Reports of Cases

ORDER OF THE GENERAL COURT (Second Chamber)

13 September 2016*

(Arbitration clause — Electricity supply contract CNT (2009) Nº 137 — Payment by the Parliament of the regional contribution made by the applicant to the Brussels-Capital Region and calculated on the basis of the power made available to the Parliament — No contractual obligation — No obligation under national law)

In Case T-384/15,

EDF Luminus, established in Brussels (Belgium), represented by D. Verhoeven and O. Vanden Berghe, lawyers,

applicant,

v

European Parliament, represented by L. Darie and P. Biström, acting as Agents,

defendant,

supported by

European Commission, represented by F. Clotuche-Duvieusart and I. Martínez del Peral, acting as Agents,

intervener,

ACTION on the basis of Article 272 TFEU seeking an order for the Parliament to pay to the applicant the sum of EUR 439672.95, plus interest, being the amount of the regional contribution paid by the applicant to the Brussels-Capital Region and calculated on the basis of the power made available to the Parliament,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: French.

Order

Legal context

EU law

1 Under Article 343 TFEU and Article 191 EA, the European Union and the European Atomic Energy Community enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks, under the conditions laid down in the Protocol of 8 April 1965 on the Privileges and Immunities of the European Union, initially annexed to the Treaty establishing a Single Council and a Single Commission of the European Communities (OJ 1967, 152, p. 13) and subsequently, under the Treaty of Lisbon, to the TEU, the TFEU and the EAEC ('the Protocol').

2 Article 3 of the Protocol provides as follows:

'The Union, its assets, revenues and other property shall be exempt from all direct taxes.

The governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Union makes, for its official use, substantial purchases the price of which includes taxes of this kind. These provisions shall not be applied, however, so as to have the effect of distorting competition within the Union.

No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.'

Belgian law

3 Article 26 of the Order of the Brussels-Capital Region (Belgium) of 19 July 2001 concerning the organisation of the electricity market in the Brussels-Capital Region (*Moniteur belge*, 17 November 2001, p. 39135) ('the Electricity Order') provides as follows:

'Paragraph 1: The holding of a supply licence issued on the basis of Article 21 shall entail the monthly payment of a charge by the natural or legal person holding the licence, hereinafter called "the person liable".

...

Paragraph 3: The charge shall be calculated on the basis of the power made available to eligible end customers by means of networks, service connections and direct lines of 70 kV or less at consumption sites located in the Brussels-Capital Region. For high-voltage customers, the power made available shall be the power of the connection. The power of connection shall be equal to the maximum power, expressed in kVa, made available under the connection contract. Where the connection contract does not refer to a maximum power or in the event that the power used is greater than the maximum power made available as stated in the connection contract, the connection power shall be equal to the maximum power, expressed in kVa, used during the previous 36-month period, multiplied by 1.2.

...

Paragraph 4: The monthly charge shall be set at EUR 0.67 per kVa for high-voltage.

…

The amount is adjusted annually in accordance with the consumer price index of the Kingdom. ...

Paragraph 5: The Government shall lay down measures implementing the present Article. It may, inter alia, require the operator of the distribution network, the operator of the regional transport network and the users of direct lines to provide it with data for the collection of the charge.

The Government may entrust the operator of the distribution network with contacting the persons liable by post to require them to pay the charge. Such letters shall, inter alia, state the financial year, the basis for calculating the charge, the rate, the date for payment and the means of paying the charge. The sending or failure to send such a letter shall not, however, prejudice the rights and obligations of persons liable.

Paragraph 6: The charge shall be collected and sought according to the rules laid down in Chapter VI of the Order of 23 July 1992 concerning the regional tax on occupiers of buildings and persons holding real rights in certain immovable property. The deadline for the payment of the charge shall be set in accordance with Paragraph 3 of the present Article.

