore inadequate for the purposes of enabling reasonably informed tenderers exercising ordinary care to interpret it in the same way and of enabling the contracting authority to make an objective and transparent assessment of the various tenders submitted (see the case-law referred to in paragraph 101 above). As submitted by the applicants, it follows that the sub-criteria listed *a posteriori* in the evaluation report, namely the tactical or operational levels, the definition of a communications plan and standard governance method, do not have a sufficiently clear, precise and unambiguous basis in the wording of that award criterion. However, such an approach is manifestly contrary to the settled case-law to the effect that, in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, of their relative importance, when they prepare their tenders and that, accordingly, a contracting authority cannot apply, in respect of the award criteria, sub-criteria which it has not previously brought to the tenderers' attention (see, to that effect, judgments of 24 January 2008 in *Lianakis and Others*, C-532/06, ECR, EU:C:2008:40, paragraphs 36 to 38, and of 21 July 2011 in *Evropaïki Dynamiki* v *EMSA*, C-252/10 P, EU:C:2011:512, paragraphs 30 and 31). Accordingly, the arguments put forward on that issue by EUIPO during the proceedings, seeking a reinterpretation of the award criterion in question and *ex post* justification of the assessment set out in the evaluation report in the light of the meaning thus assigned to that criterion, cannot be upheld and must therefore be rejected. It follows that the contracting authority was not entitled to base the negative assessment set out in the evaluation report on the award criterion in question.

194 If only for those reasons, it is appropriate to confirm the existence of a manifest error of assessment and to uphold the present complaint, which is set out in sufficient detail in the wording of the application itself. It further follows that the plea of inadmissibility raised in its defence by EUIPO in that regard with respect in particular to the reference to the considerations set out in Annex A.14 to the application must be rejected and that there is no need to assess whether the first applicant's bid covered the issues purportedly lacking, such as the existence of a communications plan.

– The fourteenth complaint, relating to Criterion 3, sub-criterion No 3.1, point 3.1.2.2, of the tender specifications …

– The fifteenth complaint, concerning Criterion 3, sub-criterion No 3.1, point 3.1.4.2, of the tender specifications …

The second, third and fourth parts of the second plea in law, alleging manifest errors of assessment made in the context of the assessment of the financial quality of the first applicant's bid, infringement of the criterion of the most economically advantageous tender, and a change in the object of the contract

– Reminder of the relevant content of the tender specifications …

– Summary of the arguments of the parties …

– Assessment of the present case

215 First, it should be noted, as a preliminary point, that a tenderer is entitled to challenge indirectly the lawfulness of the financial assessment formula used in the tender specifications and used by the contracting authority in the course of the comparative assessment of the tenders (see, to that effect, judgment of 20 September 2011 in *Evropaïki Dynamiki* v *EIB*, T-461/08, ECR, EU:T:2011:494, paragraph 74). Moreover, with respect to the substantive legality of the choice of the disputed financial assessment formula, it should be noted that the contracting authority has a broad discretion as to the choice, content and implementation of the relevant award criteria related to the contract at issue, including those the purpose of which is to determine the most economically advantageous tender, those criteria having to correspond to the nature, purpose and specific characteristics of that market and to serve as best they can the targeted needs and objectives pursued by the contracting authority (see, to that effect, judgment in *Evropaïki Dynamiki* v *EIB*, EU:T:2011:494, paragraphs 137 and 192).

…

223 Those considerations are sufficient for the purposes of concluding that the applicants have demonstrated neither the unlawfulness of the financial assessment formula laid down in the tender specifications, nor the existence of manifest errors of assessment relating to the application of that formula.

224 Consequently, the second to fourth parts must be rejected as unfounded, without it being necessary to order the measures of organisation of procedure requested by the applicants.

Intermediate conclusion

225 In the light of all of the foregoing, it must be concluded that the second plea in law must be upheld in part and rejected in part.

226 It is important to note that, inasmuch as the Court has established, in that context, the existence of manifest errors of assessment or inadequate reasoning vitiating the lawfulness of the assessment of the first applicant's bid, those illegalities, by themselves, justify the annulment of the decision to reject the tender.

