Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

22 May 2019*

(Seventh Framework Programme for research, technological development and demonstration activities — Recommendation 2003/361/EC — Decision of the Commission's Validation Panel on qualification as a micro, small and medium-sized business — Request for review under sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838/EU, Euratom — No administrative appeal within the meaning of Article 22 of Regulation (EC) No 58/2003 — Rights of the defence — Principle of sound administration — Legal certainty — Legitimate expectations — *Res judicata* — Criteria for the definition of micro, small and medium-sized businesses in EU policies — Concept of an 'enterprise' — Concept of an 'economic activity' — Criterion of independence — Obligation to state reasons)

In Case T-604/15,

European Road Transport Telematics Implementation Coordination Organisation — Intelligent Transport Systems & Services Europe (Ertico — ITS Europe), established in Brussels (Belgium), represented by M. Wellinger and K. T'Syen, lawyers,

applicant,

v

European Commission, represented initially by R. Lyal and M. Clausen, and subsequently by R. Lyal and A. Kyratsou, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU seeking annulment of the decision of the Validation Panel of 18 August 2015 provided for under section 1.2.7 of the Annex to Commission Decision 2012/838/EU, Euratom of 18 December 2012 on the adoption of the Rules to ensure consistent verification of the existence and legal status of participants, as well as their operational and financial capacities, in indirect actions supported through the form of a grant under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities and under the Seventh Framework Programme of the European Atomic Energy Community for nuclear research and training activities (OJ 2012 L 359, p. 45), in so far as that decision concludes that the applicant does not qualify as a micro, small or medium-sized enterprise within the meaning of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36),

THE GENERAL COURT (Fourth Chamber),

composed of H. Kanninen, President, L. Calvo-Sotelo Ibáñez-Martín and I. Reine (Rapporteur), Judges,

Registrar: C. Heeren, Administrator,

* Language of the case: English.

having regard to the written procedure and further to the hearing on 4 October 2017,

gives the following

Judgment

Background to the dispute

1 The applicant, European Road Transport Telematics Implementation Coordination Organisation — Intelligent Transport Systems & Services Europe (Ertico — ITS Europe), established in 1991, is a cooperative limited liability company governed by Belgian law. It provides a multisectoral platform to both private and public stakeholders in the intelligent transport systems and services sector. Its statutes state that its objects are to encourage, promote and help to coordinate the implementation of advanced transport telematics in European transport infrastructure.

2 Since 31 December 2006, the applicant had been considered to be a micro, small or medium-sized enterprise ('an SME') within the meaning of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36). That status enabled the applicant to receive, for several years, additional subsidies from the European Union, in particular within the context of the Seventh Framework Programme of the European Community for research, technological development and demonstration services (2007-2013) ('the FP7').

3 In December 2013, in a review of the SME status of participants in existing research programmes, the Research Executive Agency ('the REA'), in its capacity as the validation service for the SME status of participants, requested that the applicant provide information proving that it should still be entitled to SME status. Following a series of emails, the REA decided, on 27 January 2014, that the applicant could not be regarded as an SME.

4 By email of 7 February 2014, the applicant contested the REA's position and attached two legal opinions prepared by independent, external lawyers.

5 By email of 24 February 2014, the REA informed the applicant that it could request a review of the decision of 27 January 2014 before the validation panel under sections 1.2.6 and 1.2.7 of the Annex to Commission Decision 2012/838/EU, Euratom of 18 December 2012 on the adoption of the Rules to ensure consistent verification of the existence and legal status of participants, as well as their operational and financial capacities, in indirect actions supported through the form of a grant under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities and under the Seventh Framework Programme of the European Atomic Energy Community for nuclear research and training activities (OJ 2012 L 359, p. 45) ('the Validation Panel').

6 By email of 25 February 2014, the applicant requested that the REA refer the case for review by the Validation Panel.

7 On 15 April 2014, the REA informed the applicant of the decision of the Validation Panel confirming the decision of the REA of 27 January 2014 ('the first negative decision').

8 On 23 June 2014, the applicant brought an action against the first negative decision before the Court, registered as Case T-499/14. That action was brought against both the European Commission and the Validation Panel.

9 On 18 November 2014, the applicant was informed by the REA of the Validation Panel's decision to withdraw the first negative decision pending the adoption of a new decision relating to the applicant's SME status. That withdrawal was explained by the fact that the first negative decision had not explicitly addressed the arguments raised by the applicant in its email of 7 February 2014. Following that withdrawal, the Court found that the action in Case T-499/14 had become devoid of purpose and decided, by order of 30 April 2015, *Ertico — ITS Europe* v *Commission* (T-499/14, not published, EU:T:2015:285), that there was no longer any need to adjudicate on the action.

10 On 18 August 2015, the Validation Panel adopted a new decision ('the contested decision') in which it concluded, on the basis of an amended version of the argument adopted in the first negative decision, that the applicant was not entitled to SME status.

Procedure and forms of order sought

11 By application lodged at the Court Registry on 27 October 2015, the applicant brought the present action.

12 The Commission lodged its defence at the Court Registry on 5 February 2016.

13 The applicant lodged a reply at the Court Registry on 18 April 2016.

14 By decision of the President of the General Court of 15 June 2016, owing to the partial renewal of terms of office in the Court, the present case was assigned to a new Judge-Rapporteur.

15 The Commission lodged a rejoinder at the Court Registry on 15 June 2016.

16 As a result of changes in the composition of the Chambers of the General Court pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was accordingly allocated.

17 Pursuant to Article 89 of the Rules of Procedure, the Court put written questions to the Commission on 30 November 2016 and 25 July 2017 by way of measures of organisation of procedure. The Commission replied to those questions within the prescribed time limit.

18 On 27 January 2017, the Court also put a written question to the applicant by way of a measure of organisation of procedure. The applicant replied to that question within the prescribed time limit.

19 By decision of 25 July 2017, the President of the Fourth Chamber of the Court decided to open the oral part of the procedure, despite none of the parties having requested that it do so.

20 At the hearing on 4 October 2017, the parties presented oral argument and replied to the questions put by the Court.

21 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

22 The Commission contends that the Court should:

– dismiss the action as inadmissible;

– dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

23 In support of its action, the applicant relies on eight pleas in law, alleging, first, infringement of the third subparagraph of Article 22(1) of Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ 2003 L 11, p. 1), second, infringement of Article 22 of that regulation and of the rights of the defence and breach of the principle of sound administration, third, breach of the principles of legal certainty, sound administration, the protection of legitimate expectations and *res judicata*, fourth, infringement of Recommendation 2003/361, fifth, infringement of Recommendation 2003/361 and breach of the principles of legal certainty and sound administration, including the requirement of impartiality, sixth, misapplication of Recommendation 2003/361, seventh, breach of the most favourable treatment principle and, eighth, a contradictory and inadequate statement of reasons in the contested decision.

24 It should be noted that the Commission asks the Court in its first head of claim to declare the action inadmissible. However, it is apparent from the defence that that first head of claim relates solely to the assessment of the applicant's first plea in law seeking annulment of the contested decision. Accordingly, it is appropriate to rule on that question while analysing the first plea.

