



Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

8 April 2014*

(Application for interim measures — Appeals — Application for suspension of operation of a measure — Seventh framework programme for research, technological development and demonstration actions (2007-2013) — Contracts relating to the Oasis and Perform projects — Suspension of payments — Irregularities established in the course of audits of other projects — Orders for payment against the European Commission — Manifest insolvency of the recipient — Prima facie case — Serious and irreparable damage — Urgency — Balancing of competing interests)

In Case C-78/14 P-R,

APPLICATION for suspension of operation under Article 278 TFEU, lodged on 17 February 2014,

European Commission, represented by D. Triantafyllou and B. Conte, acting as Agents, with an address for service in Luxembourg,

applicant,

the other party to the proceedings being:

ANKO AE Antiprosopion, Emporiou kai Viomichanias, established in Athens (Greece), represented by V. Christianos, dikigoros,

defendant,

THE VICE-PRESIDENT OF THE COURT,

after hearing the First Advocate General, P. Cruz Villalón,

makes the following

Order

- 1 By its appeal lodged at the Court Registry on 13 February 2014, the European Commission sought the setting aside by the Court of the judgment of the General Court of the European Union in *ANKO v Commission* (T-117/12, EU:T:2013:643, 'the judgment under appeal').
- 2 By application lodged at the Court Registry on 17 February 2014, the Commission requested the Court to suspend application of the judgment under appeal pending delivery of the judgment on appeal. By letter lodged at the Court Registry on 18 February 2014, the Commission also requested that that application be granted provisionally pending the order terminating the interim proceedings, even prior to submission by the other party to the proceedings of its observations.

* Language of the case: Greek.

- 3 By order of 21 February 2014, the Vice-President of the Court decided, under Article 160(7) of the Rules of Procedure of the Court, to suspend operation of the judgment under appeal pending the order terminating the interim proceedings, even prior to submission by the other party to the proceedings of its observations. The latter, ANKO AE Antiprosopion, Emporion kai Viomichanias ('ANKO'), submitted its written observations on the interlocutory application on 4 March 2014.

Background to the dispute and the judgment under appeal

- 4 ANKO is a company incorporated under Greek law whose object is the marketing and production of metallic products and electronic products, devices and equipment and telecommunications products which has, since 2006, been involved in the implementation of several projects subsidised by the European Community or by the European Union.
- 5 As stated in paragraph 2 of the judgment under appeal, in accordance with Regulation (EC) No 1906/2006 of the European Parliament and of the Council of 18 December 2006 laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007-2013) (OJ 2006 L 391, p. 1), in the framework laid down by Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) (OJ 2006 L 412, p. 1), and in particular the specific 'Cooperation' programme, the Commission, acting on behalf of the Community, on 19 December 2007 and 21 January 2008, entered into with Siemens SA and FIMI Srl respectively, in their capacity as coordinators of the two separate consortia of which ANKO formed part, grant agreement no 215754 for the financing of the project entitled 'Open architecture for accessible services, integration and standardisation' ('the Oasis project') and grant agreement no 215952 for the financing of the project entitled 'A complex multi-parameter system for the effective and ongoing evaluation and monitoring of motor capacity in sufferers of Parkinson's disease and other neurodegenerative illnesses' ('the Perform Project').
- 6 As stated in paragraph 3 of the judgment under appeal, the general conditions applicable both to grant agreement no 215754 for the financing of the Oasis project, and to grant agreement no 215952 for the financing of the Perform project (together, 'the grants'), are in Annex II to those agreements ('Annex II'). The General Court also stated, in paragraph 46 of the judgment under appeal, that, under point II.5(3)(d) of Annex II, following receipt of the reports mentioned in point II.4 of Annex II, the Commission may suspend payments at any time in respect of all or part of the amount earmarked for the recipient in question:
- if the works carried out are not in conformity with the terms and conditions of the grant agreement;
 - if the recipient has to reimburse to the State of which he is a national an amount which he has improperly received by way of State aid;
 - in the event of infringement of the provisions of the grant agreement, or if those provisions are suspected or presumed to have been infringed, in particular as a result of the inspection and audits provided for in points II.22 and II.23 of Annex II;
 - in the event of a suspected irregularity committed by one or more recipients in the implementation of the grant agreement at issue; and

