



## Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

9 September 2015\*

(Appeal — Contract granting Community financial assistance for a project in the field of medical collaboration — Commission decision to recover in part an advance payment made — Action for annulment — Inadmissibility)

In Case C-506/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 September 2013,

**Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro AE**, established in Athens (Greece), represented by E. Tzannini, dikigoros,

appellant,

the other party to the proceedings being:

**European Commission**, represented by S. Lejeune, acting as Agent, and E. Petritsi, dikigoros, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, A. Borg Barthet, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2015,

gives the following

\* Language of the case: Greek.

## Judgment

- 1 By its appeal, Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro AE ('Lito') seeks to have set aside the judgment of the General Court of the European Union in *Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro v Commission* (T-552/11, EU:T:2013:349, 'the judgment under appeal'), by which the General Court, first, dismissed Lito's action for annulment of a debit note issued by the European Commission on 9 September 2011 for the recovery of the sum of EUR 83 001.09 paid in the framework of Community financial assistance for a project in the field of medical collaboration ('the debit note'), and, second, upheld the counterclaim brought by the Commission for an order requiring Lito to pay that sum together with default interest.

### Background to the proceedings

- 2 The background to the case, set out in paragraphs 1 to 8 of the judgment under appeal, is as follows:
  1. The applicant[, Lito,] is a maternity hospital specialised in the fields of obstetrics, gynaecology and surgery. It is a member of a consortium which, on 12 May 2004, entered into contract C510743 with the [Commission] on a project, known as Ward In Hand (WIH) ["the WIH project"] under which the Commission agreed to pay its financial contribution in several instalments ("the contract"). The [WIH] project commenced on 1 May 2004 and came to a conclusion on 31 January 2006. Under [that] project ..., the Commission paid to [Lito], by way of European Union financial assistance, the sum of EUR 99 349.50 in total.
  - 2 Article 5(1) of the contract stipulates that it is governed by Belgian law. Furthermore, Article 5(2) thereof provides that the General Court or, in the case of an appeal, the Court of Justice, have sole jurisdiction to adjudicate in any dispute between the European Union and the members of the consortium relating to the validity, application or interpretation of the contract.
  - 3 By letter of 29 April 2009, the Commission informed [Lito] that it would be subject to an investigation, in the form of a financial audit, on account of its participation in the WIH project. It is apparent from that letter that [Lito] would be required, during that investigation, to submit the time sheets of the staff employed on [that] project. At the time of the audit, which was performed from 4 to 6 August 2009, [Lito] did not present the time sheets recording the hours worked by its staff for which it was requesting reimbursement.
  - 4 By letter of 20 October 2009, the Commission sent [Lito] the draft audit report, which stated that the time sheets were missing, and requested it to submit its observations. By emails of 13 and 16 November 2009, [Lito] sent its observations on the outcome of the audit together with time sheets relating to the work on the [WIH] project. By letter of 23 December 2009, to which the final audit report was attached, the Commission upheld the findings set out in the draft audit report.
  - 5 On 25 October 2010, the Commission sent [Lito] an information letter prior to a recovery procedure, requesting that it repay EUR 93 778.90. By letter of 15 November 2010, [Lito] asked the Commission to re-examine and approve the observations which it had previously submitted.
  - 6 By letter of 24 May 2011, after examining the evidence submitted by [Lito], the Commission acknowledged that a staff member, MV, had contributed to the [WIH] project and accepted the calculation of the working hours which she had allotted [to that] project ..., while making it clear that the contractual requirements in that regard had not been met. Furthermore, the Commission accepted accounts for the indirect costs of up to 20% of the recognised direct costs. The amount to be repaid was therefore reduced to EUR 83 001.09. [Lito] submitted observations by letter dated 17 June 2011.

- 7 Since the Commission considered that, nonetheless, [Lito's] response did not provide any new evidence capable of proving the hours worked by the other staff members in the framework of the [WIH] project, it sent to [Lito], by letter of 17 August 2011, its final observations. Finally, on 16 September 2011, the Commission sent [the debit note] to [Lito] in which it was requested to pay EUR 83 001.09 by 24 October 2011 ...
- 8 By letter of 3 November 2011, received by [Lito] on 15 November 2011, the Commission reminded [Lito] of its debt, pointing out that that debt bore interest at a rate of 5% per annum, corresponding to EUR 11.37 per day of delay, and, on 18 November 2011, the interest accrued amounted to EUR 284.25.'