The first plea in law, alleging infringement of the third subparagraph of Article 22(1) of Regulation No 58/2003

Arguments of the parties

25 The applicant submits that, under the third subparagraph of Article 22(1) of Regulation No 58/2003, which is expressly referred to in sections 1.2.6 and 1.2.7 of the Annex to Commission Decision 2012/838, the Commission had a period of two months, starting on the date on which the request for review of the validation services' decision was lodged, within which to issue its decision. Therefore, taking into account the fact that the applicant had lodged its request for review by the Validation Panel on 25 February 2014, the applicant maintains that the Commission had to take its decision by 25 April 2014 at the latest. The Commission adopted the contested decision more than one year after that date, and therefore failed to respect that time limit. Moreover, the Commission's failure to respond within the two-month period is not tantamount to an implicit rejection of the applicant's request, given that, on 15 April 2014, the Validation Panel adopted its first negative decision, which was subsequently withdrawn.

26 The applicant asserts that sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 and Article 22 of Regulation No 58/2003 refer to one and the same review procedure. Furthermore, in its email of 24 February 2014, the REA referred only to the review procedure envisaged in sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838, and makes no reference to any review under Article 22 of Regulation No 58/2003, which means that they were not regarded as separate review procedures.

27 The Commission disputes the applicant's arguments.

Findings of the Court

28 In order to examine the alleged infringement of Article 22 of Regulation No 58/2003, it is appropriate, first of all, to establish that that provision is applicable in the present case, which is contested by the Commission. This involves considering whether sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 and Article 22 of Regulation No 58/2003 refer to one and the same review procedure, as is maintained by the applicant. If that is not the case, it will be appropriate to determine whether the applicant's request for review by the Validation Panel is actually within the scope of the procedure envisaged under Article 22 of Regulation No 58/2003.

29 In that regard, in the first place, it is indeed the case that paragraph 2 of section 1.2.6 of the Annex to Decision 2012/838 contains a footnote which explains that, under Article 22 of Regulation No 58/2003, acts of an executive agency can be referred to the Commission for a review of their legality. However, a mere reference to such an appeal procedure cannot be interpreted, in isolation and without any further supporting explanation, as an indication that the appeal procedures provided for respectively in sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 and in Article 22 of Regulation No 58/2003 are one and the same and form a single remedy.

30 On the contrary, it is apparent from both the wording and the context of, first, sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 and, second, Article 22 of Regulation No 58/2003 that those provisions relate to separate appeal procedures. Those two appeal procedures differ both in terms of their respective procedures and their natures. Accordingly, the appeal provided for under Article 22 of Regulation No 58/2003 must be brought before the Commission. It is subject to strict time limits and constitutes a limited review of the lawfulness of the act referred, but does not empower the Commission to vary that act itself. On the other hand, requests for review by the Validation Panel are not subject to any procedural requirements and must be sent to the validation services — in the present case, the REA, which has a separate legal personality from that of the Commission — pursuant to Article 4(2) of Regulation No 58/2003. Further, no time limit is provided for the lodging of such an appeal. Lastly, the decision of the Validation Panel involves a complete review of the decision submitted to it, both in terms of the law and the facts.

31 It is apparent from the foregoing that those two remedies are separate.

32 Therefore, taking account of the separate nature of the appeal procedures provided for in sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 and in Article 22 of Regulation No 58/2003, it is necessary to examine, in the second place, whether, having regard to the particular circumstances in the present case, the applicant actually brought its request for review under the procedure referred to in Article 22 of Regulation No 58/2003 and whether, as a result, its arguments that the contested decision was adopted out of time can be upheld.

33 In that regard, first, it must be found that, as is stated in paragraph 6 above, the applicant requested by email of 25 February 2014 that the case be reviewed by the Validation Panel. Rather than being submitted to the Commission, that request was sent to the REA in accordance with paragraph 2 of section 1.2.6 of the Annex to Decision 2012/838.

34 As is pointed out in paragraph 30 above, requests for a review of lawfulness that form the subject of the first subparagraph of Article 22(1) of Regulation No 58/2003 are referred to the Commission, rather than to the REA. Therefore, it must be concluded that the applicant's request for review was not lodged under the latter provision (see, to that effect, order of 27 March 2017, *Frank* v *Commission*, T-603/15, not published, EU:T:2017:228, paragraphs 56 and 57), but rather under paragraph 2 of section 1.2.6 of the Annex to Decision 2012/838.

35 Second, under the procedure provided for in paragraph 3 of section 1.2.6 of the Annex to Decision 2012/838, the validation services are to acknowledge receipt of the request for a review by the Validation Panel. In the present case, it is apparent from the documents before the Court that, on 8 March 2014, the REA, which was the relevant validation service, acknowledged receipt of the applicant's request for review and informed it that its case had been submitted to the Validation Panel in accordance with Decision 2012/838, making reference to section 1.2.7 of the Annex to that decision. No reference was made to Article 22 of Regulation No 58/2003. Moreover, in the same email, the REA stated that the procedure before the Validation Panel would not involve the applicant, which was consistent with the provisions of sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838. However, as the applicant maintains, Article 22 of Regulation No 58/2003 required that the interested party be heard before any decision is taken. The applicant did not approach the REA and claim that the latter provision had been infringed.

36 If the applicant had believed that its appeal had been lodged under paragraph 3 of Article 22 of Regulation No 58/2003, the circumstances should have led it to question, and even to seek further information on, why it had been recategorised and why its request was being dealt with by the REA rather than by the Commission (see, to that effect, order of 27 March 2017, *Frank* v *Commission*, T-603/15, not published, EU:T:2017:228, paragraphs 58 and 59). Consequently, the applicant cannot claim that the factual context accounted for its mistake, without carelessness or negligence on is part, as to the fact that the Commission had not issued a decision in response to its request under Article 22 of Regulation No 58/2003 (see, to that effect, order of 27 March 2017, *Frank* v *Commission*, T-603/15, not published, EU:T:2017:228, paragraph 60).

37 Third, in the contested decision, the Validation Panel carried out a complete review of the substance of the REA's decision of 27 January 2014. That approach is consistent with section 1.2.7 of the Annex to Decision 2012/838, which provides that the panel is to review and decide on the validation cases referred to it. However, as is noted in paragraph 30 above, under Article 22(3) of Regulation No 58/2003, the Commission can only 'uphold the executive agency's act or decide that the agency must modify it either in whole or in part' and cannot itself vary the act.

38 It follows from the foregoing that the applicant's request for review was lodged under sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 and was governed by those provisions.

39 Moreover, the applicant cannot rely on the fact that, in its email of 24 February 2014, the REA failed to mention that it was possible to lodge an appeal under Article 22 of Regulation No 58/2003, despite it being obliged to do so if that appeal was separate from the review procedure before the Validation Panel.

40 In that regard, even if REA had been obliged to set out the available remedies, it must be found that, in that email of 24 February 2014, the REA did make clear to the applicant that sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 were applicable and that, in accordance with those provisions, if the applicant wanted the REA's position to be reviewed, the REA had to refer the case to the Validation Panel.

41 That remedy allows the applicant to have the decision referred to the Validation Panel reviewed in its entirety, both in terms of the law and the facts, and is not limited to a review of lawfulness.