227 In that regard, it should be recalled that, as is clear from the comparative table of technical tenders set out in paragraph 14 above, the first applicant's technical tender obtained, in respect of qualitative criteria 1 to 3, after weighting of the net points awarded, the maximum score of 100 gross points, whereas the tenders of the three successful tenderers had obtained only a significantly lower number of gross and net points, some just above the exclusion threshold of 45, 15 and 10 points respectively for qualitative criteria 1 to 3. Thus, the 87.90 net points awarded to the first applicant's bid were increased to 100 gross points, whereas the 71.96 net points awarded to the IECI tender were increased to 81.86 gross points, the 70.66 net points awarded to the Unisys tender were increased to 80.38 gross points and the 78.05 net points awarded to the Drasis tender were increased to 88.78 gross points.

228 As confirmed by EUIPO in response to a written question from the Court, the increase in points in the case of the three successful tenderers was due to the application of the rule of three and was proportionate to the increase applied to the first applicant's bid, which constituted the reference value with the highest number of points. Conversely, if, following the delivery of the present judgment, a new assessment of the first applicant's technical tender, not vitiated by the irregularities noted, were to lead the contracting authority to award it more points in respect of qualitative criteria 1 to 3, it would follow that, pursuant to the rule of three, the corresponding increase in points in favour of that tender, whose score constitutes the reference value, would necessarily lead to a proportionate reduction in the gross scores awarded to the successful tenderers, which could affect their final ranking in the cascade procedure. Moreover, that result would necessarily affect the weighting, on the basis of the gross amounts thus calculated, of all the tenders in order to determine the most economically advantageous tender in accordance with the table referred to in paragraph 14 above.

229 It must be concluded, therefore, that the irregularities established in the context of the second plea in law were capable of having an impact on the outcome of the tendering procedure, which EUIPO is required to take into account under the first paragraph of Article 266 TFEU (see also paragraph 276 below).

The new plea in law, alleging infringement of the tender specifications in that EUIPO accepted IECI's financial tender …

The first plea, alleging an infringement of the duty to state reasons

238 The applicants allege an infringement of Article 100(2) of the General Financial Regulation and Article 149(2) of the implementing rules in that EUIPO failed to provide an adequate statement of reasons, in particular a full copy of the evaluation report, so as to enable them to understand, inter alia, the comparative assessment of the relative merits of the various tenders and to decide whether to bring an action and to allow the Court to exercise its power of review. To that end, the applicants ask the Court to order EUIPO to produce the full versions of the evaluation report and of the tenders of the three successful tenderers as well as the non-confidential versions of those documents. In that context, they deny, in particular, that the score awarded to the first applicant in respect of the technical quality of its tender was 100%, that score having been 58.21 for Criterion 1, 18.00 for Criterion 2 and 11.69 for Criterion 3, a total of 87.90%. Even considering that the first applicant had received the maximum score on the technical level, it would have been necessary to justify in detail the relative advantages presented by the successful tenderers' bids with respect to the various relevant criteria and sub-criteria, in order for the unsuccessful tenderer to be able to understand the comparative evaluation of tenders and to exercise its right to effective judicial review.

239 EUIPO contends, in essence, that it complied with its duty to state reasons, in particular, by informing the applicants of the results of the tendering procedure by means of the letter at issue and that it answered the applicants' requests for further information by the letters of 26 August and 15 September 2011. The extract from the evaluation report attached to the letter of 26 August 2011 includes no comment by the evaluation committee on the successful tenderers' bids solely because

there were no relative advantages to point out as regards their technical quality and because the first applicant's bid had obtained the maximum score of 100 out of 100 points for all of the technical award criteria and the best score for each technical award criterion considered separately. Likewise, the information provided as regards the evaluation of the financial criteria was sufficient and, in particular, enabled the first applicant to calculate, on the basis of the points awarded to its financial tender and those awarded to the successful tenderers, the financial tenders submitted by the successful tenderers.