### **The action before the General Court and the judgment under appeal**

- 3 By application lodged at the General Court Registry on 24 October 2011, Lito brought an action seeking the annulment of the debit note.
- 4 In its defence, lodged at the General Court Registry on 13 January 2012, the Commission introduced a counterclaim seeking an order requiring Lito to repay in part the financial contribution paid under the WIH project and to pay default interest.
- 5 The General Court held, in paragraphs 17 to 31 of the judgment under appeal, that the evidence in the case-file does not support the conclusion that the debit note is intended to produce binding legal effects going beyond those resulting from the contract and which involve the exercise of the prerogatives of a public authority conferred on the Commission in its capacity as an administrative authority. Therefore, that debit note is not among the acts whose annulment may be sought under Article 263 TFEU and the General Court, accordingly, dismissed as inadmissible the action for annulment brought by Lito.
- 6 In paragraphs 32 to 81 of the judgment under appeal, the General Court examined the counterclaim introduced by the Commission, alleging breach by Lito of its contractual obligations, in particular that set out in Article 14(1)(a) of the general conditions of the contract regarding the keeping of time sheets and the registration of hours worked by the staff on the WIH project. At the end of its examination, the Court judged that application to be well founded.
- 7 It accordingly ordered Lito to pay to the Commission EUR 83 001.09 as principal debt together with default interest of 5% due from 25 October 2011 until the principal debt is discharged.

### **Form of order sought by the parties before the Court of Justice**

- 8 Lito claims that the Court should set aside the judgment under appeal, rule on the substance of the dispute and order the Commission to pay the costs.
- 9 The Commission contends that the Court should dismiss the appeal and order Lito to pay the costs.

## The appeal

### *The first ground of appeal*

#### Arguments of the parties

- 10 By its first ground of appeal, alleging incorrect application of Article 263 TFEU, Lito argues that the General Court erred in law in holding that the content of the debit note was limited to enforcing rights which the Commission derived from the provisions of the contract, whereas it should have found that the note resulted from the Commission's making use of its prerogatives of a public authority. The debit note, which was adopted to produce binding effects in accordance with the provisions of Article 299 TFEU, constitutes an act whose legality should be examined by the EU judicature within the framework of an action for annulment on the basis of Article 263 TFEU.
- 11 In that regard, Lito recalls, first, that the Commission reserved, under Article 19(5) of the general conditions of the contract, the right to adopt an enforceable decision for the purposes of Article 299 TFEU. Given the ambiguous nature of the document at issue, recognised as such by the General Court in paragraph 29 of the judgment under appeal, Lito's action should have been allowed, in any event, in order to safeguard its right to judicial protection guaranteed in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 12 Second, the fact that, in the main text of the debit note, reference was also made to the right to avail of the procedure provided for in Article 299 TFEU should have led the General Court, pursuant to the principle of the protection of legitimate expectations, to declare Lito's action for annulment admissible.
- 13 Lito adds that, by accepting the deadline set unilaterally by the Commission in the debit note as the date from which interest is owed, the General Court accepted indirectly, in paragraphs 73 and 77 of the judgment under appeal, the debit note's enforceability and therefore that it is not a purely informative document.
- 14 The Commission is of the opinion that the first ground of appeal, which has no legal basis, must be dismissed as inadmissible. In the alternative, since the General Court referred to the reasoning followed in its order in *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro v Commission* (T-353/10, EU:T:2011:589) and since that decision has become *res judicata*, it is no longer possible to dispute the finding that the debit note is an informative preparatory measure which is unenforceable.

#### Findings of the Court

- 15 By its first ground of appeal, Lito alleges, in essence, that the General Court erred in law by holding that the debit note does not have the characteristics of a challengeable act for the purposes of Article 263 TFEU.
- 16 It is clear from settled case-law that an action for annulment for the purposes of Article 263 TFEU must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see, to that effect, judgments in *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 9, and in *Internationaler Hilfsfonds v Commission*, C-362/08 P, EU:C:2010:40, paragraph 51).