42 It follows from the foregoing that Article 22 of Regulation No 58/2003 is not applicable in the present case. Consequently, the applicant's arguments alleging that the Commission infringed the third subparagraph of Article 22(1) of that regulation must be rejected, without it being necessary to rule on the admissibility of the action, as relied on by the Commission in the event that it were found that that provision did apply. Therefore, the first plea in law must be rejected as ineffective.

The second plea in law, alleging infringement of Article 22(1) of Regulation No 58/2003 and infringement of the applicant's rights of defence and breach of the principle of sound administration

Arguments of the parties

43 The applicant claims that it was not heard by the Validation Panel either prior to the adoption of the contested decision or prior to the adoption of the first negative decision, which was withdrawn, despite the Validation Panel being obliged to hear it under Article 22(1) of Regulation No 58/2003. The applicant submits that that irregularity is all the more unacceptable considering that the contested decision is based on new arguments entirely different from those relied upon in the first negative decision and from those relied upon by the REA in its negative decision of 27 January 2014. In particular, the matter of whether the applicant was a genuine and independent SME was not mentioned in the Validation Panel's first negative decision.

44 Consequently, the applicant asserts that the Validation Panel infringed the applicant's rights of defence and breached the principle of sound administration. The applicant adds that the principle of observance of the rights of the defence is a fundamental principle of EU law which must be guaranteed in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person even in the absence of any specific rules.

45 The Commission disputes the applicant's arguments.

Findings of the Court

46 First, it should be borne in mind that, according to settled case-law, observance of the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in an act adversely affecting that person, a fundamental principle of EU law which must be guaranteed, even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (see, to that effect, judgments of 15 June 2006, *Dokter and Others*, C-28/05, EU:C:2006:408, paragraph 74 and the case-law cited, and of 9 April 2003, *Forum des migrants* v *Commission*, T-217/01, EU:T:2003:106, paragraph 56). Nevertheless, that obligation does not apply to a mere restatement, redrafting or development of a point already made in respect of which the addressee of the decision at issue previously had the opportunity effectively to make known his views (see, to that effect and by analogy, judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 194).

47 Furthermore, it must be recalled that the right to be heard in all proceedings is affirmed not only in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure observance of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter of Fundamental Rights provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (judgments of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 29, and of 15 December 2016, *Spain* v *Commission*, T-466/14, EU:T:2016:742, paragraph 40).

48 Lastly, in order for an infringement of the rights of the defence to be capable of resulting in annulment of the contested decision, it must be established that, had it not been for such an irregularity, the outcome of the procedure might have been different. The burden of proof in that regard falls upon the applicant, since any infringement of the rights of the defence constitutes a procedural defect, which

means that the party concerned must demonstrate the specific prejudice to its individual rights caused by the breach (see, to that effect, judgment of 4 September 2009, *Italy* v *Commission*, T-211/05, EU:T:2009:304, paragraphs 45 and 59 and the case-law cited).

49 It is in the light of those principles that the second plea in law raised in the present action must be examined.

50 As a preliminary point, taking into account the findings relating to the first plea in law and the non-applicability of Article 22(1) of Regulation No 58/2003, as established in paragraph 42 above, the applicant's arguments relating to the infringement of that provision, in so far as the Validation Panel failed to hear the applicant before adopting the contested decision, should be rejected.

51 In addition, it must be found that sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838, which are applicable in the present case, do not set out any right for the parties concerned to be heard by the Validation Panel.

52 However, in accordance with the case-law cited in paragraphs 46 and 47 above, the obligation to observe the applicant's rights of defence and the principle of sound administration apply even in the absence of any particular provision to that effect. It follows that the applicant had to be placed in a position in which it could effectively make known its views prior to the adoption of the contested decision, notwithstanding the fact that no such right was granted to it under sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838. The parties agree that the applicant was not heard by the REA or the Validation Panel after its case was submitted to the latter.

53 Therefore, it should be examined whether, in accordance with the case-law cited in paragraph 46 above, the contested decision is based on new points in respect of which the applicant has not had the opportunity effectively to make known its views during the procedure before the REA.

54 In that context, it should be recalled that the contested decision is based on two grounds.

55 With regard to the first ground, it is apparent from point 2.2 of the contested decision that the Validation Panel does not consider the applicant to be regularly engaged in economic activities carried out for remuneration in a given market. Consequently, it was concluded that the applicant was not an enterprise within the meaning of Article 1 of the Annex to Recommendation 2003/361.

56 The second ground, set out in point 2.3 of the contested decision, is that, while none of the applicant's members owned 25% or more of the its capital or voting rights and it therefore formally satisfied the independence criterion set out in Recommendation 2003/361, from an economic standpoint, the applicant did not satisfy those criteria, given that it belonged de facto to a large economic group. As a consequence, it does not have to contend with the handicaps usually faced by SMEs.

57 Turning to the first ground of the contested decision, during the procedure before the REA, the REA requested in its email of 13 December 2013 that the applicant clarify the activities generating its turnover and, in particular, whether that turnover resulted from the provision of services or products on a competitive market. The REA also asked the applicant what portion of its income came from, inter alia, subsidies, membership fees and donations. It should be noted that that email precedes not only the REA's decision of 27 January 2014, but also the Validation Panel's first negative decision and the contested decision.

58 The applicant answered the REA's questions in its email of 31 December 2013. In response to those answers, on 3 January 2014, the REA raised doubts with regard to the applicant's assertion that, for the purposes of qualifying as an enterprise within the meaning of Article 1 of the Annex to

Recommendation 2003/361, certain income came from an economic activity. Further, between 20 and 24 January 2014, the applicant had a telephone conversation with the REA in order to discuss this matter.

59 Concerning the second ground of the contested decision, it is apparent from the REA's decision of 27 January 2014 that the purpose of the independence criterion in Recommendation 2003/361 is to ensure that the measures intended for SMEs benefit enterprises for which size represents a handicap. In that respect, the REA concluded that, as the applicant's size did not represent a handicap for it, it did not qualify as a genuine SME.

60 Before the case was submitted to the Validation Panel, the applicant expressed its views in that regard by means of two legal opinions prepared by independent, external lawyers, which were attached to its email of 7 February 2014 and dealt with this matter. It is also apparent from the documents before that Court that those legal opinions were analysed by the Validation Panel once they had been submitted to it by the REA.

61 In addition, it should be noted that the first negative decision was withdrawn on the ground that it did not explicitly address the arguments raised by the applicant in its email of 7 February 2014. Therefore, the contested decision sought precisely to examine in more detail the arguments raised by the applicant before the REA, including those alleging that the applicant qualified as a genuine and independent SME.

62 It follows that the contested decision covers matters discussed during the administrative procedure before the REA during which the applicant had the opportunity to express a view, as is apparent from paragraphs 57 to 60 above. The relevant discussions took place long before the applicant's case was submitted to the Validation Panel. Thus, the contested decision contains responses to the arguments raised by the applicant during the administrative procedure; such responses were absent in the first negative decision, which caused that decision to be withdrawn. Consequently, the contested decision is not based on new points in relation to which the applicant was not placed in a position allowing it effectively to make known its views.

63 In any event, it is apparent from the case-law cited in paragraph 48 above that, in order for an infringement of the rights of the defence to be capable of resulting in annulment of the contested decision, it must be established that, had it not been for such an irregularity, the outcome of the procedure might have been different, which is for the applicant to prove. It is sufficient to find that the applicant has advanced no arguments to that effect.