240 In that regard, it should be noted that, where, as in the present case, the institutions, bodies or agencies of the European Union, in their capacity as contracting authorities, have a broad power of appraisal, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to provide adequate reasons for its decisions. Only in this way can the European Union judicature verify whether the factual and legal elements upon which the exercise of the discretion depends are present (judgment of 21 November 1991 in *Technische Universität München*, C-269/90, ECR, EU:C:1991:438, paragraph 14; judgment in *VIP Car Solutions* v *Parliament*, cited in paragraph 145 above, EU:T:2012:671, paragraph 61; and judgment of 12 December 2012 in *Evropaïki Dynamiki* v *EFSA*, T-457/07, EU:T:2012:671, paragraph 42).

241 In the light of the duty to state reasons laid down in the second paragraph of Article 296 TFEU, the author of the measure must disclose its reasoning in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see *Evropaïki Dynamiki* v *Commission*, cited in paragraph 145 above, EU:T:2013:88, paragraphs 25 and 26 and the case-law cited). Furthermore, the duty to state reasons is an essential procedural requirement, which is distinct from the question whether the grounds given are correct, which goes to the substantive legality of the contested measure (see judgment of 22 May 2012 in *Evropaïki Dynamiki* v *Commission*, T-17/09, EU:T:2012:243, paragraph 40 and the case-law cited).

242 In the area of public procurement, the first subparagraph of Article 100(2) of the General Financial Regulation and Article 149(3) of the implementing rules set out the requirements which the contracting authority must fulfil in order to comply with the duty, in respect of the tenderers, to state reasons.

243 Thus, under the first subparagraph of Article 100(2) of the General Financial Regulation, '[t]he 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'.

244 In that regard, it is apparent from well-established case-law that, in respect of that provision, the contracting authority cannot be required to provide an unsuccessful tenderer, first, in addition to the reasons for rejecting its tender, with a detailed summary of how each detail of its tender was taken into account when it was evaluated and, secondly, in the context of the notification of the characteristics and relative advantages of the successful tender, with a detailed comparative analysis of the successful tender and of the unsuccessful tender. Similarly, the contracting authority is not under an obligation to provide an unsuccessful tenderer, upon written request from it, with a full copy of the evaluation report (see orders of 20 September 2011 in *Evropaïki Dynamiki* v *Commission*, C-561/10 P, EU:C:2011:598, paragraph 27; of 29 November 2011 in *Evropaïki Dynamiki* v *Commission*, C-235/11 P, EU:C:2011:791, paragraphs 50 and 51; and judgment of 4 October 2012 in *Evropaïki Dynamiki* v *Commission*, C-629/11 P, EU:C:2012:617, paragraphs 21 to 23). The EU

judicature nevertheless verifies whether the method applied by the contracting authority for the technical evaluation of the tenders is clearly set out in the tender specifications, including the various award criteria, their respective weighting in the evaluation (that is to say, in the calculation of the total score) and the minimum and maximum number of points for each criterion (see, to that effect, judgment in *Evropaïki Dynamiki* v *Commission*, EU:C:2012:617, paragraph 29).

245 As a preliminary point, it should be noted that, in accordance with the case-law cited in paragraph 244 above, the contracting authority is not, in principle, obliged to give the unsuccessful tenderer access to the full version of the contractor's tender for the contract at issue or to the evaluation report. Furthermore, if it were to become apparent that, in the present case, having regard to the parties' pleadings, the documents in the file and the outcome of the hearing, the Court has sufficient information to rule on the present dispute (see, to that effect, judgment of 16 November 2006 in *Peróxidos Orgánicos* v *Commission*, T-120/04, ECR, EU:T:2006:350, paragraph 80), there would be no cause to accede to the applicants' requests for measures of organisation of procedure or of inquiry, in respect of which, moreover, the Court is the sole arbiter (see, to that effect, judgment of 24 September 2009 in *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P and C-137/07 P, ECR, EU:C:2009:576, paragraph 319, and order of 10 June 2010 in *Thomson Sales Europe* v *Commission*, C-498/09 P, EU:C:2010:338, paragraph 138). In any event, it should be noted that, in the present case, the Court has, in part, granted the applicants' requests inasmuch as it ordered EUIPO, by its order for measures of inquiry of 27 March 2015 (see paragraph 26 above), to produce the documents setting out the calculation and comparative assessment of the financial tenders of the successful tenderers and of the first applicant, an order with which EUIPO complied.