- 17 The objective of an action for annulment is to ensure observance of the law in the interpretation and application of the FEU Treaty and it would therefore be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article 288 TFEU (see, to that effect, judgment in *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 8).
- 18 The fact remains that that power of interpretation and application of the provisions of the Treaty by the EU judicature does not apply where the applicant's legal position falls within the contractual relationships whose legal status is governed by the national law agreed to by the contracting parties.
- 19 Were the EU judicature to hold that it had jurisdiction to adjudicate on the annulment of acts falling within purely contractual relationships, not only would it risk rendering Article 272 TFEU — which grants the Courts of the European Union jurisdiction pursuant to an arbitration clause — meaningless, but would also risk, where the contract does not contain such a clause, extending its jurisdiction beyond the limits laid down by Article 274 TFEU, which specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party (see, to that effect, judgment in *Maag v Commission*, 43/84, EU:C:1985:328, paragraph 26).
- 20 It follows from this that, where there is a contract between the applicant and one of the institutions, an action may be brought before the European Union judicative on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside of the contractual relationship between the parties and which involve the exercise of the prerogatives of a public authority conferred on the contracting institution acting in its capacity as an administrative authority.
- 21 In that regard, it should be noted that, in the event that an institution, specifically the Commission, chooses to allocate financial contributions by means of a contract falling within the framework of Article 272 TFEU, it is bound to stay within that framework. Accordingly, the institution is obliged, in particular, to ensure that it does not use, in the context of relationships with its counterparties, ambiguous formulations which might be understood by the parties to the contract as constituting unilateral decision-making powers going beyond the contractual provisions.
- 22 In the present case, as the General Court noted in paragraph 28 of the judgment under appeal, nothing in the case-file supports the conclusion that the Commission availed of the prerogatives which it enjoys as a public authority.
- 23 As regards specifically the debit note, it is clear from paragraphs 25 and 26 of the judgment under appeal that that note falls within the contract's scope, since the note's purpose is the recovery of a debt which is grounded on the provisions of the contract. The debit note must be understood as a formal demand for payment setting out the maturity date and also the payment terms and it cannot be equated to an enforcement order, even though it refers to enforcement pursuant to Article 299 TFEU as a possible option among others open to the Commission where a party fails to perform an obligation by the delivery date laid down.
- 24 The General Court was therefore right to conclude, in paragraph 28 of the judgment under appeal, that the debit note does not produce legal effects stemming from the exercise of the prerogatives of a public authority, but must, on the contrary, be regarded as inseparable from the contractual relationship existing between the Commission and Lito.
- 25 It follows from the above that the General Court did not err in law by holding that, in paragraph 30 of the judgment under appeal, an action could not be validly brought before that court on the basis of Article 263 TFEU.



- 26 It should, moreover, be pointed out that, irrespective of the fact that the General Court acknowledged, in paragraph 29 of the judgment under appeal, that the debit note was ambiguous, the right to effective judicial protection as guaranteed in the first paragraph of Article 47 of the Charter is not in any way affected. It is apparent from the Court of Justice's case-law that that article is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union, as is apparent also from the Explanation on Article 47 of the Charter, which must, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter (judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97, and order in *von Storch v ECB*, C-64/14 P, EU:C:2015:300, paragraph 55).
- 27 Regarding Lito's argument by which it is alleged that the General Court infringed the principle of the protection of legitimate expectations, it should be recalled that although, according to settled case-law, any economic operator to whom an institution has given justified hopes may rely on the principle of the protection of legitimate expectations that an existing situation will be maintained (see, to that effect, judgment in *Di Lenardo and Dilexport*, C-37/02 and C-38/02, EU:C:2004:443, paragraph 70 and the case-law cited) Lito has failed, however, to demonstrate how the Commission gave it such hopes in respect of the supposed admissibility of the action for annulment which it brought.
- 28 As to the argument concerning the starting date of the capitalisation of default interest, raised against paragraphs 73 to 77 of the judgment under appeal, that argument will be examined in the context of the third ground of appeal.
- 29 It follows from the above that the first ground of appeal must be rejected as unfounded.

### *The second ground of appeal*

#### Arguments of the parties

- 30 By its second ground of appeal, alleging an error of law in the application of the concept of amount unduly paid, Lito complains that the General Court misinterpreted, in paragraphs 47 to 69 of the judgment under appeal, the concept of recovery of undue payments as provided for in Article 1376 of the Belgian Civil Code and applied it erroneously to the facts of the case at issue.
- 31 First, Lito argues that the conditions for the application of Article 1376 of the Belgian Civil Code require an element of intent or mistake, a subjective element which is lacking in the present case. Second, the relevant date for considering a payment to be undue is the payment's collection date, corresponding to the delivery date of the WIH project. Lito claims that the failure to produce the time sheets cannot be equated to a failure to deliver that project.
- 32 Lito considers that the General Court was wrong to reject, in paragraph 56 of the judgment under appeal, the time sheets submitted ex post, bearing the logo of the company and thus confirming their authenticity. Lito points out that, due to the merger with companies in the group concerned, it was impossible for Lito, at the time of the audit, to recover files created electronically.
- 33 Moreover, Lito claims to have believed, in good faith, that the Commission had waived its rights, because it failed to make its views known for almost five years after the WIH project's delivery.