- in the event of a suspected or established irregularity committed by one or more recipients in the implementation of another grant agreement financed by the general budget of the Union or by budgets managed by it. In such a case, payments are to be suspended where the irregularity appears to be of a serious and systematic nature likely to affect the implementation of the grant agreement at issue.
- 7 Taking the view, essentially, that there were valid reasons for suspecting a possible infringement of the grant agreements, and in particular of point II.5(3)(d) of Annex II, as a result of irregularities committed by ANKO, the Commission, by two letters of 9 August 2011, suspended payment to that company of amounts provided for by those agreements by way of preventative measure.
- 8 By application lodged at the Registry of the General Court under Article 272 TFEU and the arbitration clauses contained in the grant agreements at issue, ANKO claimed that the General Court should:
- declare the suspension of payments by the Commission under the Oasis and Perform projects to be in breach of its contractual obligations;
 - ‘order’ the Commission to pay to it the amount of EUR 637 117.17 under the Perform project, together with interest as provided for in point II.5(5) of Annex II, as from the date of service of that application;
 - ‘order’ the Commission to find that ANKO was not bound to repay to the Commission the sum of EUR 56 390 which had been paid to it under the Oasis project; and
 - order the Commission to pay the costs.
- 9 At paragraph 79 of the judgment under appeal, the General Court upheld ANKO’s plea in support of its principal form of order sought, according to which the Commission had suspended payments under the Oasis and Perform projects without any legal basis and in breach of the grant agreements relating to those projects. It likewise upheld the second form of order sought, at paragraph 93 of the judgment ‘seeking an order against the Commission to pay the amounts suspended under the Perform project without that payment prejudging the eligibility of the expenditure declared by [ANKO]’. However, it rejected the third form of order sought at paragraph 98 of the judgment under appeal.
- 10 Paragraphs 1 and 2 of the operative part of the judgment under appeal are worded as follows:
- ‘(1) orders the ... Commission to pay to ANKO ... the sums of which the payment was suspended on the basis of the third indent of point II.5(3)(d) of [Annex II] ... without such payment prejudging the eligibility of the expenditure declared by ANKO ... or the implementation of the findings of final audit report 11-INFS-0035 by the Commission. The amount of the sums to be paid shall be within the limits of the balance of the financial aid available at the time of the suspension of the payments and those sums must be increased by late-payment interest which shall start to run, in respect of each period, on expiry of the 105-day period for payment following receipt of the corresponding reports by the Commission. The interest rate applicable shall be that in force on the first day of the month of the final date for payment, as published in the *Official Journal of the European Union*, Series C;
 - (2) dismisses the action as to the remainder’.

Forms of order sought

- 11 The Commission claims that the Court of Justice should:
- suspend the operation of the judgment under appeal; and
 - order ANKO to pay the costs.
- 12 ANKO contends that the Court should:
- dismiss the application for suspension of operation; and
 - order the Commission to pay the costs.

