JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
14 February 2006 *

In Joined Cases T-376/05 and T-383/05,

TEA-CEGOS, SA, established in Madrid (Spain),

Services techniques globaux (STG) SA, established in Brussels (Belgium),

represented by G. Vandersanden and L. Levi, lawyers,

applicants in Case T-376/05,

GHK Consulting Ltd, established in London (United Kingdom), represented by M. Dittmer and J.-E. Svensson, lawyers,

applicant in Case T-383/05,

* Language of the case: French.

Commission of the European Communities, represented by M. Wilderspin and G. Boudot, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment, first, of the Commission's decisions of 12 October 2005 rejecting the tenders submitted by the applicants in the tendering procedure bearing reference 'EuropeAid/119860/C/SV/multi-Lot 7' and, second, of all other decisions taken by the Commission in the same call for tenders following the decisions of 12 October 2005,

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2006,

gives the following

Judgment

Legal context

1 The award of Commission service contracts in connection with its external actions is governed by the provisions of the second part of Title IV of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the Financial Regulation') and the provisions of the second part of Title III of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1, 'the Implementing Rules').

2 Under Article 94 of the Financial Regulation, reproduced in point 2.3.3 of the Practical Guide to contract procedures for EC external actions ('the Practical Guide'):

'Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest,

(b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.'

3 Under Article 146(3) of the Implementing Rules:

'Requests to participate and tenders which do not satisfy all the essential requirements set out in the supporting documentation for invitations to tender or the specific requirements laid down therein shall be eliminated.

However, the evaluation committee may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within a specified time-limit.'

4 Article 13 of the procurement notice issued in the tendering procedure bearing reference 'EuropeAid/119860/C/SV/multi-Lot 7' relating to a multiple framework contract to recruit technical assistance for short-term expertise for exclusive benefit of third countries benefiting from European Commission external aid ('the call for tenders') stated that no more than one application could be submitted by a natural or legal person (including legal persons within the same legal group), whatever the form of participation (as an individual legal entity or as leader or partner of a consortium submitting an application). In the event that a natural or legal person (including legal persons within the same legal group) submitted more than one application, all applications in which that person (and legal persons within the same legal group) had participated would be excluded.

5 The declaration form to be completed by candidates and tenderers mentioned their obligation to indicate whether or not they belonged to a 'group or network'.

6 Article 14 of the instructions to tenderers stated that each successful tenderer would be notified in writing. It also provided that, before the contracting authority signed the framework contract with the successful tenderer, the tenderer had to produce additional documents to prove the veracity of his statements. If a tenderer was not able to produce the required documents within a period of 15 calendar days from notification of the award of the contract or if he was found to have supplied false information, it was provided that the award of the contract would be regarded as null and void. In such a case, the contracting authority could award the framework contract to another tenderer or cancel the tendering procedure.

7 Article 16 of the instructions to tenderers provided that tenderers who believed themselves to have been harmed by an error or an irregularity in the course of the tendering procedure could submit a complaint, to which the competent authority had to respond within a period of 90 days.

Background to the dispute

8 By a procurement notice of 9 July 2004 published in the *Official Journal of the European Union* (OJ 2004, S 132), the Commission launched the call for tenders.

9 The TEA-CEGOS consortium expressed its interest in participating in the call for tenders. TEA-CEGOS, SA was chosen to be the leader of the consortium with a view to the consortium's participation in the tendering procedure. Services techniques globaux (STG) SA is also a member of the TEA-CEGOS Consortium and provides it with technical and financial management services.

10 In the course of the application to participate phase and in accordance with the requirements set out in the procurement notice, the various members of the TEA-CEGOS Consortium made statements to the effect that they were not in any of the situations corresponding to the grounds for exclusion listed in point 2.3.3 of the Practical Guide. On 18 August 2004 the Danish Institute for Human Rights (DIHR), a member of the TEA-CEGOS Consortium, sent the Commission a document in which it was stated that the DIHR had its own board of management but was part of a larger structure, the Danish Centre for International Studies and Human Rights ('the Centre'), and had as a partner the Danish Institute for International Studies (DIIS), an institute set up by a Danish law of 6 June 2002 which also established the Centre and the DIHR.

11 GHK Consulting Ltd, a company governed by English law, is part of a consortium ('the GHK Consortium') bringing together various entities including the DIIS. GHK Consulting, through its GHK International Ltd division, was chosen to be the leader of the GHK Consortium for the tendering procedure. On 29 September 2004, when the applications to participate were submitted, the DIIS stated that it did not belong to a group or network.

12 By email of 17 December 2004 and by letter of 31 December 2004, the TEA-CEGOS Consortium was invited to participate in the call for tenders for lot 7. During this stage of the tendering procedure the DIHR indicated once again that it was part of a larger structure, the Centre, which included another institute, the DIIS. The GHK Consortium was also invited to tender for lot 7.