- 34 According to the Commission, the second, fourth to sixth and eighth grounds of appeal should be examined together so as to reject them all as inadmissible in so far as they seek a fresh assessment of the facts and evidence, do not contain either an indication of the contested facts and evidence or even a criticism of the judgment under appeal and constitute an exact reproduction of the pleas in law already put forward before the General Court.
- 35 In the alternative, the Commission claims that it is clear from paragraphs 56 to 59 of the judgment under appeal that the General Court in no way altered or misinterpreted the content of the evidence adduced when it rejected both the time sheets submitted *ex post* by Lito and the periodic progress reports sent to the Commission during the WIH project for failing to meet the contractual requirements laid down.

#### Findings of the Court

- 36 As regards the application of the concept of ‘amount unduly paid’, the General Court set out, in paragraphs 48 to 50 of the judgment under appeal, the provisions of the contract, specifically the first subparagraph of Article 13(1) and the third subparagraph of Article 14(1)(a) of the general conditions of the contract, pursuant to which Lito was required to register the working hours charged to the WIH project and to have them certified at least on a monthly basis by a person designated or authorised for that purpose.
- 37 After noting, in paragraph 51 of the judgment under appeal, the importance of commitments relating to the financial conditions, the General Court found, in paragraphs 52 and 53 of the judgment under appeal, that it is clear from the final audit report that Lito had not registered the working hours in accordance with the contractual provisions.
- 38 The General Court rejected, in paragraphs 55 and 56 of the judgment under appeal, Lito’s arguments claiming it was impossible to provide the time sheets due to the merger. In that regard, the General Court held that the time sheets submitted by Lito *ex post* were not dated or certified by a person designated for that purpose, contrary to what is expressly provided in Article 14(1)(a) of the general conditions of the contract, and therefore could not be admitted as evidence certifying the hours worked on the WIH project.
- 39 In so far as Lito puts forward, in the context of the present ground of appeal, the same argument as that already put forward at first instance, without demonstrating what the error allegedly committed by the General Court in paragraphs 55 and 56 of the judgment under appeal consisted of, it must be rejected as inadmissible in accordance with the Court of Justice’s settled case-law (see, *inter alia*, judgment in *Interporc v Commission*, C-41/00 P, EU:C:2003:125, paragraph 16).
- 40 As regards the complaint relating to the misinterpretation of the concept of recovery of undue payments, it must be rejected as unfounded.
- 41 The General Court cannot be accused of any misinterpretation of the provisions of Belgian law, for having held, in paragraph 64 of the judgment under appeal, that the submission of the time sheets is a contractual obligation in its own right, the failure to comply with which constitutes a breach of contract which may lead to the repayment of advances made.
- 42 It follows from this that the repayment of the amounts paid may be required regardless of the delivery date of the WIH project or the subjective character on which the recovery of undue payments under Belgian law is allegedly contingent.

- 43 In addition, and in accordance with the case-law cited in paragraph 27 above, Lito cannot plead infringement of the principle of protection of legitimate expectations in the absence of specific assurances from the Commission as regards to how an action for recovery of undue payments is to be treated.
- 44 It follows from the foregoing that the second ground of appeal must be rejected as being, in part, inadmissible and, in part, unfounded.

### *The third ground of appeal*

#### Arguments of the parties

- 45 By its third ground of appeal, Lito accuses the General Court of infringing the fundamental principles of EU law, specifically the right to be heard and the right to a fair trial, by ordering it, in paragraphs 73 to 77 of the judgment under appeal, to pay default interest without taking into account its arguments that the debit note, being purely informative in nature, cannot be regarded as fixing a payment deadline which if missed would lead to default interest accruing.
- 46 Lito claims that the starting point of the capitalisation of that interest is illegal since it was fixed unilaterally by the Commission in the debit note, a document that was characterised by the General Court as 'informative'. Lito adds that the General Court failed to give sufficient reasons for its assessment as regards the interest rate and starting point of the capitalisation of that interest.
- 47 The Commission recalls that the General Court put to the parties specific questions about the interest rate and took into account, in its analysis, the arguments presented by the parties.