The application for interim relief

- 13 Under the first paragraph of Article 60 of the Statute of the Court of Justice of the European Union, an appeal against a judgment of the General Court does not in principle have suspensory effect. None the less, under Article 278 TFEU, the Court may, if it considers that circumstances so warrant, order suspension of operation of the contested judgment (order of the President of the Court of Justice in *Front national and Martinez v Parliament*, C-486/01 P-R and C-488/01 P-R, EU:C:2002:116, paragraph 71).
- 14 Article 160(3) of the Rules of Procedure requires applications 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’. Accordingly, the judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant’s interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent. The court hearing the interim application must also if necessary balance the interests at stake (order of the President of the Court of Justice in *Technische Glaswerke Ilmenau v Commission*, C-404/04 P-R, EU:C:2005:267, paragraphs 10 and 11 and case-law therein cited).
- 15 The requirement that prima facie case must be established is satisfied where there is, at the stage of the interlocutory proceedings, a major legal disagreement whose resolution is not immediately obvious, so that the appeal is not prima facie without reasonable substance (see to that effect orders of the President of the Court of Justice in *Publishers Association v Commission*, 56/89 R, EU:C:1989:238, paragraph 31, and *Commission v Artegoda and Others*, C-39/03 P-R, EU:C:2003:269, paragraph 40). Since the purpose of the interim proceedings is to guarantee that the final decision to be taken is fully effective, in order to avoid a lacuna in the legal protection ensured by the Court, the court hearing the application for interim relief must restrict itself to assessing ‘prima facie’ the merits of the grounds put forward in the main proceedings in order to ascertain whether there is a sufficiently large probability of success of the action (order of the Vice-President of the Court of Justice in *Commission v Germany*, C-426/13 P(R), EU:C:2013:848, paragraph 41).
- 16 In the present case the Commission raises a single ground of appeal which is divided into five parts, based essentially on infringements of the contractual conditions applicable to the grant agreements, in particular of point II.5(3)(d) of Annex II thereto. More specifically, the first part of that ground of appeal alleges an error by the General Court in its interpretation of that provision of the contract and the application thereof in assessing the ‘serious and systematic’ nature of the irregularities at issue as a ground for suspension of the payments provided for under the grant agreements. The second part

alleges an incorrect assessment of the risk of repetition of those irregularities. The third alleges that the General Court drew incorrect inferences from certain ad hoc corrections and refunds of amounts by ANKO. The fourth part alleges that the General Court misinterpreted Annex II as regards the possibility afforded to recipients of the grant to use a method of calculation of expenditure based on average costs and to apply that possibility to notional rather than actual expenditure, as well as a distortion of the evidence in that connection. Finally, the fifth part alleges confusion by the General Court between the conditions under which payments may be suspended and the conditions governing eligibility of expenditure declared.

- 17 In that regard it should be observed that those different parts of the ground of appeal raise complex questions, the solution to which is not immediately apparent. Examination by the General Court of the dispute forming the subject matter of the challenge brought by the Commission required that Court to assess a set of elements comprising points of law and legal classification, and the appraisal and finding of the facts, all those questions being closely interlinked. Consequently, the assessment of the admissibility and merits of the pleas put forward in this appeal call for a thorough examination, with the result that the appeal must be regarded, at the stage of these interim proceedings, as not being without any prospect of succeeding on the merits.
- 18 More specifically, in the fourth part of its ground of appeal the Commission submits that, in upholding the validity of certain staff costs declared by ANKO, by reference to contractual provisions, and in particular point II.14(1), second subparagraph, of Annex II, which authorises average staff costs incurred by the provider to be taken into account under certain conditions, the General Court, at paragraphs 71 to 75 of the contested judgment, misconstrued the scope of those contractual provisions. Whilst those clauses allow recourse to be had to a method of calculation of expenditure based on an average, that is the case only where calculation of that average is carried out on the basis of actual and not notional staff expenses. Use of an 'average' under the clause in question cannot validate such notional costs, since the average must be based on actual costs. In any event, ANKO in fact produced to the General Court evidence based not on 'average' costs but on specific and individual costs. Consequently, the judgment under appeal is vitiated on the one hand by an error of law with regard to the interpretation of the contractual provisions at issue, and on the other hand by a distortion by the General Court of the evidence adduced by ANKO.
- 19 ANKO disputes the fact that the arguments deployed by the Commission under the fourth part of the ground of appeal disclose a *prima facie* case. In its view, those arguments are manifestly unfounded as regards the alleged distortion of the evidence and, as to the remainder, are inadmissible inasmuch as the Commission is in reality seeking to call into question the factual assessments made by the General Court.
- 20 Examination of this fourth part of the ground of appeal raised by the Commission in support of its appeal highlights a significant disagreement between the Commission and the General Court as to the method of calculating the costs at issue by ANKO, and therefore their classification under the provisions of the grant agreements. It therefore requires a detailed analysis, of both the contractual provisions on the basis of which the General Court upheld the method of calculation adopted by ANKO, and the evidence produced by it in that context before the General Court, which the latter is alleged to have distorted. In light of the technical nature of the abovementioned disagreement, this part of the appeal raises, at the stage of the interim proceedings, important legal questions whose solution is not immediately obvious, in particular, as regards the alleged distortion of the evidence. The appeal is not therefore without serious foundation within the meaning of the case-law cited at paragraph 15 above.
- 21 Moreover, if it is assumed that the fourth part of that ground of appeal is adjudged to be well-founded in the judgment to be handed down on the merits, it would be capable of calling into question the General Court's conclusion in paragraphs 78 and 79 of the judgment under appeal that the conditions required for point II.5(3)(d) of Annex II to apply were not met and that, consequently, the Commission