64 In the light of the foregoing, it is necessary to reject the applicant's arguments alleging infringement of the rights of the defence and breach of the principle of sound administration.

65 Accordingly, the second plea in law is rejected.

***The third plea in law, alleging breach of the principles of legal certainty, sound administration, the protection of legitimate expectations and* res judicata**

The first part of the third plea in law, alleging breach of the principles of legal certainty, sound administration and the protection of legitimate expectations

– Arguments of the parties

66 The applicant claims that, by substituting an entirely new statement of reasons for its original statement of reasons in the first negative decision, despite there being no new and material facts that had to be taken into account, the Validation Panel breached the principles of legal certainty, sound administration and the protection of legitimate expectations. The applicant maintains that, following the withdrawal of the first negative decision, the procedure should have been resumed at the stage preceding the adoption of the REA's negative decision of 27 January 2014.

67 The Commission disputes the applicant's arguments.

– Findings of the Court

68 The principle of legal certainty — which is one of the general principles of EU law, whose corollary is the principle of the protection of legitimate expectations — requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (see judgments of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 100 and the case-law cited; of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel*, C-231/15, EU:C:2016:769, paragraph 29; and of 15 December 2016, *Spain* v *Commission*, T-808/14, not published, EU:T:2016:734, paragraph 193).

69 According to settled case-law, the principle of the protection of legitimate expectations is among the fundamental principles of EU law. The right to rely on that principle extends to any person with regard to whom an institution of the European Union has given rise to justified hopes. In whatever form it is given, information which is precise, unconditional and consistent, comes from authorised and reliable sources and is provided to the interested party by competent EU authorities constitutes assurances capable of giving rise to such hopes (see judgments of 14 June 2016, *Marchiani* v *Parliament*, C-566/14 P, EU:C:2016:437, paragraph 77 and the case-law cited, and of 12 January 2017, *Timab Industries and CFPR* v *Commission*, C-411/15 P, EU:C:2017:11, paragraph 134 and the case-law cited; and of 26 September 2014, *B&S Europe* v *Commission*, T-222/13, not published, EU:T:2014:837, paragraph 47).

70 It is also clear from the case-law that the rights guaranteed by the EU legal order in administrative procedures include, in particular, the principle of sound administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgment of 15 September 2011, *CMB and Christof* v *Commission*, T-407/07, not published, EU:T:2011:477, paragraph 182 and the case-law cited).

71 It is in the light of these principles that the first part of the third plea in law should be examined.

72 Turning first to the principles of legal certainty and the protection of legitimate expectations in the light of the withdrawal of the first negative decision, it should be noted that, according to a general principle of law set out in the case-law, the Validation Panel was entitled to withdraw the first negative decision and replace it with a new decision provided that the withdrawal occurred within a reasonable period of time and that panel had sufficient regard to how far the applicant might have

been led to rely on the lawfulness of that act (see, to that effect, judgments of 3 March 1982, *Alpha Steel* v *Commission*, 14/81, EU:C:1982:76, paragraph 10; of 18 October 2011, *Reisenthel* v *OHIM — Dynamic Promotion (Cageots et paniers)*, T-53/10, EU:T:2011:601, paragraph 40; and of 11 July 2013, *BVGD* v *Commission*, T-104/07 and T-339/08, not published, EU:T:2013:366, paragraph 65).

73 In the present case, the first negative decision was withdrawn around seven months after it was adopted and less than five months after the applicant's action seeking its annulment was lodged. Moreover, when the Validation Panel's first negative decision was withdrawn, the applicant was informed that a new decision would be adopted to address the arguments raised in its email of 7 February 2014. Further, by lodging its action before the Court to contest the first negative decision, the applicant demonstrated that it did not rely on the lawfulness of that act. As a result, by withdrawing the first negative decision, the Validation Panel did not breach the principles of legal certainty and the protection of legitimate expectations.

74 With regard to the substitution of the statement of reasons in the first negative decision, it should be noted that the applicant does not explain in any way how this breaches the principle of legal certainty or the reasons why the legal situation ceased to be clear, precise and predictable simply as a result of the adoption of the contested decision, which the applicant alleges was based on an entirely new statement of reasons, a claim which the Court has adjudicated on in paragraph 62 above.

75 In respect of the alleged breach of principle of the protection of legitimate expectations, nor does the applicant identify exactly which precise, unconditional and consistent assurances were given to it in the first negative decision or to what extent those assurances caused it to have justified hopes. Furthermore, as was pointed out in paragraph 73 above, the fact that the applicant lodged an action for annulment of that decision before the Court shows, rather, that it did not regard that decision as lawful and therefore capable of causing it to have legitimate expectations.

76 Second, with regard to the breach of the principle of sound administration, the applicant failed to show or even allege that the Validation Panel did not examine carefully and impartially all the relevant aspects of the individual case.

77 Finally, the applicant is not justified in claiming that, following the withdrawal of the first negative decision, the procedure should have been resumed at the stage preceding the adoption of the REA's decision of 27 January 2014, which had been adopted prior to the submission of the applicant's case to the Validation Panel. The withdrawal of the first negative decision in itself had no effect on the REA's decision of 27 January 2014 and did not mean that it was legally established that that decision was unlawful. Consequently, contrary to what is claimed by the applicant, the REA was not obliged to resume the procedure at the stage preceding the adoption of its decision of 27 January 2014.

78 In the light of the foregoing, the first part of the third plea in law must be rejected.

The second part of the third plea in law, alleging breach of the principle of res judicata

– *Arguments of the parties*

79 The applicant claims that, in its order of 30 April 2015, *Ertico — ITS Europe* v *Commission* (T-499/14, not published, EU:T:2015:285), the Court ruled that the first negative decision should be considered to have been annulled. Thus, the applicant's SME status has been definitively confirmed. Consequently, by failing to recognise the applicant's SME status, the contested decision misconstrues the principle of *res judicata*, which applies to that order.

80 The Commission disputes the applicant's arguments.

– *Findings of the Court*

81 At the outset, it must be noted that the applicant misconstrues the scope of the order of 30 April 2015, *Ertico — ITS Europe* v *Commission* (T-499/14, not published, EU:T:2015:285), in which the Court merely found that the action for annulment of the first negative decision had become devoid of purpose due to the withdrawal of that decision.

82 The Court did indeed point out that the withdrawal of the first negative decision is equivalent in effect to a judgment annulling the measure (order of 30 April 2015, *Ertico — ITS Europe* v *Commission*, T-499/14, not published, EU:T:2015:285, paragraph 10).

83 However, the Court took no decision whatsoever on the lawfulness of the first negative decision or the applicant's SME status.

84 Consequently, the second part of the third plea in law must be rejected, as, consequently, must the third plea in law in its entirety.

The fourth plea in law, alleging infringement of Recommendation 2003/361

Arguments of the parties

85 The applicant submits that, in order to conclude that the applicant undertakes no economic activity, the contested decision is based on additional criteria that are not set out in Recommendation 2003/361, namely those specified in paragraph 6(c) of section 1.1.3.1 of the Annex to Decision 2012/838. According to the applicant, such an approach cannot be accepted, especially given that the scope of Recommendation 2003/361 is much broader than that of Decision 2012/838, the scope of which is limited to the FP7. Consequently, the applicant asserts that it has been unlawfully penalised in areas unrelated to FP7.