#### Findings of the Court

- 48 It must be recalled, at the outset, that the right to be heard in the context of judicial proceedings does not mean that the court has to incorporate in full in its decision all the submissions put forward by each party. That right implies, on the contrary, that the court, after listening to those submissions and assessing the evidence, decides whether or not to grant the relief sought in the application and give reasons for its decision (see, *inter alia*, judgments in *Schröder and Others v Commission*, C-221/97 P, EU:C:1998:597, paragraph 24 and in *Technische Glaswerke Ilmenau v Commission*, C-404/04 P, EU:C:2007:6, paragraph 125).
- 49 In those circumstances, it must be ascertained whether the General Court, when ruling on the default interest in paragraphs 73 to 77 of the judgment under appeal, complied with such requirements.
- 50 In that regard, it should be observed that the General Court applied, in paragraphs 74 to 77 of the judgment under appeal, Article 19(2) of the general conditions of the contract. As is clear, in particular, from paragraph 44 of that judgment, that provision provides that default interest covers the period beginning on the day after the date fixed by the Commission, for the payment of the amount due and ending on the evening of the date of the payment of the full amount due. That provision also provides that, in the event of non-payment on the date set by the Commission, the amount due by the other party is subject to interest at the rate specified in Article 3(6) of those conditions and sets the interest rate as that applied by the European Central Bank (ECB) for its main refinancing operations increased by 3.5%.
- 51 It is undisputed that Lito failed to challenge, at any stage of the proceedings, the validity of those contractual provisions.



- 52 Furthermore, having observed, in paragraph 75 of the judgment under appeal, that the applicable interest rate was 1.5%, the General Court upheld, in view of the increase to be applied, a rate of 5%, with the default interest accruing from 25 October 2011, the day following the payment date specified in the debit note.
- 53 It follows from the above that the General Court correctly applied the contractual provisions, providing grounds for its decision to the requisite legal standard.
- 54 Consequently, the third ground of appeal must be rejected as unfounded.

#### *The fourth ground of appeal*

##### Arguments of the parties

- 55 By its fourth ground of appeal, alleging the application of incorrect legal criteria in the assessment of the evidence, Lito criticises the General Court for finding, in paragraphs 52 to 56 of the judgment under appeal, that it had not established a register of the hours worked and that the time sheets submitted did not meet the requirements of the contract, even though the time sheets transmitted *ex post* bore the company's official letter head, with the logo attesting to their original nature. By making such an assessment, the General Court made incorrect findings by misreading the content of the evidence adduced by Lito, and provided an incorrect legal characterisation of that evidence.
- 56 The General Court also erred in finding, in paragraphs 60 to 64 of the judgment under appeal, that the production of the correspondence between people who worked on the WIH project could not prove how long those people actually worked on that project, since the probative force of that correspondence stems, in particular, from the fact that the Commission relied on it in order to reduce, *a posteriori*, the amount which it requested be repaid.
- 57 Lito claims that the General Court also erred, in paragraph 61 of the judgment under appeal, in holding that it was not for that court to search through the annexes submitted by Lito for evidence which could substantiate its arguments, even though, in paragraph 63 of that judgment, it relies on the fact that the content of those annexes relates to purely administrative or organisational elements.
- 58 The Commission contends that the analysis of eligible costs by the General Court forms part of the assessment of the facts which cannot be subject to review by the Court of Justice. In any event, the General Court correctly held, in paragraph 61 of the judgment under appeal, that it is not for that court to search for evidence which could substantiate Lito's arguments in a voluminous annex which, moreover, related only to the WIH project deliverables, potentially showing that the project was correctly performed.

##### Findings of the Court

- 59 The arguments directed at paragraphs 52 to 56 of the judgment under appeal must be rejected at the outset, since those arguments, under the cloak of an alleged misinterpretation of evidence, are the same as those already raised in the context of the second ground of appeal, which have been rejected as inadmissible in paragraph 40 above.
- 60 As regards the argument relating to the examination of the annexes provided by Lito, it should be pointed out that Lito reproduces, in essence, the argument that it had already raised at first instance, as is clear, in particular, from paragraphs 61 to 63 of the judgment under appeal.

