ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

27 July 2004 *

In Case T-148/04 R,

TQ3 Travel Solutions Belgium SA, established in Mechelen (Belgium), represented by R. Ergec and K. Möric, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Wagon-Lits Travel SA, established in Brussels (Belgium), represented by F. Herbert and H. Van Peer, lawyers, and D. Harrison, solicitor, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

APPLICATION, first, for suspension of the operation of the Commission's decisions not to award to the applicant Lot No 1 of the contract which was the subject of notice No 2003/S 143-129409 for the provision of travel agency services and to award that lot to another undertaking and, secondly, for an order directing the Commission to take the measures necessary to suspend the effects of the decision to award that contract and of the contract entered into pursuant to that decision,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES,

makes the following

Order

Facts and procedure

1 By framework contract No 98/16/IX.D.1/1 of 13 January 1999, the Commission entrusted the management of the travel agency services for its staff in Brussels to Belgium International Travel. That contract was entered into for an initial period of two years, with the possibility of extension for three further periods of one year, that is to say for the period from 1 April 1999 to 31 March 2004. By supplementary agreement of 27 February 2001, the contract was assigned to TQ3 Travel Solutions Belgium ('the applicant').

2 By contract notice published in the *Supplement to the Official Journal of the European Union* (OJ 2003 S 103), the Commission called for tenders under the restricted procedure for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of the Community institutions, agencies and bodies. The reference number was ADMIN/D1/PR/2003/051.

3 The documents in the case show that that tendering procedure was annulled by the Commission following the withdrawal of certain Community institutions.

4 On 29 July 2003, acting under Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1), the Commission published a new call for tenders under the restricted procedure for the provision of travel agency services for travel undertaken by officials and other staff carrying out missions and by any other persons travelling on behalf of or at the request of the Community institutions, agencies and bodies (section II.1.6 of the tender notice) in the *Supplement to the Official Journal of the European Union* (OJ 2003 S 143) under reference number 2003/S 143–129409. The contract was divided into a number of lots, each corresponding to the place where the services were to be performed, including Brussels (Lot No 1), Luxembourg (Lot No 2), Grange (Lot No 3), Geel (Lot No 5), Petten (Lot No 6) and Seville (Lot No 7).

5 By registered letter of 28 November 2003, the applicant submitted to the Commission a tender for Lots Nos 1, 2, 3, 5, 6 and 7.

6 By letter of 24 February 2004, the Commission informed the applicant that its tender for Lot No 1 had not been accepted, since the price-quality ratio of its tender was lower than that of the selected tender.

7 By letter of 8 March 2004, the applicant requested more detailed information regarding the selection of the tender accepted for Lot No 1. It also requested the Commission to suspend the award procedure for that contract and not to enter into a contract with the undertaking selected under the tendering procedure.

8 By letter of 16 March 2004, the Commission provided information to the applicant as to the reasons for its decision of 24 February 2004 not to award Lot No 1 to it ('the refusal decision') and to award the lot to another undertaking ('the award decision'). In particular, the Commission noted that the applicant's tender had obtained 51.55 points, while the tender selected, which had been submitted by Wagon-Lits Travel ('WT'), had obtained 87.62 points following a qualitative and financial analysis, and that WT's tender therefore offered the best value for money. The award of the contract for Lot No 1 to that undertaking was accordingly justified. The Commission also stated that, although the prices incorporated in WT's tender had been significantly lower than those in the applicant's tender (index 100 for WT and 165.56 for the applicant), the former tender 'did not appear abnormally low and it was therefore unnecessary to apply the provisions of Article 139 of Regulation ... No 2342/2002'.

9 By fax of 17 March 2004, the Commission proposed to the applicant that framework contract No 98/16/IX.D.1/1 relating to travel agency services, which was due to expire on 31 March 2004, be extended until 27 June 2004.

10 By letter of 19 March 2004, the Commission explained that it had requested that the framework contract be extended because the issuing of instructions to the new contractor, namely WT, and the entry into force of the new contract could not take place by the date of expiry provided for under the framework contract.