13 By letters of 20 May 2005, TEA-CEGOS and GHK International learnt that the tenders submitted by the consortia to which they each belonged had been accepted for lot 7. Those letters stated that the contracts would be sent to the consortia for signature subject to proof that they were not in any of the situations corresponding to the grounds for exclusion listed in point 2.3.3 of the Practical Guide. The applicants sent the Commission the documents that they considered to be relevant in this respect.

14 By a fax of 22 June 2005, the Commission asked TEA-CEGOS to explain the link between the DIHR and the Centre and its possible autonomy vis-à-vis the Centre, and also requested GHK International to provide it with clarification as to the legal status of the DIIS.

15 On 23 June 2005 the TEA-CEGOS Consortium sent the Commission a letter from the DIHR explaining the way it operated. On 24 June 2005 GHK International sent the Commission a fax providing clarification with regard to the DIIS.

16 In response to a further request by the Commission for additional clarification, made by telephone on 27 June 2005, on the same date the TEA-CEGOS Consortium sent the Commission a copy of the Danish law of 6 June 2002 setting up the Centre, together with a memorandum pointing out the relevant parts of the law and the link between the Centre and the DIHR, and a letter from the Centre's head of administration

17 On 14 July 2005 the TEA-CEGOS Consortium also sent the Commission a statement by the Danish Minister for Foreign Affairs in which the Minister affirmed that the DIHR and the DIIS were autonomous entities within the Centre.

18 By letters of 18 July 2005 ('the decisions of 18 July 2005'), the Commission informed the TEA-CEGOS Consortium and the GHK Consortium that its decisions to accept their tenders were based on inaccurate information which it had been given during the tendering procedure and that, in the light of new evidence, their applications and their tenders were to be rejected.

19 On 22 and 25 July 2005 the TEA-CEGOS Consortium claimed to the Commission that the DIHR and the DIIS could not be regarded as part of the same legal group within the meaning of Article 13 of the procurement notice, pointing out that from the very beginning of the tendering procedure it had stated that DIHR belonged to the Centre. On 27 July 2005 the Commission acknowledged receipt of the letter of 22 July and stated that its content would be examined in detail.

20 On 25 July 2005 the shortlist of tenderers for lot 7, published on the EuropeAid website, was altered so that it no longer included the two consortia.

21 On 8 September 2005 TEA-CEGOS and STG contacted the Commission, alleging that the decisions of 18 July 2005 were unlawful and therefore calling on it to reverse those decisions as soon as possible. By letter of 13 September 2005, the Commission informed them that a review was in progress and that it had sent the Centre a series of questions and asked it to produce documents to substantiate the answers that it provided.

22 On 14 September 2005 TEA-CEGOS and STG reiterated that they wanted a quick reply regarding the final position adopted by the Commission. On 21 September 2005 the Commission informed them that it was waiting for the Centre to provide

certain information that was needed in order to take a decision on the result of the procedure, and undertook to notify them of its decision as soon as possible.

23 By email of 23 September 2005 and by fax of 26 September 2005, the Centre answered the Commission's questions, also sending it a number of documents to substantiate its answers. On 26 September 2005 GHK International sent the Commission a letter in support of the answers provided by the Centre.

24 On 27 September 2005 and 5 October 2005 TEA-CEGOS and STG sent the Commission two letters which, among other things, highlighted the independence of the two institutes. They noted that the only grounds on which award decisions could be withdrawn were those set out in Article 14 of the instructions to tenderers, which referred to point 2.3.3 of the Practical Guide. They added that the TEA-CEGOS Consortium had not failed to provide information or supplied inaccurate information.

25 On 11 October 2005 TEA-CEGOS and STG made an enquiry to the Commission in order to ascertain whether it had adopted a final position on the tendering procedure, asking it not to conclude any contracts at the same time as the award decisions that it would be adopting. The Commission informed them that it was about to adopt a decision.

26 By two decisions sent on 12 October 2005 to the TEA-CEGOS Consortium on the one hand and to the GHK Consortium on the other, the Commission confirmed the decisions of 18 July 2005 and rejected the tenders submitted by those consortia ('the contested decisions').

Procedure and forms of order sought

27 By an application lodged with the Registry of the Court of First Instance on 13 October 2005, TEA-CEGOS and STG brought the action in Case T-376/05.