- 61 The General Court ruled that it was not obliged to analyse in detail the voluminous annexes provided by Lito, especially considering the fact that, in any event, those documents were not capable of showing the working time actually allotted to the WIH project. It added that the probative force of the correspondence adduced cannot be derived from the fact that the Commission agreed to consider as eligible the working hours recorded for one of the employees, since such a fact cannot have any impact on the evidence attesting to the hours worked by the other employees under the registration system of the working hours as provided by the contractual provisions.
- 62 It follows from the foregoing that, by its arguments, Lito merely criticises the conclusion reached by the General Court in paragraphs 62 and 63 of the judgment under appeal and seeks, in fact, a mere re-examination of the application submitted to the General Court, which falls outside the jurisdiction of the Court of Justice (see, inter alia, judgment in *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraph 50).
- 63 Consequently, that argument must be rejected as manifestly inadmissible.
- 64 As regards the criticism directed at the General Court relating to paragraph 63 of the judgment under appeal, no contradiction can be found in the General Court's reasoning, given that it was not that court which carried out an analysis of the content of the annexes provided, but that contradiction arises from particulars advanced by the Commission, which were not disputed by Lito.
- 65 The fourth ground of appeal must therefore be rejected as being, in part, inadmissible and, in part, unfounded.

#### *The fifth ground of appeal*

##### Arguments of the parties

- 66 By its fifth ground of appeal, Lito alleges that the General Court erred in law when assessing the legal nature of the time sheets.
- 67 Lito argues that, although the obligation to make periodic reports describing, in respect of each employee and each unit, the time worked on the WIH project is admittedly each company's responsibility, it cannot however result in the work provided being discounted, without creating a disproportionate or unfair obligation. Since the notion of progress report is not defined, either in EU legislation or case-law, the degree of precision required in each report must be determined on a case-by-case basis in accordance with specific needs.
- 68 The Commission recalls that, in contracts relating to programmes in receipt of financial assistance, the beneficiary is legally obliged to register and declare its costs accurately and to justify the eligibility of those costs. In that context, the Commission further states that the delivery of a project is entirely unrelated to the obligation on the beneficiary to justify the eligibility of its costs.

##### Findings of the Court

- 69 It should be noted, at the outset, that Lito merely reproduces, once more, the arguments that it already put forward at first instance, as is clear in particular from paragraph 43 of the judgment under appeal.
- 70 Furthermore, although Lito criticises the General Court's reasoning by citing the principle of proportionality, it does not, however, specify which points of the grounds of the judgment under appeal are the object of that complaint.

- 71 In those circumstances, the Court of Justice is not in a position to perform the task required of it in an appeal and to carry out its review of legality (see order in *Greinwald v OHIM*, C-608/12 P, EU:C:2014:394, paragraph 28).
- 72 Consequently, the fifth ground of appeal must be rejected as inadmissible.

### *The sixth ground of appeal*

#### Arguments of the parties

- 73 By its sixth ground of appeal, alleging infringement of the right to a fair trial and procedural rules guaranteeing the rights of defence and equality of arms between the contracting parties, Lito criticises the General Court for deciding, in a totally arbitrary fashion, in paragraph 56 of the judgment under appeal, that the time sheets included by Lito in the annexes did not meet the requirements set out in the contractual provisions and, in paragraph 63 of the judgment under appeal, that those time sheets were not sufficient to demonstrate the working time actually allotted to the WIH project.
- 74 Due to the fact that the Commission unilaterally considered that the time sheets produced could not alone establish the hours worked on that project and that the General Court followed that reasoning by relying on the contractual provisions, Lito finds itself at a disadvantage in relation to that institution, which would be, in the present dispute, both judge and interested party. It follows from this that the contractual provisions are unfair and contrary to the principle of proportionality.
- 75 The Commission considers that the General Court properly assessed, on the basis of the contractual provisions between the parties, all the evidence submitted, respecting the rights of the defence and also the principle of equality of arms between the parties.
- 76 As regards the alleged unfairness of the conditions of the contract and their non-compliance with the principle of proportionality, the Commission contends that those claims have been made for the first time on appeal and must therefore be dismissed as inadmissible.

#### Findings of the Court

- 77 As regards the sixth ground of appeal, which is, once more, directed at paragraphs 56 and 63 of the judgment under appeal, which have already been analysed within the context of the second and fourth grounds of appeal, suffice it to recall that the General Court did take account of the correspondence put into evidence by Lito, but considered that correspondence inadequate on the grounds that it was not capable of demonstrating, in accordance with the contractual provisions, the working time actually allotted by Lito's employees to the WIH project.
- 78 In those circumstances, the General Court cannot be criticised for having adopted an arbitrary decision in breach of the requirements of the right to a fair trial.
- 79 As regards the complaint that the contractual provisions are disproportionate or unfair, it should be noted that Lito did not, at any stage of the proceedings, call into question the validity of the applicable contractual provisions between the parties.
- 80 In claiming, in the context of the present appeal, that those contractual provisions are unfair and contrary to the principle of proportionality, Lito invokes for the first time, before the Court of Justice, a plea in law which was not raised before the General Court.