11 By fax of 22 March 2004, the applicant informed the Commission that it did not wish to extend the framework contract and that that contract would accordingly expire on 1 April 2004.

12 On 31 March 2004, the Commission entered into a contract with WT for the provision of travel agency services in Brussels.

13 By application lodged at the Registry of the Court of First Instance on 26 April 2004, the applicant brought proceedings seeking, first, the annulment of the refusal decision and of the award decision and, secondly, compensation for the damage allegedly suffered by it by reason of those decisions.

14 By separate document lodged at the Court Registry on the same date, the applicant brought the present application for interim measures seeking:

— first, suspension of the operation of the refusal decision and the award decision;

— secondly, an order requiring the Commission to take the measures necessary to suspend the effects of the award decision or the contract entered into following that decision.

15 On 4 May 2004, the Commission submitted its observations on that application, in which it stated that none of the conditions applicable to an order for interim measures was satisfied and that the application should accordingly be dismissed.

16 On 5 May 2004, the Court Registry forwarded the Commission's observations to the applicant and, on 10 May 2004, it invited the applicant to submit its observations on them.

17 On 12 May 2004, the applicant lodged an application for measures of inquiry pursuant to Article 105(2) and Article 65(b) of the Rules of Procedure of the Court of First Instance together with Articles 24 and 26 of the Statute of the Court of Justice, requesting that the Commission be ordered to produce certain documents, namely the contract entered into between the Commission and WT on 31 March 2004, the tender submitted by WT in response to the invitation to tender and the report of the Tender Appraisal Committee ('the documents at issue'), which the applicant claimed formed the basis of the Commission's contention in points 46 to 49 of its observations that no *prima facie* case existed. The applicant also requested that the President of the Court allow the parties to be heard in relation to those documents.

18 On 17 May 2004, the applicant submitted its observations on the Commission's observations of 4 May 2004. The applicant repeated its application for interim measures and also requested that the President of the Court exclude from consideration the Commission's arguments set out in points 46 to 49 of its observations of 4 May 2004.

19 On 18 May 2004, the Commission submitted its observations on the application for measures of inquiry, in which it stated that the application should be rejected.

20 On 24 May 2004, the Commission lodged its observations in reply to the applicant's observations of 17 May 2004. The Commission repeated its request that the President of the Court dismiss the application for interim measures and requested that the application to have points 46 to 49 of its observations of 4 May 2004 excluded from consideration be rejected as being manifestly inadmissible.

21 By document lodged at the Court Registry on 9 June 2004, WT applied for leave to intervene in these proceedings in support of the form of order sought by the Commission. That application for leave was served on the parties in accordance with Article 116(1) of the Rules of Procedure. The parties raised no objections to that application.

22 By order of the President of the Court of 28 June 2004, WT was granted leave to intervene in these proceedings in support of the form of order sought by the Commission. A copy of all procedural documents was served on WT.

23 On 5 July 2004, WT submitted its observations on the application for interim measures. The intervener concurred with the observations of the Commission. It asked the President of the Court to reject the application for interim measures and to reject the application for measures of inquiry as being manifestly inadmissible.

24 On 16 July 2004, the applicant submitted its observations on the observations of WT. It repeated its application for interim measures and, contesting WT's arguments regarding the production of the documents in question, also repeated its application for a declaration that the Commission be ordered to produce the abovementioned documents, and that the President of the Court allow the parties to be heard in relation to those documents, failing which, that it exclude points 46 to 49 of the observations of 4 May 2004 from consideration. For its part, the Commission stated that it had no observations to make on the statement in intervention.

Law

The application for interim measures

25 Under Article 242 EC in conjunction with, first, Article 243 EC and, secondly, Article 225(1) EC, the Court may, if it considers that circumstances so require, order that the operation of the contested measure be suspended or prescribe any necessary interim measures.

26 Article 104(2) of the Rules of Procedure provides that applications for interim measures are to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be rejected if any one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

27 The measures applied for must also be provisional inasmuch as they must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main proceedings (order of the President of the Court of Justice in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

28 Furthermore, the judge hearing the application enjoys, in the context of that overall examination, a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order in *Commission* v *Atlantic Container Lines and Others*, paragraph 23).