28 By separate document registered at the Registry of the Court of First Instance on 14 October 2005, TEA-CEGOS and STG submitted an application for interim measures, requesting suspension of the operation of the contested decision in that case and of all the other decisions taken by the Commission in the same call for tenders following that decision. By order of the President of the Court of First Instance of 14 October 2005, the Commission was ordered to suspend the tendering procedure bearing reference 'EuropeAid/119860/C/SV/multi-Lot 7' pending a final order on the application for interim measures. On account of an agreement reached between the parties on 26 October 2005, in the light of the settlement proposed by the President of the Court of First Instance, acting in his capacity as the judge hearing the application for interim relief, the order of 14 October 2005 was revoked by an order of the President of 13 December 2005. By an order of the President of the Court of First Instance of 11 January 2006, the application for interim measures submitted by TEA-CEGOS and STG was removed from the register of the Court of First Instance, costs being reserved.

29 By an application lodged with the Registry of the Court of First Instance on 20 October 2005, GHK Consulting brought the action in Case T-383/05, requesting that the case be decided under an expedited procedure pursuant to Article 76a of the Rules of Procedure of the Court of First Instance. On 7 November 2005 the Commission stated that it agreed to that request.

30 By separate document registered at the Registry of the Court of First Instance on 20 October 2005, GHK Consulting submitted an application for interim measures, requesting suspension of operation of the decision in that case and of all subsequent decisions with respect to other tenderers and an order of interim measures to

suspend the effects of those decisions. By letter lodged with the Registry of the Court of First Instance on 16 December 2005, GHK Consulting informed the Court pursuant to Article 99 of the Rules of Procedure that it was withdrawing its application for interim measures. By order of the President of the Court of First Instance of 11 January 2006, the application for interim measures submitted by GHK Consulting was removed from the register of the Court of First Instance, costs being reserved.

31 By letter lodged with the Registry of the Court of First Instance on 20 October 2005, GHK Consulting submitted a request for Cases T-376/05 and T-383/05 to be joined. The Commission and TEA-CEGOS and STG stated on 28 October 2005 and 8 November 2005 respectively that they had no objection to the cases being joined.

32 By letter lodged with the Registry of the Court of First Instance on 31 October 2005, GHK Consulting made a request for the language of the case to be changed to French, whilst reserving the right to use English where necessary in the written and oral procedure. On 7 November 2005 the Commission stated that it had no objection to the proposed change of language.

33 By letter lodged with the Registry of the Court of First Instance on 3 November 2005, TEA-CEGOS, STG and GHK Consulting requested that they be given the opportunity to put before the Court, in the main proceedings, the documents requested by the Present of the Court of First Instance at the interim measures hearing. On 4 November 2005 the President of the Second Chamber of the Court of First Instance granted that request, on condition that the documents were sent to the Registry of the Court of First Instance in English by 1 December 2005 at the latest.

34 On 8 November 2005 the Second Chamber of the Court of First Instance decided to grant the application for an expedited procedure in Case T-383/05 and to change the language of the case, as requested by GHK Consulting.

35 By order of the President of the Second Chamber of the Court of First Instance of 10 November 2005, Cases T-376/05 and T-383/05 were joined for the purposes of the written procedure, the oral procedure and the judgment.

36 By letter lodged with the Registry of the Court of First Instance on 30 November 2005, the Commission requested that Case T-376/05 be decided under an expedited procedure pursuant to Article 76a of the Rules of Procedure. On 1 December 2005 TEA-CEGOS and STG agreed to that request. On 6 December 2005 the Second Chamber of the Court of First Instance decided to grant the application for an expedited procedure in Case T-376/05.

37 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. The parties presented oral argument and answered the questions put to them by the Court at the hearing on 12 January 2006.

38 The applicants claim that the Court of First Instance should:

— annul the contested decisions;

— annul all the other decisions taken by the Commission in the call for tenders following the contested decisions;

— order the Commission to pay the costs.

39 The Commission contends that the Court of First Instance should:

— dismiss the applications;

— order the applicants to pay the costs.

Law

40 The applicants in Case T-376/05 rely on four pleas in law in support of their action. By the first plea, the applicants claim that the Commission infringed Article 13 of the procurement notice and Article 14 of the instructions to tenderers. By the second plea, they assert that the Commission failed to comply with its obligation to state reasons and breached the principle of legal certainty, while moreover committing a manifest error of assessment with regard to the application of Article 13 of the procurement notice. By the third plea, they allege that the Commission breached the principle of good administration and failed to exercise due care. Lastly, by the fourth plea, they claim that the Commission breached the principle of protection of legitimate expectations. Since the second plea to a large extent determines the resolution of the other pleas, it should be examined first.

41 The applicant in Case T-383/05 relies on a single plea in law, alleging misapplication of Article 13 of the procurement notice, and this plea will therefore be examined in connection with the second plea mentioned above.