246 Next, with respect to the reasons given *a posteriori* by EUIPO, that is to say, in its letters of 26 August and 15 September 2011 which followed the letter at issue, it is not disputed that those letters constitute as such an additional statement of reasons for the decision to reject the tender, pursuant to the first subparagraph of Article 100(2) of the General Financial Regulation and Article 149(3) of the implementing rules, which the Court is entitled to take into account.

247 It thus remains to be determined whether and to what extent those letters are vitiated by inadequate reasoning, precisely on the ground that they did not allow the applicants to ascertain the justifications for the measure taken in order to assert their rights and for the EU judicature to exercise its power of review of the substantive legality.

248 In that regard, it is appropriate to take account both of the individual assessment of the first applicant's bid and of the comparative assessment of that tender with the tenders of the successful tenderers.

249 First, as regards the individual assessment of the technical quality of the first applicant's bid, it is apparent from the comparative table set out in the letter of 26 August 2011 (see paragraph 14 above) that the contracting authority merely disclosed the sum of net points awarded to that tender for each of the three qualitative criteria separately, without, however, indicating the detailed number of net points awarded in respect of the different sub-criteria and sub-points set out in the tender specifications and dealt with in that tender, and with respect to which the evaluation report contained negative assessments, or, conversely, without explaining whether and to what extent that assessment had led the contracting authority to deduct points or fractions of points at the first applicant's expense. Moreover, that lack of reasoning with respect to the correlation between the negative assessments set out in the evaluation report, on the one hand, and in the net points awarded or otherwise under the different sub-criteria and sub-points, on the other, is reflected in the tender specifications. Those specifications do not provide for such a precise correlation, but merely indicate, in a separate table, the 65% weighting for qualitative criterion 1, with a 10% breakdown respectively for sub-criteria 1.1 to 1.5, 20% for qualitative criterion 2 and 15% for qualitative criterion 3.

250 Although, in principle, the contracting authority has a broad discretion as to the choice of prioritised award criteria and points to be awarded in respect of the different criteria and sub-criteria and is not required to provide the unsuccessful tenderer with a detailed summary of how each detail of its tender was taken into account for the evaluation thereof, the fact remains that, in the event that the contracting authority made such a choice, the EU judicature must be able to verify, on the basis of the tender specifications and statement of reasons of the award decision, the respective weight of the different technical award criteria and sub-criteria in the assessment, that is to say, in the calculation of the total score, and the minimum and maximum number of points for each of those criteria or sub-criteria (see, to that effect, judgment in *Evropaïki Dynamiki* v *Commission*, cited in paragraph 244 above, EU:C:2012:617, paragraphs 21 and 29). Moreover, when the contracting authority annexes specific assessments as to the manner in which the tender in question fulfils or otherwise those criteria and sub-criteria, which are clearly relevant to the overall score of the tender, the duty to state reasons necessarily includes the need to explain how, in particular, negative assessments gave rise to the deduction of points.

251 In a case such as the present one, compliance with that requirement is all the more necessary given that, as was stated in paragraphs 227 and 228 above, the possible deduction of net points in respect of certain sub-criteria or sub-points automatically results, under the formula applied by the contracting authority, in the increase in the number of gross points to be allocated to the successful tenderers' tenders in respect of their technical quality. In other words, it is in the first applicant's interest to know how points were deducted for each of the sub-criteria and sub-points in respect of which the evaluation report contains a negative assessment in order to be in a position to argue that, given the manifestly erroneous nature of that assessment, that deduction — entailing a corresponding increase in points in favour of the other tenderers — was not justified.