29 Having regard to the documents before the Court, the Court considers that it is in possession of all information necessary to give a ruling on the application for interim measures before it, and that it is not necessary to hear oral argument from the parties before doing so.

30 It is appropriate in this case to consider the condition relating to urgency first of all.

Arguments of the parties

31 The applicant argues that the condition relating to urgency is satisfied. It states that it could not await the outcome of the main proceedings without suffering serious and irreparable damage involving the loss of a substantial market share, extremely significant pecuniary damage and particularly serious harm to its reputation.

32 The applicant claims that the decision to award the disputed contract to another tenderer deprives it of substantial income and market share. The annual turnover for the disputed contract amounts to EUR 44 900 000, which represents approximately 20 per cent of the applicant's annual turnover in Belgium. Depending on the method of calculation used, the disputed contract represents between 16.83 and 23.85 per cent of its annual turnover.

33 The loss of that market share and of an 'essential reference related to the supply and management of travel agency services within the Commission in Brussels' will have an irremediable effect on its position on the market, particularly in the light of the difficult economic circumstances prevailing. The market share in question is of considerable significance in the travel agency sector, which has been faced with a

particularly difficult economic situation for a number of years. That situation will deteriorate further after 1 January 2005, when commissions previously paid by airlines will be terminated in Belgium. The result will be a substantial reduction in income for travel agencies.

34 Lastly, the applicant considers that the interim measures applied for are necessary, since the annulment of the disputed decisions by the Court in the main proceedings would not be sufficient to eliminate the damage suffered by the Community legal order and by the applicant, as the contract between the Commission and WT will have been fully performed, or substantially performed, by that time.

35 The Commission considers that the damage which the applicant alleges is neither serious nor irreparable within the meaning of the case-law of the Court of First Instance.

36 As regards the alleged pecuniary damage, the Commission argues that, as the applicant is in a position to quantify its direct loss, that loss is reparable by an award of damages.

37 The Commission adds that the applicant has failed to establish exceptional circumstances which would allow the pecuniary damage to be classified as serious and irreparable. It points out in that regard that the applicant has failed to show either that the loss of market share at issue jeopardises its existence or that its position on the market has been irremediably altered. The applicant is not prevented from recovering the lost market share and its activities elsewhere than on that market are quite adequate to ensure that its existence itself is not jeopardised.

38 As regards the non-pecuniary damage alleged by the applicant, namely the loss of an essential reference and particularly serious harm to its reputation, the Commission states that the loss of an essential reference has no role to play at the contract award stage and that the loss of a reference contract implies no harm to reputation, as the Court has already held in its case-law.

39 Lastly, the Commission argues that the fact that the contract entered into by it with WT may be fully performed by the time the Court gives judgment in the main proceedings does not go to show that the condition as to urgency is satisfied. Were there to be an annulment, the Commission would be in a position to restore the applicant's rights by issuing a new invitation to tender and making payment of compensation.

40 WT supports the Commission's arguments and states that the applicant has failed to establish the serious and irreparable nature of the alleged damage. The applicant has not shown in what way a reduction in its turnover of approximately 20 per cent could affect its survival. WT notes that the applicant is a member of an international group, the TUI Group, which is one of the leading European groups in the travel sector, with a turnover for 2003 of approximately EUR 19 215 million and net profits for the same year of EUR 315 million. As regards the loss of market share, it observes that the applicant could easily recover it if, on the expiry of the current contract or, as the case may be, on its annulment, the applicant were to be awarded the contract following a new tender procedure organised by the Commission. As regards harm to its reputation, WT supports the Commission's arguments and adds that the loss of a contract following a tender procedure is not, in practice, harmful.

Findings of the Court

41 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and

irreparable damage being caused to the party who requests the interim measure. It is for that party to demonstrate that it cannot await the outcome of the main proceedings without suffering such damage (see order of the President of the Court of First Instance in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43, and the case-law cited there).

42 In the present case, the applicant argues that the serious and irreparable nature of the alleged damage arises from the fact that, in losing the disputed contract not only has it suffered damage consisting in loss of income and significant market share (pecuniary damage), but it has also lost an essential reference and suffered particularly serious harm to its reputation (non-pecuniary damage).