The second plea, alleging breach of the obligation to state reasons, manifest error of assessment and breach of the principle of legal certainty

Arguments of the parties

42 TEA-CEGOS and STG point out that Article 13 of the procurement notice excludes applications from 'a natural or legal person' who submits more than one tender for the same lot, including 'legal persons within the same legal group'. However, no definition of 'legal group' is given in Community law or in the documents supplied in connection with the call for tenders. In the absence of such a definition, GHK Consulting considers that tenders should be excluded under Article 13 of the procurement notice only where the entities belong to the same group, that is to say where they are controlled by a common parent company or control each other. GHK Consulting claims that in the present case the DIHR and the DIIS are independent, that they have their own statutes and that they each pursue their own specific objectives, and that the Centre was set up to facilitate the administration of the two institutes. Only the management of their administrative services is shared in so far as they are managed by the Centre, which receives remuneration for the services provided. In addition, TEA-CEGOS and STG claim that the Commission committed a manifest error of assessment in failing to take account of the fact that each of the institutes had its own assets.

43 TEA-CEGOS and STG consider that the Commission changed its interpretation of the concept of 'legal group' since, in the decisions of 18 July 2005, it stated, for the first time, that the criterion of independence was no longer relevant and that it was sufficient for the DIHR to form part of the Centre structurally, an approach confirmed in the contested decisions, thus breaching the principle of legal certainty.

44 TEA-CEGOS and STG state that the objective of Article 13 of the procurement notice is to prevent conflicts of interest between persons who, directly or indirectly, might compete several times for a single contract and therefore find themselves in competition for the framework contract or, later, for specific contracts. Thus, if the DIHR and the DIIS were not independent from the Centre and had to be given the Centre's prior approval to conclude a contract, a conflict of interest could exist between them. In the present case, TEA-CEGOS and STG consider that the conduct of each entity may be imputed only to that entity and not to third parties, with the result that the Centre and the two institutes cannot constitute a single economic entity (Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraphs 218 and 219). The Commission cannot therefore take the view, as it did in the present case, that because the two institutes belong to the Centre effective competition between them in the implementation of the framework contract is precluded. In the event that an examination of a conflict of interest is not required by the provisions of Article 13 of the procurement notice, TEA-CEGOS and STG consider that that article must be manifestly disproportionate and inappropriate in relation to the objective being pursued, namely to prevent conflicts of interest between tenderers.

45 The Commission acknowledges that there is no definition of 'legal group' in Article 13 of the procurement notice. However, that concept is general and can cover a variety of situations, with the Commission making an assessment in the specific case in order to decide on the existence of a legal group. It states that Article 13 of the procurement notice reproduces a more general provision of the Financial Regulation, namely Article 94, which expressly provides for the exclusion of candidates who are subject to a conflict of interest. In the present case, according to the Commission, the fact that the two institutes belong to the Centre makes effective competition between them difficult, since they have similar areas of expertise and their fields of competence may overlap. Moreover, Article 13 is sufficiently clear in that it prohibits membership of the same legal group, thereby introducing a structural criterion.

46 The Commission considers that the applicants' claims alleging breach of the principle of legal certainty and breach of the obligation to state reasons are not well founded.

Findings of the Court

47 First, as regards the complaint alleging a failure to state reasons, it should be stated that the reasons for which the Commission rejected the applicants' tenders can be clearly seen from the grounds of the contested decisions.

48 According to consistent case-law, the scope of the obligation to state reasons depends on the nature of the measure at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution, so as to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded, and so as to enable the Community judicature to exercise its power of review (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case T-217/01 *Forum des migrants* v *Commission* [2003] ECR II-1563, paragraph 68).

49 In the present case, the contested decisions expressly mention that the tenders submitted by the two consortia infringed Article 13 of the procurement notice because the DIIS and the DIHR belonged to the same legal group, the evidence which enabled the Commission to make this finding also being set out in those decisions. In addition, it should be stressed that the contested decisions were adopted following a thorough review by the Commission, after the decisions of 18 July 2005 and after hearing the views of the applicants. The applicants were therefore aware of the Commission's questions as to the nature of the link between the two institutes and the Centre. In these circumstances, this complaint cannot be upheld.

50 Second, as regards the complaint alleging the manifest error of assessment affecting the contested decisions, it should be noted that the Commission has a broad discretion with regard to the factors to be taken into account for the purpose of

deciding to award a contract following an invitation to tender, and review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 147, and Case T-169/00 *Esedra* v *Commission* [2002] ECR II-609, paragraph 95).

51 The Court observes that Article 13 of the procurement notice prohibited entities within the same legal group from participating in the same call for tenders, for example as members of consortia, in order to prevent the risk of a conflict of interest or of distorted competition between the tenderers. As a result of that prohibition, the validity of a tender was dependent on compliance with Article 13 of the procurement notice, since the Commission has a broad discretion in determining both the content and the application of the rules applicable to the award of a contract following a call for tenders. Therefore, the article applies even where an infringement of the article is detected only at an advanced stage of the tendering procedure.