252 In that regard, it must be stated that, in response to an oral question raised by the Court at the hearing, EUIPO did not deny having awarded points on the basis of the different sub-criteria or sub-points, but merely stated that the first applicant was not entitled to be provided with the detailed method of calculation and breakdown of those points, since the disclosure of the final overall score for each of the three technical or qualitative criteria was sufficient. It is apparent from a combined reading of the tables referred to in paragraphs 14 and 249 above that 6.79 net points were deducted from the first applicant's bid in respect of qualitative criterion 1 (65 – 58.21 = 6.79), 2 net points in respect of qualitative criterion 2 (20 – 18 = 2) and 3.31 net points in respect of qualitative criteria 3 (15 – 11.69 = 3.31), that is to say, by including the deduction of fractions of points with two decimal places. It follows that, for the purposes of the assessment of the tenders having regard to those qualitative criteria, the evaluation committee applied a mathematical formula or, at least, awarded fractions of points in respect of sub-criteria or sub-points. However, it is impossible, both for the applicants and for the Court, to understand the calculation or precise breakdown of the points deducted for each sub-criterion, or even for each of the sub-points, in particular, for qualitative criterion 1, in respect of which the evaluation report made specific negative assessments with respect to the first applicant's bid. In those circumstances it is also not possible to verify whether and to what extent those deductions actually correspond to those assessments and, accordingly, whether they are justified or not, or, at the very least, sufficiently plausible.

253 It follows that, even though the first applicant's bid was finally awarded, in respect of its technical quality, the maximum score of 100 points gross, it retains, under the principle of effective judicial protection referred to in Article 47 of the Charter of Fundamental Rights of the European Union, the inherent link of which with the duty to state reasons was noted by the case-law (see, to that effect and by analogy, judgment of 18 July 2013 in *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECR, EU:C:2013:518, paragraphs 116 to 119), an interest in knowing the extent to which the negative assessments put forward by the contracting authority had resulted in a deduction of net points whose scope and justification could be decisive in the context of the review of the lawfulness of both individual and comparative assessment of tenders (see paragraphs 227 and 228 above).

254 Consequently, it must be held that the decision to reject the tender is inadequately reasoned with respect to the correlation between the specific negative assessments set out in the evaluation report, on the one hand, and the contracting authority's deductions of net points, on the other.

255 That inadequate reasoning is in addition to the inadequate reasoning noted in paragraphs 145 and 148 above in respect of Criterion 1, sub-criterion 1.1, point 1.1.4.5, of the tender specifications.

256 Furthermore, to the extent that the applicants complain that EUIPO's inadequate reasoning vitiated the assessment of the first applicant's bid in respect of Criterion 1, sub-criteria 1.5 and 1.6, of the tender specifications (see paragraphs 178 and 179 above), it is sufficient to note that that complaint coincides with the considerations set out in paragraphs 249 to 253 above according to which the contracting authority failed to explain how the assessment set out in the evaluation report, moreover rather neutral in that regard, could have resulted in a deduction of net points to the detriment of the first applicant's bid. Although it cannot be ruled out that no deduction was made, neither the applicants nor the Court are in a position to verify whether that was the case.

257 Secondly, as regards the comparative assessment of the technical quality of the first applicant's bid with the bids of the successful tenderers, it should be noted that the act of having awarded the first applicant's bid the maximum score of 100 points does not of itself make it possible to take the view that the contracting authority was not required to specify the points that it had awarded to that tender in respect of the various award sub-criteria and sub-points, the challenge to that score also enabling the applicants to call into question the level of gross points awarded to the successful tenderers' tenders (see paragraph 228 above). That finding coincides with the considerations set out in paragraphs 249 to 253 above and is not capable of acting as a basis for a separate claim of inadequate reasoning. In that regard, it should be noted that, having regard to the case-law referred to in paragraph 244 above, it is not necessary for the contracting authority to provide the unsuccessful tenderer with the detailed assessment of the technical quality of the successful tenderers' bids or the full version of the evaluation report.

258 Thirdly, as regards the comparative assessment of the financial tenders, it is sufficient to note that the applicants were not able to set out the substance of their challenge following EUIPO's production of the document setting out that comparative assessment (see paragraph 219 above). It follows that the statement of reasons concerning the decision to reject the tender as a result thereof did not prevent the applicants from bringing an action before the Court on that point or the Court from exercising its power of review.

259 In view of all of the foregoing, it must be held that the decision to reject the tender is vitiated by several shortcomings in the statement of reasons in respect of Article 100(2) of the General Financial Regulation, read in conjunction with the second paragraph of Article 296 TFEU, and that it must be annulled on that ground.