was in breach of the conditions applying to the grants by suspending payment on that footing. That would also apply to the conclusion at paragraphs 88 and 93 reached on the basis of paragraphs 78 and 79 of the judgment under appeal, under which the amounts whose payment was suspended by the Commission had to be paid to ANKO, together with interest on late payment. The *prima facie* case established with regard to the fourth part of the ground of appeal is therefore relevant in the present case for the purposes of the grant of suspension of operation sought by the Commission.

- 22 Having regard to the whole of the foregoing, it must be found that the requirement that a *prima facie* case be established has been satisfied in this case.
- 23 As regards the condition as to urgency, it is for the party seeking the adoption of interim measures to adduce evidence that it cannot await the outcome of proceedings on the merits without incurring serious and irreparable harm (see, to that effect, orders of the President of the Court of Justice in *Matra v Commission*, C-225/91 R, EU:C:1991:460, paragraph 19, and *SCK and FNK v Commission*, C-268/96 P(R), EU:C:1996:381, paragraph 30). In order to establish the existence of serious and irreparable damage, it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, it being sufficient to show that damage is foreseeable with a sufficient degree of probability (order of the Vice-President of the Court of Justice in *EMA v InterMune UK and Others*, C-390/13 P(R), EU:C:2013:795, paragraph 38 and the case-law cited).
- 24 In that connection, the Commission cites the financial loss it would incur in the event of the judgment under appeal being implemented. In order to establish the irreparable nature of that damage, it relies on the fact that the judgment is enforceable in accordance with Article 280 TFEU, and on the fact that that judgment orders it to pay to ANKO the ‘amounts in respect of which payment was suspended under point II.5(3)(d), [of Annex II]’, together with interest for late payment. It maintains that it is accordingly at risk of facing measures to enforce that order at any time. Moreover, the Commission states that, according to information that ANKO itself has communicated to it, the company is ‘on the verge of insolvency’ and is subject to insolvency proceedings in Greece from which it is apparent that it has no assets with which to satisfy its creditors.
- 25 ANKO disputes those arguments. The Commission’s allegations concerning its financial state are ‘totally without foundation’ and are based on evidence that is out of date, inaccurate and irrelevant. ANKO puts forward other evidence in support of its position that it is fully solvent and carries on business normally. Moreover, Article 1 of the Protocol on the Privileges and Immunities of the European Union annexed to the EU Treaty, the FEU Treaty and the EAEC Treaty, eliminates the risk of mandatory enforcement against the Commission without an authorisation for seizure of the assets of the Union being issued by the Court of Justice.
- 26 In that regard, it is clear from the case-law of the Court of Justice that, where the harm referred to is of a financial nature, interim measures sought are justified where, in the absence of those measures, the applicant would be in a position that would imperil its financial viability before final judgment is given in the main action, or where its market share would be affected substantially (see, to that effect, order of the President of the Court of Justice in *Camar v Commission and Council*, C-43/98 P(R), EU:C:1998:166, paragraph 36, and of the Vice-President of the Court of Justice in *EDF v Commission*, C-551/12 P(R), EU:C:2013:157, paragraph 54). However, the financial loss relied on by the Commission in the present case does not correspond to either of those two scenarios.
- 27 None the less, the financial loss that would be incurred by the Commission were the judgment under appeal to be implemented, although different from that described in the orders cited in the preceding paragraph, would be no less irreparable, regard being had to the particular circumstances of the present case if it is assumed that ANKO is in fact in a financial situation close to insolvency. In fact, in such a case the payment to ANKO of the amounts referred to in the operative part of the judgment under appeal would risk occasioning the irreversible loss of those sums to the Union budget.