52 In the light of the foregoing, it must be determined in the present case whether the Commission committed a manifest error of assessment in taking the view that the DIIS and the DIHR belonged to the same legal group. To that end, it should be noted that in the absence of a definition of the concept of legal group in legislation or in case-law, laying down the criteria applying to such a group, the Commission was required to conduct an examination of each individual case, taking into account all the relevant factors, in order to decide whether the conditions for the application of Article 13 of the procurement notice had been met.

53 Consequently, in order to recognise the existence of a legal group in the present case, the Commission had to determine whether the entities in question were structurally linked to the Centre, since this factor was liable to give rise to a risk of a conflict of interest or of distorted competition between the tenderers, although

other factors could support the examination of structural links, such as those relating to the degree of independence of the entities in question which are described by the parties as 'functional criteria'.

54 In the present case, it can be seen from the contested decisions that the Commission found that the DIIS and the DIHR legally formed part of the Centre and therefore belonged to the same structure. It inferred from the Danish law of 6 June 2002 and from the statutes of the Centre and those of the institutes that the DIIS and the DIHR did not constitute legal entities distinct from the Centre and noted that the Centre was among other things responsible for the common administration of the two institutes, which were, moreover, represented on the Centre's board of management.

55 First, as regards the question whether institutes belong to the Centre structurally, it is apparent from the documents before the Court, and more specifically Paragraph 1(2) of the Danish Law of 6 June 2002, that the Centre is composed of two autonomous entities, the DIIS and the DIHR, and that the two institutes and the Centre share the same premises.

56 As regards the administration of the two institutes, as the Commission observed in the contested decisions, Article 2 of the Centre's statutes provides that the Centre 'shall provide joint administration concerning finance, staff administration, management, joint services and the joint library'. Thus, administrative services, such as payment of salaries and management of invoices, are provided by the Centre, which receives specific remuneration from the two institutes for the services provided, and the Centre is also responsible for receiving payments made to the institutes.

57 Furthermore, as the Commission also pointed out in the contested decisions, there is a link between the institutes and the Centre's board of management, since certain board members are appointed by the DIIS and the DIHR (Paragraph 5(3) of the Danish Law of 6 June 2002). An exchange of views on the commercial strategies to

be pursued by the two institutes may therefore take place at this high level of the structure. This link is reinforced by the fact, also apparent from the papers before the Court, that the Centre's board of management discusses operational forecasts for the two institutes.

58 In the light of the foregoing, the two institutes must be regarded as structurally forming part of the same legal group. Consequently, the Commission did not commit a manifest error of assessment in applying Article 13 of the procurement notice, since the fact that the institutes belonged to the Centre structurally was sufficient evidence of a risk of distorted competition between the tenderers, or even a conflict of interest. It must also be stated that consideration of factors relating to the functional criterion does not call into question the Commission's assessment in this regard.

59 Second, as regards the functional criterion, namely the institutes' independence from the Centre, the Court notes that the institutes' financial autonomy is relatively limited by the influence of the Centre. As is apparent from the papers before the Court, the DIIS and the DIHR are financed in part by public funds granted to the Centre, which must divide them on the basis of an 80% share for the DIIS and 20% for the DIHR. In addition, Articles 4 and 15 of the DIIS's statutes provide that the DIIS is 'under the auspices of the [Centre]' and that 'the accounts of the institute, as an entity of the [Centre], shall be audited by the "Rigsrevisor"'. Similarly, the DIHR's accounts must be approved by the Centre's board of management.

60 As regards the institutes' decision-making autonomy, the applicants highlight the fact that the institutes' boards of management are autonomous from the Centre. However, this claim is not sufficient to rebut the finding that the DIIS and the DIHR belong to the same legal group, since such a situation does not necessarily preclude decision-making autonomy for different legal entities coexisting within the same group.

61 As regards the applicants' argument that the Commission failed to take into consideration the fact that the institutes had distinct assets, the Court notes that the applicants have not been able to provide conclusive evidence to show that in the contested decisions the Commission wrongly took the view that the institutes' assets belonged to the Centre. Furthermore, the fact that the Commission did not consider the institutes to have legal personality does not constitute a manifest error of assessment resulting in a misapplication of Article 13 of the procurement notice. First, it should be noted that the contested decisions are not in any way based on the absence of legal personality, since no mention is made of that factor in the decisions. Second, as the Commission proves satisfactorily in its written submissions, even if the institutes had their own legal personality, the fact that the DIIS and the DIHR belonged to the Centre justified the application of Article 13 of the procurement notice.

62 Consequently, the Commission did not commit a manifest error of assessment in basing its position principally on a structural criterion. The fact that it was able initially to request information relating to the functional criterion and then used the structural criterion cannot affect this finding, since the Commission undertook a thorough examination of the facts of the case before applying Article 13 of the procurement notice.