Conclusion on the applications for annulment of the contested decisions

260 In the light of the foregoing, as a result of the instances of unlawful conduct of substance and form found to have occurred in the context of the first, second and third pleas in law, the decision to reject the tender must be annulled in its entirety.

261 Moreover, given the inextricable links between the contested decisions, that is to say, between the decision to reject the tender and the other related decisions, including those to award the contract and to rank the successful tenderers from first to third ranks in the cascade procedure (see, to that effect and by analogy, judgment of 25 February 2003 in *Strabag Benelux* v *Council*, T-183/00, ECR, EU:T:2003:36, paragraph 28), those decisions must also be annulled in accordance with the applicants' heads of claim (see paragraph 30 above).

2. *The claim for damages …*

264 According to settled case-law, in order for the European Union to incur non-contractual liability, within the meaning of the second paragraph of Article 340 TFEU, on account of the unlawful conduct of its institutions, a number of requirements must be satisfied, namely that the alleged conduct is unlawful, that the damage is real and that there is a causal link between the conduct alleged and the damage relied upon (see *Evropaïki Dynamiki* v *Commission*, cited in paragraph 63 above, EU:T:2013:528, paragraph 215 and the case-law cited). Those principles apply *mutatis mutandis* to the non-contractual liability incurred by the European Union within the meaning of that provision, as a result of the unlawful conduct and damage caused by one of its bodies (see, to that effect, judgments of 2 December 1992 in *SGEEM and Etroy* v *EIB*, C-370/89, ECR, EU:C:1992:482, paragraphs 15 and 16, and of 10 April 2002 in *Lamberts* v *Ombudsman*, T-209/00, ECR, EU:T:2002:94, paragraph 49), such as EUIPO, for which the latter is liable under Article 118(3) of Regulation No 207/2009.

265 In that regard, it should be recalled that the claim for damages is based on the same unlawful conduct as that relied on in support of the application for annulment of the decision to reject the tender, which is vitiated by various instances of substantive unlawful conduct, including an infringement of the principle of equal treatment between tenderers (see paragraph 77 above) and manifest errors of assessment (see paragraphs 104, 115, 134, 138, 144, 158, 166, 186, 194 and 207 above), and several shortcomings in the statement of reasons (see paragraphs 145 and 254 to 256 above).

266 However, with respect to the existence of a causal link between those instances of unlawful conduct in substance and form and the damage purportedly suffered, it is settled case-law that inadequate reasoning is not capable as such of rendering the EU liable, in particular because it is not capable of showing that, had the reasoning not been inadequate, the market could, or should, have been awarded to the applicant (see, to that effect, judgments of 20 October 2011 in *Alfastar Benelux* v *Council*, T-57/09, EU:T:2011:609, paragraph 49; of 17 October 2012 in *Evropaïki Dynamiki* v *Court of Justice*, T-447/10, EU:T:2012:553, paragraph 123; and of 14 January 2015 in *Veloss International and Attimedia* v *Parliament*, T-667/11, EU:T:2015:5, paragraph 72).

267 Accordingly, in the present case, it is not possible to accept that there is a causal link between the shortcomings identified in the statement of reasons and the damage alleged by the applicants.

268 However, as regards the causal link between the substantive illegalities found, namely the infringement of the principle of equal treatment of tenderers and the manifest errors of assessment, on the one hand, and the loss of opportunity, on the other, EUIPO cannot merely claim that, in view of its broad discretion as a contracting authority, it was not obliged to sign a framework contract with the first applicant (see, to that effect, judgment in *Evropaïki Dynamiki* v *EIB*, cited in paragraph 215 above, EU:T:2011:494, paragraph 211).

269 In the present case, it must be stated that the infringement of the principle of equal treatment of tenderers, in conjunction with that of Article 93(1)(e) of the General Financial Regulation and point 13.1, first paragraph, subparagraph (e), of the tender specifications, and the manifest errors of assessment made by the contracting authority in the context of the individual assessment of the first applicant's bid, necessarily affected the latter's chance of being ranked higher in the cascade procedure and of becoming, at least, the third successful tenderer, in particular in the event the Drasis consortium were to be excluded from the tendering procedure for the reasons outlined in paragraphs 64 to 78 above.