86 The Commission disputes the applicant's arguments.

Findings of the Court

87 In the context of this plea in law, it is appropriate to examine whether the contested decision applied criteria other than those set out in Recommendation 2003/361 to determine whether the applicant could qualify as an enterprise within the meaning of Article 1 of the Annex to that recommendation and, more particularly, whether it was undertaking an economic activity.

88 In order to assess whether the applicant is undertaking an economic activity, the contested decision reproduces in part paragraph 6(c) of section 1.1.3.1 of the Annex to Decision 2012/838, which sets out the definitions for the terms used in the annex to that decision and states that, in the context of that decision, some definitions, including, inter alia, the concept of an 'economic activity', are to apply to SMEs 'in addition to those set out in Recommendation 2003/361/EC'.

89 Further, it is apparent from point 1.2 of the contested decision that, in order to assess the applicant's SME status, reference is to be made to Recommendation 2003/361 which — unlike Decision 2012/838, which is limited to FP7 — is a non-binding, interdisciplinary instrument.

90 It should be added that point 2.2 of the contested decision assesses whether the applicant qualifies as an enterprise by making reference to certain criteria, which are set out in point 1.2 of that decision and state that the applicant must be involved in some form of trade or activity done for remuneration in a given market.

91 The Validation Panel cannot be criticised for making reference to those criteria when assessing whether the applicant qualifies as an enterprise.

92 Under Article 1 of the Annex to Recommendation 2003/361, an enterprise is defined as any entity engaged in an economic activity, irrespective of its legal form. The term 'economic activity' is not expressly defined therein.

93 However, recital 3 of Recommendation 2003/361, which it is appropriate to bear in mind when interpreting that recommendation (see, to that effect, judgments of 29 April 2004, *Italy* v *Commission*, C-91/01, EU:C:2004:244, paragraph 49, and of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 30) states that the term 'enterprise' is to be assessed in accordance with Articles 54, 101 and 102 TFEU, as interpreted by the Court of Justice.

94 In that regard, it must be recalled that, in the field of competition law, it has previously been held that, inter alia, any activity consisting of offering services on a given market — that is to say, services normally provided for remuneration — constitutes an economic activity (see, to that effect, judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraphs 46 to 48 and the case-law cited, and of 11 July 2006, *FENIN* v *Commission*, C-205/03 P, EU:C:2006:453, paragraph 25 and the case-law cited).

95 Therefore, notwithstanding the fact that, with regard to the definition of the term 'economic activity', paragraph 6(c) of section 1.1.3.1 of the Annex to Decision 2012/838 provides for criteria additional to those set out in Recommendation 2003/361 and that the content of that section was quoted by the contested decision, there is no basis for the conclusion that, in the present case, this led to criteria being applied by the Validation Panel other than those that apply in the field of competition law and, consequently, those provided for in Recommendation 2003/361. Consequently, the criteria applied by the Validation Panel to assess whether the applicant is an enterprise comply with that recommendation.

96 Consequently, the fourth plea in law is unfounded and must be rejected.

The fifth plea in law, alleging infringement of Recommendation 2003/361 and breach of the principles of legal certainty and sound administration, including the requirement of impartiality

Arguments of the parties

97 The applicant maintains that the contested decision accepted that the applicant formally met the independence criterion set out in Recommendation 2003/361. However, by concluding that the applicant could not qualify as an SME under the spirit of that recommendation, the contested decision is wrong and ignores the clear wording of Recommendation 2003/361, the goal of which is to provide legal certainty by formulating a uniform definition of the term 'SME'. Consequently, by departing from the wording of Recommendation 2003/361, the contested decision breached the principles of legal certainty and sound administration, including the requirement of impartiality. Furthermore, the approach adopted in the contested decision finds no support in the case-law.

98 In addition, the applicant argues that the Validation Panel erred when it asserted that recitals 9 and 12 of Recommendation 2003/361 required a case-by-case analysis in order to ensure that, even if the formal criteria were complied with, only those enterprises which suffer from handicaps typical of an SME were to be granted SME status. Moreover, that interpretation is incompatible with the SME User Guide, which propagates a wide application of the definition of an SME.

99 The Commission disputes the applicant's arguments.

Findings of the Court

100 It has previously been held that the advantages afforded to SMEs are, in most cases, exceptions to the general rules, such as, for example, in the area of public procurement, and therefore the definition of an SME must be interpreted strictly (judgment of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 32).

101 It should also be noted that it is apparent from recitals 9 and 12 of the preamble to Recommendation 2003/361 that the definition of linked enterprises aims to gain a better understanding of the economic position of SMEs and to remove from that qualification of SMEs groups of enterprises whose economic power may exceed that of genuine SMEs, with a view to ensuring that only those enterprises which really need the advantages accruing to the category of SMEs from the different rules or measures in their favour actually benefit from them (judgment of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 31).

102 The purpose of the independence criterion is to ensure that the measures intended for SMEs genuinely benefit the enterprises for which size represents a handicap and not enterprises belonging to a large group which have access to funds and assistance not available to competitors of equal size. In those circumstances, in order to include only enterprises that are genuinely independent SMEs, it is necessary to examine the structure of SMEs which form an economic group, the power of which exceeds the power of an SME, and to ensure that the definition of SMEs is not circumvented by purely formal means (see, to that effect, judgments of 29 April 2004, *Italy* v *Commission*, C-91/01, EU:C:2004:244, paragraph 50; of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 33; and of 14 October 2004, *Pollmeier Malchow* v *Commission*, T-137/02, EU:T:2004:304, paragraph 61).

103 Accordingly, the independence criterion must be interpreted in the light of that purpose, so that an enterprise which is owned as to less than 25% by a large enterprise and thus formally meets the criterion, but in reality belongs to a large group of enterprises, may not nevertheless be regarded as meeting the criterion (see, to that effect, judgment of 29 April 2004, *Italy* v *Commission*, C-91/01, EU:C:2004:244, paragraph 51). Article 3 of the Annex to Recommendation 2003/361 must also be interpreted in the light of that purpose (see, to that effect, judgment of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 34).

104 It is in the light of those principles that the fifth plea raised in the present action must be considered.

105 It should be noted that, to justify the contested decision, the Validation Panel relied on criteria set out in the case-law cited in paragraph 102 above.

106 In particular, in the present case, as a ground for refusing to grant the applicant SME status, in point 2.3 of the contested decision, the Validation Panel took into account the purpose of Recommendation 2003/361, namely that the measures intended for SMEs genuinely benefit the enterprises for which size represents a handicap and not enterprises belonging to a large group which therefore have access to funds and assistance not available to competitors of equal size. In particular, in the same point of the contested decision, it is stated that, even though the applicant formally meets the independence criterion set out in Recommendation 2003/361, from an economic standpoint, it belongs de facto to a large economic group. Also, in the same point of the contested decision, the Validation Panel concluded that, on account of the organisational links between the applicant and its partners or members, the applicant had access to funds, credit and assistance and, therefore, did not have to contend with the handicaps from which SMEs usually suffer.

107 It follows that the independence criterion applied by the Validation Panel in the contested decision does not infringe Recommendation 2003/361.