- 28 Notwithstanding the rebuttals by ANKO on this point, the evidence adduced by the Commission with regard to the financial situation of the company supports its arguments. In that connection, the Commission notes, without being contradicted by ANKO, that conciliation or composition proceedings were initiated at that company's behest with its creditors. In those proceedings, the Protodikio Athinon (Court of first instance, Athens) has adjudged ANKO's financial situation to be so dire that its assets were insufficient to cover the procedural costs of a declaration of insolvency.
- 29 The Commission, without being challenged on the point by ANKO, refers to Greek insolvency legislation and specifically Article 6(2) of Law 3588/2007, under which the insolvency court is to dismiss an application made to it if it is shown that, although the conditions for a declaration of insolvency are met, the debtor's assets are not sufficient to cover the costs of the proceedings. In the event of dismissal on that ground, the insolvency court is to order registration of the name or, where appropriate, designation of the debtor at the general companies register and in the insolvency registers in order to give formal notice of the financial status of the debtor, such registration to be removed after a period of three years. The certificate issued on 20 January 2014 by the Protodikio Athinon, annexed to the application for suspension of operation, attests that, even if the proceedings initiated at the request of ANKO were not successful, and the company was not declared insolvent, a notice concerning the company was none the less entered in the general companies register and in the insolvency registers under Articles 6(2) and 8(3) of Law 3588/2007.
- 30 Consequently, that certificate, which is valid until 20 January 2017, read with Article 6(2) of Law 3588/2007, unequivocally shows that ANKO is in a financial situation that is manifestly close to insolvency, the insolvency court having taken the view that its assets were not sufficient even to cover the costs of the proceedings. It also clearly shows that the argument of that company to the effect that the certificate issued by the registry of the Protodikio Athinon merely confirms that it was not declared insolvent is of no avail. Moreover it is clear from that certificate that the entry of ANKO in the registers in question remains current.
- 31 Moreover, the evidence adduced by ANKO attesting that it is not in default of payment either of social security contributions or of taxes and continues to sign certain commercial agreements is not sufficient to invalidate the conclusion to be drawn from the certificate of the registry of the Protodikio Athinon, which the Commission has produced.
- 32 With regard to ANKO's argument that there is no immediate risk of mandatory enforcement, regard being had to Article 1 of the Protocol on the Privileges and Immunities of the European Union, the existence of the judgment under appeal is sufficient none the less to establish that the Commission cannot await the outcome of the proceedings on the merits without suffering irreparable loss, and that the occurrence of the loss relied on is foreseeable with a sufficient degree of probability, as defined in the case-law cited at paragraph 23 of this order. Just as the adoption by a Member State of legally binding measures is sufficient for the risk of loss from recovery of State aid to be foreseeable with a degree of probability sufficient to satisfy the condition relating to urgency (see, to that effect, order of the Vice-President of the Court of Justice in *France v Commission*, C-574/13 P(R), EU:C:2014:36, paragraphs 22 to 26), the enforceability of the judgment under appeal entails the same consequence in these proceedings.
- 33 As to the serious nature of the loss mentioned by the Commission, it is apparent from the claim for interim measures read as a whole, and in particular from paragraphs 5 and 6 thereof, that that loss is constituted by that institution being required, under paragraph 1 of the operative part of the judgment under appeal, to pay to ANKO the 'sums of which the payment was suspended on the basis of point II.5(3)(d), [of Annex II]', together with interest for late payment. Even if paragraph 1 of the operative part does not state the precise amount to be paid to the Commission by ANKO, the General Court essentially upheld the second head of claim formulated by the company, seeking payment of the amount of EUR 637 117.17, together with interest for late payment, as the Commission notes in its claim for interim measures.