270 It also follows that, even taking account of the contracting authority's broad discretion with respect to the award of the contract at issue, the loss of opportunity suffered in the present case by the first applicant constitutes actual and certain damage according to case-law (see, to that effect and by analogy, judgments of 9 November 2006 in *Agraz and Others* v *Commission*, C-243/05 P, ECR, EU:C:2006:708, paragraphs 26 to 42, and *Evropaïki Dynamiki* v *EIB*, cited in paragraph 215 above,

EU:T:2011:494, paragraphs 66 and 67; Opinion of Advocate General Cruz Villalón in *Giordano* v *Commission*, C-611/12 P, ECR, EU:C:2014:195, point 61). In the present case, the fact that the first applicant was awarded the highest score for the technical quality of its tender, although that tender was ranked fourth, renders implausible the premiss that the contracting authority could have been led not to award it the contract at issue but to offer it a framework contract with EUIPO.

271 Furthermore, as the applicants correctly submit, in a situation such as the present case, in which, at the end of the proceedings before the Court, there is a significant risk that the contract at issue has already been implemented in full, the very lack of acknowledgment by the EU judicature of the loss of such an opportunity and the need to grant compensation in that regard is contrary to the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights. In such a situation, the retroactive annulment of an award decision does not provide the unsuccessful tenderer with any advantage, with the result that it is apparent that the loss of opportunity is irremediable. Moreover, it should be noted that, because of the conditions governing interlocutory proceedings before the President of the General Court, the tenderer whose tender was assessed and unlawfully rejected is, in practice, only rarely able to obtain suspension of the operation of such a decision (see, to that effect, orders of 23 April 2015 in *Commission* v *Vanbreda Risk & Benefits*, C-35/15 P(R), ECR, EU:C:2015:275, and of 4 February 2014 in *Serco Belgium and Others* v *Commission*, T-644/13 R, ECR, EU:T:2014:57, paragraph 18 et seq.).

272 Consequently, the Court considers that, in the present case, it is necessary to compensate the first applicant in respect of the loss of opportunity, to the extent that the decision to reject the tender, even in the event of its annulment with retroactive effect, has in practice definitively removed any possibility of its being awarded the contract at issue as a contractor under the cascade procedure and, accordingly, its opportunity to perform specific contracts in the context of the implementation of a framework contract.

273 However, in respect of the scope of the compensation for the damage related to the loss of opportunity, estimated by the applicants to be EUR 6 750 000, the Court is not in a position, at this stage of the proceedings, in the light of the contents of the Court file, to rule definitively on the amount of compensation that the European Union must award to the first applicant. In view of the fact that it is not yet possible to assess the harm, it is thus appropriate, for reasons of economy of procedure, to give an initial interlocutory ruling on the liability of the European Union. The determination of the amounts of compensation resulting from EUIPO's unlawful conduct is deferred to a later stage, either by mutual agreement of the parties, or by the Court in the absence of such an agreement (see, to that effect, judgment of 16 September 2013 in *ATC and Others* v *Commission*, T-333/10, ECR, EU:T:2013:451, paragraph 199 and the case-law cited).

274 Nonetheless, to that end, in the present case, both the parties and the Court are required to consider the following aspects.

275 First, it should be borne in mind that the estimated value of the contract at issue, as set out in the contract notice and in point 16 of the tender specifications, is EUR 135 000 000, before tax, for the maximum period of seven years for the implementation of the framework contract and that, accordingly, the value of obtaining the framework contract for the initial three years is at least EUR 57 857 143.