63 The complaint that the Commission breached the principle of legal certainty by deciding to opt for a structural criterion is therefore unfounded. In addition, the removal of Article 13 of the procurement notice from subsequent tender notices is irrelevant to the outcome of the present case, since the lawfulness of the individual measure contested must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87; and Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119).

64 As regards the allegedly disproportionate and inappropriate nature of Article 13 of the procurement notice, the applicants stated at the hearing that the scope of Article 13 of the procurement notice was too broad and was capable of covering situations where no conflict of interest could result from an entity belonging structurally to another. It should be considered in this regard that, in view of the broad discretion enjoyed by the Commission and the need to lay down clear, understandable rules in the procurement notice in advance, the Commission did not manifestly misuse its power in deciding on the content of Article 13 of the procurement notice and in applying it to the applicants' tenders. In particular, it did not exceed the limits of that power in stipulating in Article 13 that if legal persons belonged to the same legal group, they would be excluded from the tendering procedure.

65 The Court notes, for the sake of completeness, that in Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraph 36, the Court of Justice held that a candidate or tenderer cannot automatically be excluded from a tendering procedure without having the opportunity to comment on the reasons justifying such exclusion.

66 In the present case, in exercising its broad discretion the Commission gave the applicants several opportunities to offer a detailed explanation of the link between the two institutes and the Centre before concluding that the two institutes belonged structurally to the same legal group and applying Article 13 of the procurement notice. Thus, it was finally decided to exclude the applicants from the tendering procedure only after they had the opportunity to express their point of view regarding the links between the DIIS and the DIHR. Consequently, the Commission did not automatically apply the provisions laid down in Article 13 of the procurement notice. The facts of the present case are therefore different from those of the *Fabricom* case. As a result, the applicants' argument regarding the disproportionate or inappropriate nature of Article 13 of the procurement notice must be rejected.

67 In the light of the foregoing, since the DIIS and the DIHR belong to the Centre structurally, the Commission did not commit a manifest error of assessment and did not breach the principle of legal certainty in taking the view that the two institutes were part of the same legal group and in applying Article 13 of the procurement notice. The second plea must therefore be rejected.

The first plea, alleging infringement of Article 13 of the procurement notice and Article 14 of the instructions to tenderers

Arguments of the parties

68 TEA-CEGOS and STG state that under Article 14 of the instructions to tenderers the signing of the framework contract with the successful tenderer was subject to the production of additional documents to prove the correctness of the statements made by the tenderer during the tendering procedure. Consequently, the decision to award the contract should have been declared null and void only if the successful tenderer had not been able to produce those documents or had communicated inaccurate information during the tendering procedure.

69 They stress that in the present case, in accordance with the request made in the letter of 20 May 2005 (see paragraph 13 above), the TEA-CEGOS Consortium communicated the required documents within the period of 15 calendar days and did not provide any wrong information, since the fact that the DIHR belonged to the Centre was mentioned from the initial application to participate. Consequently, TEA-CEGOS and STG claim that the required evidence was duly provided in accordance with Article 14 of the instructions to tenderers. In addition, TEA-CEGOS and STG consider that Article 13 of the procurement notice could not be applicable once an award decision had been taken. The only grounds on which the award decision could have been withdrawn were those set out in Article 14 of the instructions to tenderers, which refer to point 2.3.3 of the Practical Guide.

70 The Commission contests the arguments put forward by the applicants. In its view, the letters of 20 May 2005 cannot be treated as decisions definitively awarding the contract to the applicants, since the award was dependent on the submission of documents showing that the applicants were not in a situation corresponding to the grounds for exclusion. The Commission considers that the documents supplied disclosed that the applicants failed to comply with Article 13 of the procurement notice.

Findings of the Court

71 It should be noted that the decisions of 20 May 2005 expressly stated that the signing of the framework contract was subject to evidence being provided by the applicants that they were not in any of the situations corresponding to the grounds for exclusion set out in point 2.3.3 of the Practical Guide. In addition, it is apparent from the actual wording of Article 14 of the instructions to tenderers that it was for the successful candidates to prove the truth of their statements. Consequently, the award of the contract was dependent on the submission of evidence capable of proving the veracity of the information supplied by the applicants when they submitted their tenders and on the Commission verifying that Article 13 of the procurement notice had been complied with.

72 As has already been pointed out (paragraph 51 above), the validity of any tender was dependent on compliance with Article 13 and the Commission could apply that article at an advanced stage of the procedure, at the very least until the evidence mentioned in the preceding paragraph had been examined. Consequently, the applicants' argument that Article 13 of the procurement notice could not apply once an award decision had been taken is unfounded.