- 34 It must be borne in mind that for the Commission, and therefore the public finances of the Union, to suffer the loss of a sum of money of this magnitude, and of an amount that is objectively not insignificant, must be regarded as constituting a serious loss for the purposes of these interim proceedings.
- 35 Consequently the condition relating to urgency is also satisfied.
- 36 Finally, as regards the balancing of competing interests, ANKO maintains that the Commission has caused it irreparable damage by depriving it of valuable liquidity during a period that was critical to its viability, when it has been successfully carrying out contracts for that institution for several years. It also emphasises the fact that the sum of money payable to it is negligible compared to the relevant Commission budget but is of much greater significance to it as an undertaking. The amount of EUR 637 117.17 represents only 0.007% of the budget allotted by the Commission solely to technology development projects carried out under the seventh framework programme for research, technological development and demonstration activities, which amounts to EUR 9.05 billion for the years 2007 to 2013. Conversely, such sum represents 0.953% of ANKO's turnover for the years 2007 to 2012, which was EUR 66 835 051.14.
- 37 In that connection, the fact that ANKO is deprived of the possibility of obtaining immediate enforcement of the contested judgment, and thus of receiving the amounts at issue without delay, is not capable of depriving it definitively or even depriving its creditors, if such be the case, of the benefit of its rights should the appeal subsequently be dismissed. Moreover, it is apparent from the operative part of the judgment under appeal that interest for late payment is payable on the principal amount, so that payment of that interest will if applicable be deemed to offset the loss attendant on a delay in the enforcement of that judgment.
- 38 Conversely, as stated at paragraph 27 of this order, immediate enforcement of the contested judgment, even before the judgment terminating the appeal proceedings is handed down, would be capable of doing irreparable damage to the Union's financial interests which the Commission defends. The suspension of operation sought is therefore necessary to ensure that any judgment setting aside the judgment under appeal would be capable of being effective.
- 39 That conclusion is not invalidated by the arguments put forward by ANKO comparing its own resources with those deployed by the Commission under the seventh framework programme for research, technological development and demonstration activities. Since there is no risk of ANKO being definitively deprived of the amounts at issue in this case, which it does not deny, whereas the Commission runs a risk, which is not insignificant, regard being had to ANKO's financial situation, of no longer being able to recover those amounts were the court to set aside the judgment under appeal, ANKO's arguments cannot lead to a finding in its favour as regards the balance of interests.
- 40 Finally, ANKO asserts that it is at risk of suffering irreparable loss if the judgment under appeal is not enforced immediately because it would be deprived of valuable liquidity during a period crucial to its viability. Admittedly, it is apparent from the examination as to urgency at paragraphs 23 to 25 of this order that ANKO is on the verge of insolvency, so that its assertion is not without credibility. None the less, it cannot be deduced therefrom that ANKO's interest in the immediate enforcement of the judgment under appeal, enabling it to obtain an amount representing by its own admission only about 1% of its turnover over the period in issue, should prevail over the interest in protecting Union finances defended by the Commission. Precisely because of the dire financial situation of ANKO, as established herein, the Union's interest in not having public money paid to a company which is at a significant risk of being unable to repay it, with interest for late payment, should the judgment terminating the appeal proceedings, or any subsequent judgment of the General Court, compel it to do so, must prevail.

- ⁴¹ In those circumstances, in the interests of the sound administration of justice, enforcement of the judgment under appeal should be suspended pending delivery of the judgment terminating the appeal proceedings.

On those grounds, the Vice-President of the Court hereby orders as follows:

- 1. Enforcement of the judgment of the General Court of the European Union in Case T-117/12 *ANKO v Commission* shall be suspended pending delivery of the judgment terminating appeal proceedings in Case C-78/14 P.**
- 2. Costs are reserved.**

[Signatures]