108 Against that background, it is appropriate to reject the alleged breach of the principles of legal certainty and sound administration, including the requirement of impartiality, based on a potential infringement of Recommendation 2003/361.

109 The fifth plea in law must therefore be rejected.

The sixth plea in law, alleging misapplication of Recommendation 2003/361

110 In its sixth plea in law, the applicant contests the actual application in the present case of the criteria used by the Validation Panel in the contested decision.

111 In that regard, the applicant submits, first, that it should have qualified as an enterprise within the meaning of Article 1 of the Annex to Recommendation 2003/361. It adds, second, that it is an autonomous enterprise and, third, that it satisfies all the criteria relating to staff headcount and financial ceilings, as set out in Article 2 of the Annex to Recommendation 2003/361.

112 Those three grounds of complaint should be examined in turn.

The applicant's qualification as an enterprise

– *Arguments of the parties*

113 The applicant maintains that, in that decision, it was wrongly concluded that the applicant could not qualify as an enterprise within the meaning of Article 1 of the Annex to Recommendation 2003/361 on the ground that it was not regularly engaged in economic activities carried out for remuneration in a given market.

114 According to the applicant, the term 'enterprise' within the meaning of Article 1 of the Annex to Recommendation 2003/361 is clear and self-standing and must be construed in the same manner as that applied in competition law. Furthermore, in accordance with that provision of Recommendation 2003/361 and with the case-law, and contrary to the approach taken by the Validation Panel, the legal form of the applicant is not relevant for that analysis. It is the nature of the activity undertaken that should be taken into account.

115 The applicant asserts that, in the present case, it is engaged in an economic activity and, for the purposes of Recommendation 2003/361, it is sufficient that that activity is occasional or marginal. Moreover, at least a fifth of the applicant's turnover resulted from services provided to third parties. In addition, the membership fees paid to the applicant by its members in return for services provided to the latter cannot be excluded from the analysis just because the remuneration takes that particular form. It adds that the contested decision itself recognises that the applicant is engaged in an economic activity and provides services to third parties in return for remuneration. The contested decision recognised, in point 2.3 thereof, that the applicant has competitors. Consequently, there is no basis for the submission that it was not active on an economic market.

116 In addition, the applicant maintains that the Validation Panel's first negative decision recognised its status as an enterprise.

117 The Commission submits that grant income, membership fees and donations do not constitute remuneration or reward for the supply of goods or services on a given market and therefore do not constitute income from economic activity

– *Findings of the Court*

118 As was pointed out in paragraph 93 above, the term 'enterprise' within the meaning of Article 1 of the Annex to Recommendation 2003/361 is to be assessed in accordance with Articles 54, 101 and 102 TFEU, as interpreted by the Court of Justice. The term 'enterprise' therefore covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Inter alia, any activity consisting of offering services on a given market — that is to say, services normally provided for remuneration — constitutes an economic activity (see, to that effect, judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraphs 46 to 48 and the case-law cited, and of 11 July 2006, *FENIN* v *Commission*, C-205/03 P, EU:C:2006:453, paragraph 25 and the case-law cited). In that regard, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question.

119 In addition, it should be noted that Article 101(1) TFEU applies to associations in so far as their own activities or those of the undertakings affiliated to them are calculated to produce the results that that provision aims to suppress. The qualification as an association of undertakings is not called into question merely by the fact that the association may also comprise persons or entities that cannot qualify as undertakings (see, to that effect, judgment of 13 December 2006, *FNCBV and Others* v *Commission*, T-217/03 and T-245/03, EU:T:2006:391, paragraphs 49 and 55).

120 It is in the light of those principles that the sixth plea raised in the present action should be examined.

121 In the contested decision, the Validation Panel concluded that the applicant was an association of undertakings which did not provide services in return for remuneration and acted in the name of, and in furtherance of the interests of, its members. In addition, the applicant derives a significant part of its income from grant income, membership fees and donations, which cannot be regarded as income from an economic activity. Furthermore, the applicant provides only some marginal services to third parties. Consequently, the applicant could not be considered to be an enterprise as it was not regularly engaged in economic activities carried out for remuneration in a given market.

122 That conclusion in the contested decision cannot be accepted.

123 It should be noted, first, that, in accordance with the case-law cited in paragraphs 118 and 119 above, the legal status of the applicant or its qualification as an association of undertakings cannot, in itself, prevent it from being considered to be an enterprise (see, by analogy, judgment of 26 January 2005, *Piau* v *Commission*, T-193/02, EU:T:2005:22, paragraph 72).

124 Second, it is apparent from Article 8.2 of the applicant's statutes that its members are obliged to pay membership fees in exchange for the services it provides. This is also confirmed in point 2.1 of the contested decision.

125 In accordance with the case-law cited in paragraph 118 above, the existence of an economic activity does not depend on the way in which it is financed. In that regard, remuneration comes from an economic activity if that remuneration is financial consideration for services provided.

126 In addition, it has already been held in the case-law that, for the purposes of the application of competition rules to an entity, membership fees collected by the latter may be taken into account as revenue in order to calculate a fine imposed under Article 101(1) TFEU (see, to that effect, judgment of 13 December 2006, *FNCBV and Others* v *Commission*, T-217/03 and T-245/03, EU:T:2006:391, paragraph 220).

127 It follows that the services provided by the applicant to its members in exchange for membership fees, which the latter are obliged to pay to it, constitute an economic activity provided in exchange for remuneration. Further, given that those membership fees are paid in the form of annual remuneration, they constitute regular income for the applicant.

128 Consequently, in the light of the economic activities it carries out, contrary to what is concluded in point 2.2 of the contested decision, the applicant constitutes an undertaking the activity of which belongs to the sphere of economic activity (see, to that effect, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 40).

129 Moreover, the contested decision itself accepts that the applicant carried out certain economic activities and, in particular, that it generated revenue by organising events. The applicant claimed that, in 2012, that revenue represented around 15% of its total turnover. When it accepted, during the hearing, that the target audience of the events organised by the applicant was not its members, the Commission did not contest that it actually received that revenue.

130 Further, the applicant's objects, as set out in Article 3 of its statutes, are to encourage, promote and help to coordinate the implementation of advanced transport telematics in European transport infrastructure, principally on behalf of its members. The competition rules have already been applied to entities with similar objects (see, to that effect, judgment of 26 January 2005, *Piau* v *Commission*, T-193/02, EU:T:2005:22, paragraph 2).

131 In the light of the considerations above, it follows that the Validation Panel was not justified in concluding that the applicant was not an enterprise and that it did not carry out a regular economic activity carried out for remuneration in a given market.

132 It follows from the foregoing that the contested decision is vitiated by an error of assessment in so far as it is concluded, in point 2.2 thereof, that the applicant was not an enterprise within the meaning of Article 1 of the Annex to Recommendation 2003/361.

133 Nevertheless, the error of assessment established in paragraph 132 above is not sufficient to require the contested decision to be set aside. It follows from point 1.2 of that decision that, if an entity is considered to be an enterprise, it is also necessary to check whether it satisfies the independence criterion. Accordingly, even if the applicant is an enterprise, it must also satisfy the independence criterion set out in Recommendation 2003/361 in order to be regarded as having SME status.