73 The first plea must therefore be rejected.

The third plea, alleging breach of the principle of good administration and failure to exercise due care

Arguments of the parties

74 TEA-CEGOS and STG state that the Commission had been aware from the initial application to participate that the DIHR belonged to the Centre. If the Commission had questions as to the extent to which the DIHR belonged to the Centre, it should have asked the TEA-CEGOS Consortium during the tendering procedure and not after it had decided to award it the contract. By failing to do so, the Commission breached the principle of good administration. It should also have answered the letters sent by the TEA-CEGOS Consortium on 22 and 25 July 2005, which it did only after being requested to do so by TEA-CEGOS. In their view, the carelessness with which the Commission acted, an attitude reflected in the contradictory information on its website relating to the successful tenderers for lot 7, should therefore be condemned.

75 The Commission notes that, while it is true that the DIHR had pointed out the link with the DIIS, the DIIS had not made any such statement. Consequently, the computer system set up for the administrative procedure was not able to detect a possible infringement of Article 13 of the procurement notice. Having been alerted by a third party to the existence of a link between the DIHR and the DIIS, the Commission reacted by asking the applicants about this point. The Commission cannot therefore be accused of any failure to exercise due care. The Commission also claims that it responded quickly to the requests made by the applicants on 22 and 25 July 2005, as early as 27 July 2005, when it informed them, among other things, that it would take their comments into consideration and would notify them as soon as possible of the action it intended to take.

Findings of the Court

76 According to settled case-law, the guarantees conferred by the Community legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; and Case T-70/99 *Alpharma* v *Council* [2002] ECR II-3495, paragraph 182). Furthermore, the Commission is bound to ensure, at each stage of a tendering procedure, compliance with the principle of equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108, and *ADT Projekt* v *Commission*, paragraph 164).

77 In the present case, on 20 May 2005 the Commission informed the applicants that their tenders had been accepted for lot 7 on the condition that the applicants produced documents to prove that they were not in any of the situations corresponding to the grounds for exclusion set out in point 2.3.3 of the Practical Guide.

78 The DIHR indicated that it belonged to the Centre when the TEA-CEGOS Consortium applied to participate, and also mentioned that one of its partners was the DIIS. The DIIS stated that it did not belong to any group or network. However, if the DIIS really considered that it did not belong to any legal group, in view of the information required in the declaration form, it should at the very least have notified the Commission that it had links with the Centre and was therefore part of a network, since the Centre's statutes expressly provide that the DIIS is one of its entities.

79 Although the DIIS's statement was inaccurate, it should be noted that the technical tender submitted by the GHK Consortium indicated the names of the various members of the Consortium and that the DIIS was the third name mentioned there. Consequently, the Commission could have realised that the DIIS's statement was not accurate. However, the fact that the Commission realised that the institutes belonged to the Centre only at an advanced stage of the procedure has no bearing on the outcome of the present case, since, even at that stage, the tender submitted by the GHK Consortium had to be excluded in accordance with Article 13 of the procurement notice.

80 Whatever the case, the inherent complexity of the range of information submitted in tendering procedures can explain why the Commission realised that the institutes belonged to the Centre only once the two tenders had been conditionally accepted. It was only at this stage of the procedure that the applicants were required to produce documents to prove the veracity of their initial statements. It follows that the Commission did not breach the principle of good administration by failing to raise the question whether the institutes belonged to the Centre until after the tender submitted by the GHK Consortium had been conditionally accepted.

81 With regard to the way the Commission conducted the tendering procedure, it is clear that as early as 22 June 2005 the Commission asked TEA-CEGOS to explain the link between the DIHR and the Centre and asked GHK International to provide it with clarification as to the legal status of the DIIS. Further to the information supplied by TEA-CEGOS, on 27 June 2005, before adopting the decision of 18 July 2005, the Commission asked it to provide supplementary information. In addition, it is apparent from the facts that between 18 July and 12 October 2005 the Commission was in constant contact with the applicants and, among other things, informed them that it was reviewing the evidence submitted and would notify them as soon as possible of the final position it adopted. Furthermore, the Commission endeavoured to answer the applicants' questions promptly, in particular by informing TEA-CEGOS' lawyers of the state of the procedure as early as 13 September 2005, after those lawyers expressed a desire to find out about this on 8 September 2005.

82 As regards the contradictory information allegedly circulated on the EuropeAid website, it should be stated that the names of the successful tenderers mentioned on that website were those that had been conditionally accepted by the Commission. It was therefore logical for the applicants' names to appear there, since it became clear and unequivocal that the DIIS and the DIHR belonged to the Centre only when the applicants were required to prove the veracity of their statements, in this case following the decisions of 20 May 2005. Once the decisions of 18 July 2005 had been adopted, the applicants' names were removed from the website, with effect from 25 July 2005.

83 In the light of the foregoing, the applicants have not shown that the Commission breached the principle of good administration and failed to exercise due care, with the result that their complaints are in any event unfounded. The third plea must therefore be rejected.