276 Secondly, it is necessary to determine the likelihood of success of the first applicant's bid, namely the chance of being ranked at the very least third in the cascade procedure, in the absence of the various instances of EUIPO's substantive unlawful conduct during the tendering procedure. In that regard, account should be taken of the contracting authority's possible duty to exclude the Drasis consortium as the third successful tenderer. The fact that the first applicant's technical tender was awarded the highest score, but that its financial tender was ranked only fourth (see the tables set out in paragraph 14 above) must also be taken into consideration, as well as the fact that, according to the

method of calculation set out in point 13.5 of the tender specifications, the weighting of those tenders for the purpose of the award of the contract at issue was 50-50. In particular, as part of a new assessment of the technical quality of the first applicant's bid in the absence of the manifest errors of assessment established, account would have to be taken of the fact that, under the calculation formula used by the contracting authority, any increase in points in favour of the tender, the score for which is the reference value, would necessarily result in the proportionate reduction of the gross points awarded to the successful tenderers, which would be liable to have an impact on their ranking in the cascade procedure and on the comparative assessment, on the basis of the gross values thus calculated, of all the tenders in order for the tender which is the most economically advantageous under the table referred to in paragraph 14 above to be determined (see paragraph 228 above).

277 Thirdly, it is necessary to take account of the fact that the framework contract is awarded and signed only for an initial period of three years, that there is no certainty that it will be renewed by EUIPO for the four following years (see point 14.3 of the tender specifications), that the first contractor has no exclusive right to provide the services covered by the framework contract and that EUIPO is not subject to an obligation to purchase, but is legally bound only through the conclusion of specific agreements and the issue of purchase orders (see points 14.4 and 14.5 of the tender specifications, and points 1.1.3 to 1.1.5 of the model framework contract). In that context, it is also appropriate to assess the likelihood that the first contractor is able to meet the requirements of the various purchase orders issued by the contracting authority both during the first three years of the implementation of the framework contract and in the years thereafter in the event that it is renewed (see points 1.4.1 to 1.4.4 of the model framework contract). It follows that it is necessary to adjust the likelihood of success to the lack of certainty in respect of the renewal of the framework contract and the possible inability of that contractor to implement those purchase orders.

278 Fourthly, it is appropriate to establish the recoverable loss by taking into consideration the net profit which could have been made by the first applicant during the implementation of the framework contract. In that regard, it should be recalled that the applicants argued that, in the 2006 tax year, in the context of commercial projects, the first applicant made an average gross profit of 10.33%.

279 Fifthly, it is necessary to deduct the other profits made by the first applicant by reason of its failure to have the contract at issue awarded to it in order to avoid overcompensation.

280 Sixthly, in order to determine the total amount payable by way of compensation for the loss of opportunity, it is necessary to multiply the net income established by the likelihood of success.

281 In the light of all the foregoing considerations, it is therefore appropriate to uphold the applicants' claim for damages inasmuch as it seeks compensation for the loss of opportunity.

282 With respect to the amount payable by way of compensation for the loss of opportunity, the parties should therefore be asked, subject to a subsequent decision of the Court, to reach agreement on that amount in the light of the foregoing considerations and to inform the Court, within three months from the date of delivery of the present judgment, of the amount to be paid, reached by agreement, failing which they are to send to the Court a statement of their views with supporting figures within the same period (see, to that effect, *ATC and Others* v *Commission*, cited in paragraph 273 above, EU:T:2013:451, paragraph 201).

Costs …

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the decision of the European Union Intellectual Property Office (EUIPO), notified by letter of 11 August 2011 and adopted in tendering procedure AO/029/10 entitled 'Software development and maintenance services', rejecting the tender submitted by European Dynamics Luxembourg SA and the other related decisions of EUIPO adopted in the context of that procedure, including those awarding the contract to three other tenderers as successful tenderers ranked first to third in the 'cascade' procedure;**

2. **Orders EUIPO to compensate European Dynamics Luxembourg for the damage incurred as a result of the loss of opportunity to be awarded the framework contract as, at the very least, the third contractor in the cascade procedure;**

3. **Orders the parties to inform the Court, within three months from the date of delivery of the present judgment, of the amount, in figures, of compensation arrived at by agreement;**

4. **Orders that, in the absence of agreement, the parties shall forward to the Court, within the same period, a statement of their views with supporting figures;**

5. **Reserves the costs.**

Prek Labucka Kreuschitz

Delivered in open court in Luxembourg on 27 April 2016.

[Signatures]