43 As regards the pecuniary damage relied on by the applicant, it should be pointed out that, as the Commission has stated, settled case-law provides that such damage cannot in principle be regarded as irreparable, or even reparable with difficulty, where it can be the subject of future pecuniary compensation (see order in *Esedra* v *Commission*, paragraph 44, and the case-law cited there).

44 In the present case, as the Commission rightly points out, the applicant appears to be able to quantify the pecuniary loss complained of, as it has not only brought proceedings on the basis of Articles 230 EC and 288 EC before the Court of First Instance, but also assessed its loss at the sum of EUR 44 900 000.

45 It follows that the pecuniary damage invoked by the applicant cannot be considered to be irreparable. Such damage represents a loss which is economically capable of being compensated for through the means of redress laid down under the Treaty, in

particular Article 288 EC (order in *Esedra* v *Commission*, paragraph 47, and order of the President of the Court of First Instance in Case T-230/97 R *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1997] ECR II-1589, paragraph 38).

46 In the light of the above, the interim measures applied for would be justified in this case only if it appeared that, if the order were not granted, the applicant would find itself in a situation which could jeopardise its very existence or irremediably alter its position in the market (see, to that effect, order in *Esedra* v *Commission*, paragraph 45).

47 The applicant has not shown that if the interim measures applied for are not granted it is at risk of being placed in a situation which could jeopardise its very existence or irremediably alter its share of the market.

48 It must be held in that regard that the applicant has produced no evidence regarding its financial position which would allow the Court to conclude that its existence will be jeopardised. On the contrary, it must be held that the fact that the disputed contract accounts for only 15 to 25 per cent of the applicant's annual turnover in Belgium demonstrates the applicant's ability to remain in business until the Court delivers its judgment in the main proceedings. That conclusion is supported by the fact that the applicant also carries on business outside Belgium, that it was in fact successful in bidding for other lots in the tendering procedure at issue and that it is a member of a large and profitable international group. The applicant's arguments regarding the difficulties faced by travel agencies do not alter that conclusion in any way. Even if it is accepted that travel agencies are in a difficult economic situation and that that situation will continue, the applicant does not explain how the loss of the disputed contract jeopardises its existence. In any event, the damage alleged is not the result of the refusal decision but arises from factors unconnected with it.

49 With respect to the possibility that if the interim measures applied for were not to be granted the applicant's position on the market would be irremediably altered, it is clear that the applicant has produced no evidence to show that its position will be altered in that way.

50 The applicant has failed to show that obstacles of a structural or legal nature would prevent it from regaining a significant proportion of the market share lost (see, to that effect, order of the President of the Court of First Instance in Case T-369/03 R *Arizona Chemical and Others* v *Commission* [2004] ECR II-205, paragraph 84).

51 In particular, the applicant has not demonstrated that it will be prevented from being successful in other tendering procedures, including one having as its subject-matter the disputed contract on the occasion of a new invitation to tender. The applicant's arguments based on the general economic situation faced by travel agencies do not show that its position on the market in question will be irremediably altered. The purported economic situation has the same consequences for all operators in the travel agency sector. There is nothing to prevent the applicant from recovering the lost market share, as it is fully open to it to recover that market share following a new invitation to tender. The fact that the applicant has lost an 'essential reference' does not preclude it from participating and being successful in new tendering procedures. Those references represent only one of many criteria taken into account in the qualitative selection of service providers (see Article 137 of Regulation No 2432/2002; see also, to that effect, order in *Esedra* v *Commission*, paragraph 49).

52 It follows that the applicant has failed to provide sufficient evidence to allow the Court to reach the view that the pecuniary damage alleged is serious and irreparable.

53 As regards the non-pecuniary damage alleged by the applicant and its argument that interim measures are urgent because of the irreparable damage caused to its reputation and credibility, it must be pointed out that the refusal decision would not necessarily cause such damage. According to settled case-law, participation in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants, and the elimination of a tenderer under the rules on tenders is not, in itself, prejudicial (order of the President of the Court of Justice in Case 118/83 R *CMC* v *Commission* [1983] ECR 2583, paragraph 5, and order in *Esedra* v *Commission,* paragraph 48).