134 Consequently, it is also necessary to examine whether, taking into account the details of the present case, the Validation Panel was entitled to conclude that the applicant was not independent.

Independence criterion

– Arguments of the parties

135 The applicant asserts that, in point 2.3 of the contested decision, it was accepted that the applicant formally met the independence criterion set out in Recommendation 2003/361, but that it was concluded that it did not have to contend with the handicaps which SMEs usually suffer from and that, consequently, it cannot qualify as a SME in the light of the purpose and spirit of that recommendation.

136 The applicant claims that it is an independent enterprise. It maintains that it is neither a 'partner enterprise' nor a 'linked enterprise' within the meaning of Article 3 of the Annex to Recommendation 2003/361, since none of its members holds at least 25% of the applicant's capital or voting rights.

137 Consequently, it satisfies all of the conditions set out in Recommendation 2003/361 and cannot be accused of circumventing that recommendation. The applicant asserts that it cannot be refused the status of SME on the basis of the presence of one or a number of companies among its shareholders which are not SMEs, as no such requirement is set out in Recommendation 2003/361. Furthermore, it claims that it is misleading and tendentious to suggest that the presence of a shareholder with one share in a company would grant that company access to any facilitated funding in the absence of a controlling position in that company.

138 The Commission disputes the applicant's arguments.

– *Findings of the Court*

139 In point 2.3 of the contested decision, it was concluded that, even though the applicant formally met the independence criterion set out in Recommendation 2003/361, from an economic standpoint, it belongs de facto to a large economic group. Given the organisational links between the applicant and its partners and members, the applicant would have access to funds, credit and assistance and, therefore, would not have to contend with the handicaps usually faced by SMEs. Further, point 1.2 of the contested decision states that a case-by-case analysis was required in order to establish the economic situation of the enterprise at issue and to ensure that only those enterprises that fall within the purpose and spirit of Recommendation 2003/361 are regarded as SMEs.

140 In the present case, it should be noted, as is apparent from paragraphs 106 and 107 above, that the Validation Panel was entitled to base its analysis on the purpose and spirit of Recommendation 2003/361 when it concluded that, even if the applicant formally met the independence criterion set out in that recommendation, it was also appropriate to examine whether it had to contend with the handicaps usually faced by SMEs.

141 It should also be noted that the applicant's members include large businesses and public bodies.

142 In that regard, it must be pointed out, first, that, in accordance with Article 3 of the applicant's statutes, referred to in point 2.1 of the contested decision, it acts principally on behalf of its members.

143 Second, under Article 5 of the applicant's statutes, the company's authorised capital is unlimited. It should be noted that the authorised share capital is the total amount of contributions received by the applicant from its members. Further, it is a guarantee to the applicant's partners and potential lenders. Therefore, a large authorised share capital facilitates the applicant's relations with third parties.

144 Finally, as is noted in paragraph 124 above, it is apparent from Article 8.2 of the applicant's statutes that, as remuneration for the services provided by the applicant to its members, the latter each pay it an annual membership fee determined by the supervisory board. Contrary to what was claimed by the applicant at the hearing, it is apparent from Article 8.3 of its statutes that the supervisory board sets the amount of those membership fees according to the applicant's expenses. Further, during or after the applicant's financial year the supervisory board may reduce the membership fees in order to align them with the applicant's actual expenditure.

145 It follows from paragraph 144 above that the membership fees paid by the applicant's members are set and adjusted according to what it actually spends. Consequently, the applicant's expenses are met by its members which, as is not disputed by the applicant, are not SMEs. This means that, even though, as was claimed by the applicant at the hearing, the level of the membership fees has not changed in 20 years, the applicant's statutes allow it to rely on resources, coming from its members, which are broadly sufficient and larger than those of an SME and can be adjusted according to its expenditure.

146 It follows that the Validation Panel did not misapply Recommendation 2003/361 in point 2.3 of the contested decision in so far as it concluded that the applicant did not have to contend with the handicaps usually faced by SMEs, which meant that the applicant could not qualify as an SME within the meaning of that recommendation, despite being an enterprise.

Criteria relating to staff headcount and financial ceilings, as set out in Article 2 of the Annex to Recommendation 2003/361

147 While the Commission does not make any specific arguments in this regard, the applicant claims that it satisfies all the criteria relating to staff headcount and financial ceilings set out in Article 2 of the Annex to Recommendation 2003/361, namely that it employs fewer than 250 people, has an annual turnover that does not exceed EUR 50 million and has an annual balance sheet total that does not exceed EUR 43 million.

148 In this respect, it should be noted that, as is noted in paragraph 140 above, enterprises that formally meet the independence criterion but have greater economic power than an SME do not necessarily qualify as an SME.

149 As is noted in paragraph 102 above, the purpose of the independence criterion is to ensure that the measures intended for SMEs genuinely benefit enterprises for which size represents a handicap and not enterprises belonging to a large group which have access to funds and assistance not available to competitors of equal size.

150 Accordingly, by analogy, the applicant cannot derive its status as an SME from the fact that it satisfies the formal requirements set out in Article 2 of the Annex to Recommendation 2003/361 if, in fact, it does not have to contend with the handicaps usually faced by SMEs. As was held in paragraph 146 above, the applicant does not face such handicaps.

151 Accordingly, if an enterprise does not in reality face the handicaps typical of an SME, the Validation Panel is entitled to refuse to grant it that status (see, to that effect, judgment of 29 April 2004, *Italy* v *Commission*, C-91/01, EU:C:2004:244, paragraph 54).

152 As the applicant is not considered to satisfy the independence criterion, it cannot claim that it satisfies the criteria relating to staff headcount and financial ceilings set out in Article 2 of the Annex to Recommendation 2003/361. In accordance with Article 6 of the Annex to Recommendation 2003/361, those criteria relating to staff headcount and financial ceilings cannot be determined on the basis of data relating solely to the applicant because it is not an independent enterprise and its members are enterprises that are not SMEs.

153 In the light of the foregoing, the sixth plea in law must be rejected.

The seventh plea in law, alleging infringement of the most favourable treatment principle under Decision 2012/838 and 'Horizon 2020 — Framework Programme for Research and Innovation'

Arguments of the parties

154 The applicant argues that, as it was accepted in point 2.2 of the contested decision, first, that the applicant exercised at least some economic activities and provided some services to third parties in return for remuneration and, second, that it formally met the independence criterion set out in Recommendation 2003/361, that it should qualify as an SME under FP7 and the 'Horizon 2020' programme.

155 The applicant maintains that, with regard to FP7, in accordance with indent 5 of section 1.1.3 of the Annex to Decision 2012/838, if a legal entity may be classified in different categories, the validation services should choose the most favourable category for that entity. The applicant asserts that the same conclusion is to apply under the 'Horizon 2020' programme, pursuant to page 5 of the Commission's Guide on beneficiary registration, validation and financial viability check of 11 April 2014.

156 Therefore, given that the contested decision accepts that the applicant may, at least in part, qualify as an SME, the Commission should have granted it the status of a fully fledged SME.