…'

Background to the dispute

4 On 10 July 2009, the European Parliament signed a contract with reference CNT (2009) No 137 ('the contract') relating to the supply by the applicant, EDF Luminus, of green electricity to the Parliament's buildings in the Brussels region. The contract took effect from the date of actual supply of the electricity by the applicant and was to remain in force for a period of two years. The contract was renewed for a one-year period, namely until 31 July 2012, by a supplemental agreement signed on 15 July 2011.

5 By a letter of 13 May 2011, the applicant informed the Parliament that it was thenceforth under an obligation to invoice the Parliament for the electricity supply charge provided for in Article 26 of the Electricity Order ('the contribution') and that, in addition, it was reclaiming from the Parliament a retrospective payment with effect from the date the contract came into force. That contribution, which had been paid to the Brussels-Capital Region by the applicant since 2009, had not previously been invoiced by the applicant to the Parliament.

6 After the Parliament refused to accept that demand, the applicant routinely sent to the Parliament two types of invoice, one type relating only to the contribution, the other type relating to the undisputed elements of the electricity supply. The Parliament settled the second type of invoice but refused to settle the first type.

7 Following a further demand for payment of the contribution and a further refusal to meet that demand, the applicant brought the present action.

8 The applicant also brought an action before the Tribunal de première instance francophone de Bruxelles (Francophone Court of First Instance of Brussels, Belgium) seeking a refund from the Brussels-Capital Region of the amount of the contribution that it had paid.

9 Additionally, on 4 April 2014, the European Commission brought proceedings against the Kingdom of Belgium for failure to fulfil an obligation, under Article 258 TFEU. By a judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4), the Court of Justice held that, by not exempting the EU institutions from the contributions laid down by Article 26 of the Electricity Order and by

objecting to the refund of the contributions thereby collected by the Brussels-Capital Region, the Kingdom of Belgium had failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol.

Forms of order sought and procedure

10 The applicant claims that the Court should:

— order the Parliament to pay to the applicant the sum of EUR 439672.95;

— order the Parliament to pay to the applicant contractual interest on that sum from the date on which the invoices became payable;

— order the Parliament to pay the costs.

11 The Parliament claims that the Court should:

— declare that this action has become devoid of purpose following the Court's judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4);

— in the alternative, dismiss the application as manifestly unfounded;

— declare that the Brussels-Capital Region is responsible for refunding the sum in question to the applicant;

— order the applicant to pay the costs.

12 The applicant clarifies that its application is made 'to the extent that it cannot obtain a refund of the contribution from the Brussels-Capital Region in the proceedings before the Tribunal de première instance francophone de Bruxelles (Francophone Court of First Instance of Brussels)'.

13 The Commission sought leave to intervene in support of the Parliament. By a decision of the President of the General Court (Second Chamber) of 16 February 2016, the Commission was granted leave to intervene in the present case in support of the forms of order sought by the Parliament.

14 The President of the General Court (Second Chamber) decided, pursuant to Article 69(c) of the Rules of Procedure of the General Court, to stay proceedings until delivery of a final decision in case C-163/14, *Commission* v *Belgium*. Proceedings resumed on 14 January 2016 when the judgment was delivered in that case.

15 The Parliament lodged its defence at the Court Registry on 22 March 2016. In its defence, it relied inter alia on the judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4).

16 By way of a measure of organisation of procedure, the Court invited the applicant and the Commission to present their observations on the consequences of that judgment on the present case. The applicant and the Commission submitted their observations within the period prescribed.

Law

17 Under Article 126 of the Rules of Procedure, where it is clear that the General Court has no jurisdiction to hear and determine an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the General Court may, on a proposal from the Judge-Rapporteur, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

18 In the present case, the Court considers it has sufficient information from the documents in the file and has decided to give a decision without taking further steps in the proceedings.

19 First of all, it is necessary to examine the Parliament's claim that the Court should declare that there is no need to adjudicate on the action.

Claim for declaration of no need to adjudicate

20 The Parliament, relying on the judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4), claims that there is no need to adjudicate on the action. It submits that, as a result of that judgment, the contributions wrongly collected by the Brussels-Capital Region must necessarily be refunded to the applicant, so that there is no need for the applicant to claim payment from the Parliament of the amounts of those contributions.