The fourth plea, alleging the retroactive withdrawal of the contested decisions and breach of the principle of protection of legitimate expectations

Arguments of the parties

84 TEA-CEGOS and STG take the view that the decision contested by them annuls the decision of 20 May 2005 awarding the contract to the TEA-CEGOS Consortium, which in fact constitutes retroactive withdrawal of an administrative act. It follows from settled case-law that the retroactive withdrawal of a favourable decision is subject to very strict conditions (Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 38). They also state that, according to settled case-law, while it must be acknowledged that any Community institution which finds that a measure which it has just adopted is tainted by illegality has the right to withdraw it within a reasonable period, with retroactive effect, that right may be restricted by the need to

fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on its lawfulness (Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999, paragraph 35).

85 TEA-CEGOS and STG claim that in the present case the initial decision is not unlawful and should not therefore have been withdrawn. Even if that decision were unlawful, which is not the case in their view, its withdrawal could have been decided only if the conditions laid down for that purpose by the abovementioned case-law were satisfied. However, the Commission's request for explanation as to the links between the DIHR and the Centre was not made until 22 June 2005, even though it had had the DIHR's statement since October 2004. It was not until almost two months after the favourable decision of 20 May 2005 that the decision was withdrawn. The TEA-CEGOS Consortium also took care to answer the Commission's questions as set out in its fax of 22 June 2005. However, the decision contested by it was based on grounds which did not correspond with those questions. Consequently, TEA-CEGOS and STG consider that they could legitimately take the view that the evidence communicated to the Commission was not called into question and could not form the basis for a decision altering the award of the contract. They therefore take the view that they could rely on the lawfulness of the decision of 20 May 2005 and claim that the decision should be upheld. In these circumstances, regard was not had to their legitimate expectations or to the conditions under which an administrative act may be withdrawn.

86 The Commission points out that the letters of 20 May 2005 stated that the applicants' application would be accepted on the condition that they produced the documents required under Article 14 of the instructions to tenderers. It therefore considers that those letters did not contain a decision, but simply information regarding the Commission's conditional intention to accept the applicants' tenders. It adds that, since the applicants were not able to produce evidence that the two institutes satisfied the requirements laid down in Article 13 of the procurement notice, they could not be awarded the contract in any case.

Findings of the Court

87 First, it should be noted that the retroactive withdrawal of a favourable decision is generally subject to very strict conditions (*Herpels* v *Commission*, paragraph 38). According to settled case-law, while it must be acknowledged that any Community institution which finds that a measure which it has just adopted is tainted by illegality has the right to withdraw it within a reasonable period, with retroactive effect, that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on its lawfulness (Case 14/81 *Alpha Steel* v *Commission* [1992] ECR 749, paragraphs 10 to 12; Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraphs 12 to 17; Case C-248/89 *Cargill* v *Commission* [1991] ECR I-2987, paragraph 20; Case C-365/89 *Cargill* [1991] ECR I-3045, paragraph 18; and *de Compte* v *Parliament*, paragraph 35).

88 Second, it must be recalled that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual in a situation where the Community authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources (Joined Cases T-66/96 and T-221/97 *Mellett* v *Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraphs 104 and 107). However, a person may not plead breach of the principle unless he has been given precise assurances by the administration (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59, and Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 26).

89 In the present case, first, as regards the applicants' argument relating to the withdrawal of an administrative act, it should be noted that the decisions of 20 May

2005 were conditional acts. The signing of the framework contract for lot 7, provided for by the contested decisions, was subject to the condition that the applicants produced evidence that they were not in any of the situations corresponding to the grounds for exclusion provided for in point 2.3.3 of the Practical Guide. In these circumstances, it is apparent that the applicants were not awarded the contract, not as a result of the withdrawal of a decision awarding them that contract, but because they did not meet the conditions to which such a decision was subject. Consequently, the applicants' argument on this point is irrelevant.

90 Second, as regards the breach of the principle of protection of legitimate expectations claimed by TEA-CEGOS and STG, the decisions of 20 May 2005 did not contain precise assurances as to the fact that the framework contract would be signed under any circumstances, and could not therefore cause the applicants to entertain legitimate expectations to that effect, since they expressly stated that the signing of the framework contract was subject to the applicants producing evidence that they were not in any of the situations corresponding to the grounds for exclusion provided for in point 2.3.3 of the Practical Guide. It follows that the arguments put forward by the applicants relating to the breach of the principle of protection of legitimate expectations are unfounded.

91 The fourth plea must therefore be rejected as unfounded. It follows that the present applications must be dismissed.

Costs

92 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, including those relating to the applications for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to pay the costs, including those relating to the applications for interim measures.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 14 February 2006.

E. Coulon J. Pirrung

Registrar President