54 As the Commission and WT rightly point out, the fact that an undertaking is unsuccessful in renewing a contract for a set period in a new tender procedure arises from the periodic nature of invitations to tender in the public procurement sector and does not harm its credibility and reputation.

55 The applicant's arguments seeking to establish urgency by reason of the fact that the contract entered into with WT will have been fully performed, or substantially performed, before the delivery of the judgment in the main proceedings also cannot be accepted. That is not a matter establishing urgency, since, if the Court considered the main proceedings to be well founded, the Commission would have to adopt the measures necessary to ensure appropriate protection of the applicant's interests (see, to that effect, order in *Esedra* v *Commission*, paragraph 51, and order of the President of the Court of First Instance in Case T-108/94 R *Candiotte* v *Council* [1994] ECR II-249, paragraph 27). As the Commission points out, it would be in a position in such a situation to organise a new tendering procedure in which the applicant would be able to participate without undue difficulty. Such a step could be coupled with payment of compensation. The applicant has not referred to any matter which might prevent its interests from being protected in that way (see, to that effect, order in *Esedra* v *Commission*, paragraph 51).

56 In those circumstances, it must be held that the evidence adduced by the applicant does not establish to the requisite legal standard that it will suffer serious and irreparable damage if the interim measures applied for are not granted.

57 The application for interim measures must accordingly be dismissed, and it is not necessary to consider whether the other conditions relating to the grant of such measures are satisfied.

The application for measures of inquiry and the application to have points 46 to 49 of the Commission's observations of 4 May 2004 excluded from consideration

Arguments of the parties

58 The applicant points out in its application of 12 May 2004 and its observations of 17 May and 16 July 2004, that the documents at issue are of decisive importance in the Commission's observations relating to the existence of a *prima facie* case. The applicant states that it would be difficult for it to provide evidence in support of its application if it were not allowed to have access to all of those documents. The production of the documents at issue is accordingly essential by virtue, in particular, of Article 6 of the European Convention on Human Rights, which requires that civil and criminal proceedings be fairly conducted. Alternatively, the applicant seeks an order that points 46 to 49 of the Commission's observations of 4 May 2004 be excluded from consideration.

59 The Commission, supported by WT, argues that the application for measures of inquiry should be rejected, on the grounds that the applicant has not shown that the production of the documents at issue will be worthwhile, that, in the absence of exceptional circumstances, those Commission internal documents cannot be made

available and that the production of those documents would undermine the protection of the legitimate commercial interests of tenderers. WT adds that the documents at issue contain confidential commercial information and that their disclosure to a competitor would infringe the competition rules.

Findings of the Court

60 It is clear, first of all, that the applicant's request regarding the production of the documents at issue and its request to have points 46 to 49 of the Commission's observations of 4 May 2004 excluded from consideration do not constitute an application for interim measures relating to the disputed decisions and can be understood only as an application for measures of inquiry or organisation of procedure.

61 It should be noted that under the first subparagraph of Article 105(2) of the Rules of Procedure the President of the Court of First Instance is to decide whether a preparatory inquiry is necessary. Article 65 of the Rules of Procedure provides that measures of inquiry include the production of documents. Article 64 of the Rules of Procedure allows the Court to adopt measures of organisation of procedure, including the production of documents or any papers relating to the case.

62 It should next be noted that the documents at issue, as also points 46 to 49 of the Commission's observations of 4 May 2004, relate solely to the requirement that there be a *prima facie* case, as the applicant itself notes in its application for interim measures and in its observations of 16 July 2004.

63 As the application for interim measures falls to be dismissed by reason of lack of urgency, without it being necessary to consider whether the other conditions for the grant of such measures are satisfied, in particular the requirement that there be a *prima facie* case, the Court considers that the documents in question are not relevant to the current application for interim measures and that there is therefore no need to adopt the measures regarding the documents at issue which the applicant has applied for.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 27 July 2004.

H. Jung — Registrar

B. Vesterdorf — President