157 The Commission disputes the applicant's arguments.

Findings of the Court

158 With regard to this plea, suffice it to find that at no point in the contested decision was it accepted that the applicant could, at least in part, qualify as an SME within the meaning of Recommendation 2003/361. Accordingly, with regard to FP7, indent 5 of section 1.1.3 of the Annex to Decision 2012/838, which is relied on by the applicant, does not apply in the present case. The same conclusion applies to the 'Horizon 2020 Framework Programme' and page 5 of the Commission's guide referred to in paragraph 155 above.

159 It follows that the seventh plea in law must be rejected as ineffective.

The eighth plea in law, alleging that the contested decision contains a contradictory and inadequate statement of reasons

Arguments of the parties

160 The applicant argues that the contested decision is vitiated by a contradictory and inadequate statement of reasons.

161 The applicant claims, first, that the Validation Panel cannot challenge the applicant's status as an enterprise only then to find that, first, it formally meets the independence criterion set out in Recommendation 2003/361 — which implies that it is an enterprise — and, second, it has competitors.

162 Second, the contested decision did not explain which new material facts allegedly invalidated the finding in the first negative decision, which confirmed that the applicant is an enterprise within the meaning of Article 1 of the Annex to Recommendation 2003/361.

163 Third, according to the applicant, the contested decision could not rely on the additional criteria set out in section 1.1.3.1(6)(c) of the Annex to Decision 2012/838 to qualify the applicant as an enterprise under Recommendation 2003/361.

164 Consequently, the contested decision infringed the second paragraph of Article 296 TFEU, as well as Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Articles 47 and 48 of the Charter of Fundamental Rights, and also infringed the right to a fair trial, which constitutes a general principle of law under Article 6 TEU.

165 The Commission disputes the applicant's arguments.

Findings of the Court

166 It is settled case-law that the statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the EU courts to carry out their review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63; of 26 October 2011, *Dufour* v *ECB*, T-436/09, EU:T:2011:634, paragraph 47; and of 26 April 2018, *European Dynamics Luxembourg and Evropaïki Dynamiki* v *Commission*, T-752/15, not published, EU:T:2018:233, paragraphs 22 and 23).

167 The reasoning must in addition be logical and, in particular, contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (see, to that effect, judgments of 10 July 2008, *Bertelsmann et Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 169, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151).

168 It must also be borne in mind that the mere existence of a contradiction in a decision is not sufficient to establish that the decision is vitiated by a defective statement of reasons, provided that, first, the decision, taken as a whole, is such that the applicant is able to identify and plead that lack of consistency and, second, the decision is sufficiently clear and precise to allow the applicant to ascertain the exact scope of the decision (see, to that effect, judgments of 11 December 2003, *Adriatica di Navigazione* v *Commission*, T-61/99, EU:T:2003:335, paragraph 49, and of 16 December 2015, *Air Canada* v *Commission*, T-9/11, not published, EU:T:2015:994, paragraph 76).

169 The eighth plea raised in the present action should be considered in the light of those principles.

170 With regard to the first objection in the present plea, summarised in paragraph 161 above, it is true that it was concluded in the contested decision that the applicant could not qualify as an enterprise, although that decision contains, first, an analysis of the independence criterion within the meaning of Recommendation 2003/361 — which assumes that it did have the status of an enterprise — and, second, an explicit acknowledgement that it has competitors.

171 In that regard, it should be noted that, in point 1.2 of the contested decision, it is clearly noted that, if the applicant qualifies as an enterprise, it should also be verified whether that entity faces the handicaps typical of an SME. In the contested decision, the Validation Panel concluded, at the outset, that the applicant could not qualify as an enterprise, which meant that it was not obliged to examine the independence criterion. Thus, the Validation Panel carried out that analysis merely for the sake of completeness.

172 Consequently, the contested decision clearly and unambiguously explains the relation between the two reasons examined by the Validation Panel, without any contradiction in that reasoning.

173 Further, in accordance with the case-law cited in paragraph 168 above, the contested decision is sufficiently clear and precise, as it allowed the applicant to identify and rely on that lack of consistency and ascertain the exact scope of the contested decision, which is apparent from the detail of the arguments in the current action relating to the two reasons given in that decision.

174 Accordingly, the first objection raised in this plea must be rejected.

175 Turning to the second objection of the present plea in law, explained in paragraph 162 above, suffice it to find that the first negative decision was withdrawn by the Validation Panel. The withdrawal of that decision is equivalent in effect to a judgment annulling the measure (order of 30 April 2015, *Ertico — Its Europe* v *Commission*, T-499/14, not published, EU:T:2015:285, paragraph 10).

176 An annulment by the EU courts necessarily has retroactive effect, as a finding that a measure is unlawful covers the entire period from the date on which the annulled measure took effect (see, to that effect, judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 61).

177 It follows that the first negative decision, the effects of which were nullified retroactively once it was withdrawn, cannot be relied on by the applicant in support of this plea in law.

178 Consequently, the second objection of this plea must be rejected.

179 Turning to the third objection of this plea, set out in paragraph 163 above, in the light of the findings expounded in paragraph 95 above concerning the fourth plea, it is appropriate to reject that objection, as, in the contested decision the Validation Panel did not rely on additional criteria which were not provided for in Recommendation 2003/361.

180 Having regard to the findings above, the eighth plea in law must be rejected in its entirety.

181 Consequently, as all of the pleas in law raised by the applicant have been rejected, this action should be dismissed in its entirety as being unfounded.

Costs

182 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, according to Article 135(1) of the Rules of Procedure, exceptionally, if equity so requires, the General Court may decide that an unsuccessful party is to pay only a proportion of the costs of the other party in addition to bearing his own. In addition, according to Article 135(2) of the same rules, the General Court may order a party, even if successful, to pay some or all of the costs, if this appears justified by the conduct of that party, including before the proceedings were brought. The General Court may, inter alia, order an institution whose decision has not been annulled to pay the costs on account of the inadequacy of that decision, which may have led an applicant to bring an action (judgment of 22 April 2016, *Italy and Eurallumina* v *Commission*, T-60/06 RENV II and T-62/06 RENV II, EU:T:2016:233, paragraph 245 and the case-law cited).

183 The applicant has been unsuccessful. However, as is apparent from paragraph 29 above, the interplay between appeal proceedings governed, first, by sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 and, second, by Article 22 of Regulation No 58/2003 does not emerge clearly from the provisions of Decision 2012/838, as was confirmed by the Commission at the hearing.

184 Further, the description of the relevant proceedings before the Validation Panel contained in sections 1.2.6 and 1.2.7 of the Annex to Decision 2012/838 has significant gaps, notably, as is pointed out in paragraph 30 above, with regard to the time limits that apply in the proceedings, which makes it even more difficult properly to understand the applicable rules.

185 Accordingly, these circumstances may have contributed to the complexity of the present case and are likely to have increased the applicant's costs. Thus, the Court considers that it is fair and equitable to find that the applicant should bear only one half of its own costs. The Commission shall bear its own costs and pay one half of the costs incurred by the applicant.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders European Road Transport Telematics Implementation Coordination Organisation — Intelligent Transport Systems & Services Europe (Ertico — ITS Europe) to bear one half of its costs;**

3. **Orders the European Commission to bear its own costs and pay one half of the costs incurred by Ertico — ITS Europe.**

Kanninen Calvo-Sotelo Ibáñez-Martín Reine

Delivered in open court in Luxembourg on 22 May 2019.

E. Coulon
Registrar

H. Kanninen
President