- 81 In an appeal, the jurisdiction of the Court of Justice is in principle confined to a review of the findings of law on the pleas argued at first instance (see, inter alia, judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 95 and the case-law cited).
- 82 It follows from the foregoing that the sixth ground of appeal must be rejected as being, in part, inadmissible and, in part, unfounded.

### *The seventh ground of appeal*

#### Arguments of the parties

- 83 By its seventh ground of appeal, alleging an error of law in the assessment of the legal nature of the methods for the calculation of costs, Lito claims, after setting out the various models for calculating the eligible costs, that the debit note must be annulled due to the fact that the full costs method, under which flat-rate, general fees are deducted, is not taken into account therein.
- 84 The Commission contends that Lito's arguments are not such as to call into question the General Court's reasoning in the judgment under appeal.

#### Findings of the Court

- 85 It should be noted, as is clear from paragraph 42 of the judgment under appeal, that the Commission's counterclaim was based, first, on Lito's failure to fulfil its obligation to keep time sheets in accordance with Article 14(1)(a) of the general conditions of the contract and, second, on the fact that Lito relied, mistakenly, on the full costs method for the calculation of the indirect costs charged to the WIH project.
- 86 Given that the General Court upheld, in paragraphs 47 to 64 of the judgment under appeal, the merits of the counterclaim on the basis of its first plea, there was no need to examine the argument based on the full costs method.
- 87 Accordingly, Lito's complaint relating to the assessment of the legal nature of the methods for the calculation of costs must be rejected given that it is not capable of leading to the judgment under appeal being set aside.
- 88 Consequently, the seventh ground of appeal must be rejected as ineffective.

### *The eighth ground of appeal*

#### Arguments of the parties

- 89 By its eighth ground of appeal, Lito complains that the General Court erred in law by not finding the Commission's conduct to be unfair, in that the latter requested that the sums paid be repaid even though, in its letter of 24 May 2011, it accepted that the WIH project benefitted from permanent and effective work. According to Lito, the fact that it was not able to provide the time sheets when the audit was carried out cannot be equated to a failure to perform the essential obligations under the contract, consisting of the delivery of the WIH project.
- 90 The Commission considers that the contractual provisions, to which Lito voluntarily submitted itself when the contract was concluded, are in no way unfair or contrary to the principle of proportionality.

## Findings of the Court

- 91 It is important to note, at the outset, that, in its eighth ground of appeal, Lito merely reproduces the arguments which it already put forward before the General Court, without, however, specifying the contested elements of the judgment which it seeks to have set aside, or the legal arguments specifically advanced in support of the appeal. Accordingly, Lito merely seeks, in reality, reconsideration of the application submitted before the General Court, which falls outside the jurisdiction of the Court of Justice (see, *inter alia*, judgment in *Eurocoton and Others v Council*, C-76/01 P, EU:C:2003:511, paragraphs 46 and 47).
- 92 Consequently, the eighth ground of appeal must be rejected as inadmissible.
- 93 In any event, the argument must also be rejected as unfounded.
- 94 It should be noted that, according to settled case-law, the misuse of powers is the adoption by an institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (judgments in *United Kingdom v Council*, C-84/94, EU:C:1996:431, paragraph 69; in *Windpark Groothusen v Commission*, C-48/96 P, EU:C:1998:223, paragraph 52, and *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 75).
- 95 Accordingly, the misuse of powers is one of the elements against which the EU judicature examines the legality of the contested measure in an action for annulment on the basis of Article 263 TFEU (see, to that effect, judgment in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 3).
- 96 By contrast, in the context of an action brought on the basis of Article 272 TFEU, the applicant can only complain that the institution party to the contract infringed the terms of the contract or of the law applicable to it (see, to that effect, judgment in *Commission v Zoubek*, 426/85, EU:C:1986:501, paragraph 11).
- 97 It follows from this that the ground for annulment alleging misuse of powers by the Commission, and requesting the General Court to rule on the lawfulness of the contested measure in the light of the Treaty rules, must be rejected as inadmissible.
- 98 However, in the event that the eighth ground of appeal were to be understood as alleging that the Commission behaved unfairly in its contractual relations with Lito, it would have to be held that Lito did not challenge, at any point in the proceedings, the General Court's interpretation of the contractual provisions in paragraphs 48 to 53 of the judgment under appeal or the Commission's particulars concerning the amount for which reimbursement is requested, as is clear from paragraph 65 of the judgment under appeal.
- 99 Furthermore, Lito's claim that the delivery of the WIH project is in fact the essential obligation of the contract cannot lead to the conclusion that the Commission behaved unfairly, since the General Court held, in paragraph 64 of the judgment under appeal, that Lito had failed in its obligation to keep time sheets and register the hours worked by staff, in accordance with Article 14(1)(a) of the general conditions of the contract.
- 100 Accordingly, the eighth ground of appeal must be rejected as inadmissible and, in any event, as unfounded.



*The ninth ground of appeal*

Arguments of the parties

- 101 By its ninth ground of appeal, alleging failure to state reasons, Lito criticises the General Court for not finding that the debit note was wholly lacking in any basis, since the reference to the e-mails of 24 May 2011 and 17 August 2011 was insufficient in that respect.
- 102 The Commission contends that Lito's arguments must be rejected as unfounded.

Findings of the Court

- 103 By its ninth ground of appeal, Lito criticises, in essence, the General Court for failing to rule on the second plea in the action for annulment at first instance concerning the failure to give grounds for the debit note.
- 104 First, it should be noted that the argument alleging failure to state reasons on the basis of Article 296 TFEU cannot be admitted as part of an action brought pursuant to Article 272 TFEU.
- 105 Second, it should be noted that when analysing the merits of the counterclaim, the General Court, in paragraphs 65 to 69 of the judgment under appeal, checked the calculation of the amount claimed by the Commission, on the basis of information supplied by the latter, which was not disputed by Lito.
- 106 Furthermore, the General Court held, in paragraphs 70 to 72 of the judgment under appeal, that the Commission had duly specified the repayment terms and date of payment of the sums claimed, in so far as they resulted from both the letter of 24 May 2011 and the information contained in the debit note itself, under the heading 'Payment terms'.
- 107 It follows from this that the General Court cannot be accused of having erred in law in relation to the obligation to state reasons and the ninth ground of appeal must accordingly be rejected as unfounded.

*The tenth ground of appeal*

Arguments of the parties

- 108 By its tenth and final ground of appeal, alleging infringement of the principle of protection of legitimate expectations, Lito criticises the General Court for not finding that the Commission punished its mere formal deviations from the procedure to be followed by claiming, five years after the closure of the program at the origin of the WIH project, the repayment of the amounts paid, notwithstanding the fact that the research was carried out in good faith and the financial assistance was received in accordance with the contractual obligations.
- 109 The Commission recalls that the object of the dispute is not the WIH project run by Lito, but the latter's observance of its obligations relating to the determination of eligible expenditure. Furthermore, the Commission denies having given Lito any legitimate expectations.

## Findings of the Court

- 110 As regards the principle of protection of legitimate expectations, as emerges from the case-law recalled in paragraph 27 above, suffice it to state that Lito failed to demonstrate how the Commission gave it expectations regarding the application of methods for determining the eligible expenditure which were different to those agreed to in the contract.
- 111 Lito's argument in that regard must therefore be rejected as unfounded.
- 112 As regards the period within which the Commission may claim repayment of the sums paid, it should be noted, as is apparent from paragraph 79 of the judgment under appeal, that if the Commission may, in accordance with Article 17(1) of the general conditions of the contract, carry out an audit of one of the participants within five years of the closure of the programme in question, it may, *a fortiori*, validly claim the repayment of amounts paid within that period.
- 113 In addition, by relying on the research which it carried out in good faith in the framework of the WIH project, Lito is once again attempting to hide the fact that the present dispute relates only to the alleged breach of the obligation to keep time sheets and register the hours worked by the staff, as provided for in Article 14(1)(a) of the general conditions of the contract.
- 114 Lito's arguments must therefore be rejected as unfounded.
- 115 Accordingly, Lito's tenth and last ground of appeal must be rejected as unfounded.
- 116 It follows from all the foregoing that none of the grounds put forward by Lito in support of its appeal can succeed.
- 117 The appeal must therefore be dismissed in its entirety.

## Costs

- 118 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Lito has been unsuccessful and the Commission has applied for costs to be awarded against it, Lito must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro AE to pay the costs.**

[Signatures]