21 It should be recalled that, in the present proceedings, which were brought on the basis of the contract entered into between the Parliament and the applicant, the applicant claims that the Parliament should be ordered to pay to it, first, a sum corresponding to the contribution which the applicant had paid to the Brussels-Capital Region and which had been calculated on the basis of the power made available to the Parliament under the contract and, secondly, contractual interest applied to that sum.

22 Even assuming that a refund of the sums claimed by the applicant from the Brussels-Capital Region, which is not a party to these proceedings nor a party to the contract, would lead to the applicant having no further interest in the present proceedings, the fact remains that the Parliament and the Commission have not shown, or even alleged, that a refund of the sums claimed, including contractual interest, would be made or that the applicant would have a successful claim in this respect against the Brussels-Capital Region. Such a claim could, for example, arise from a judgment of the Tribunal de première instance francophone de Bruxelles (Francophone Court of First Instance of Brussels) in the proceedings brought before it by the applicant (see paragraph 8 above). Moreover, in its observations submitted on 10 May 2016 in response to the measure of organisation of procedure referred to in paragraph 16 above, the applicant asserts that, at that date, the Brussels-Capital Region was 'refusing to refund the disputed contributions paid, despite the judgment in case C-163/14'.

23 For the sake of completeness, it should be noted that, even though the Court of Justice held in its judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4) that, by not exempting the EU institutions from the contributions laid down by Article 26 of the Electricity Order and by objecting to the refund of the contributions thereby collected by the Brussels-Capital Region, the Kingdom of Belgium had failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol, the wording of the Electricity Order remains as set out above, given that the Kingdom of Belgium has not executed that judgment. The Parliament has not provided any evidence to show that the applicable law has since been amended.

24 It follows from the above that this action has not become devoid of purpose, in that the applicant has not lost its interest in acting, meaning that it is not necessary to rule on the Parliament's claim for a declaration of no need to adjudicate.

Substance of the action

25 In support of the form of order sought, on the basis of Article 272 TFEU, the applicant relies on three pleas in law, the first alleging a breach by the Parliament of its contractual obligations, the second, a breach of the provisions of Article 26 of the Electricity Order and the third, a breach of the principle of equal treatment.

First plea in law

26 The applicant submits that the contract allows it to claim payment of the contribution from the Parliament.

27 It must, first of all, be pointed out that the contract does not provide for the contribution to be invoiced to the Parliament. In particular, there is no reference to the contribution in Annex 2 to the contract which sets out the method of calculating the price of the electricity supply.

28 In addition, according to the provisions of point 3.2 of the contract, under Article 3, 'prices are set taking account of the fact that EU institutions are exempted from customs duties, indirect taxes and sales taxes, in particular value added tax (VAT)'.

29 Point 3.2 of the contract also states that 'taxes, dues and other regional and federal contributions cannot be invoiced'.

30 It must, therefore, be concluded that the contract does not contain any obligation on the part of the Parliament to pay to the applicant the contribution that has been calculated on the basis of the power made available to the Parliament under the contract.

31 It should be added that Article 19 of the contract states that the contract shall be 'governed by Belgian law and applied and interpreted in accordance with that law in the event that EU legislation, including financial legislation, does not cover the situation'. The terms of the contract must, therefore, first be interpreted with regard to EU law.

32 In its judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4, paragraph 39), the Court of Justice held that the contribution should be regarded as an indirect tax under the second paragraph of Article 3 of the Protocol.

33 Therefore, the reference in the contract, and in particular in point 3.2 of the contract, to 'indirect taxes' must be taken to include the contribution. This confirms that the parties to the contract intended to exempt the Parliament from payment of the contribution.

34 It should also be noted that the supplemental contract, concluded on 15 July 2011, does not in any way affect the obligations of the parties with regard to payment of the contribution.

35 The other arguments raised by the applicant do not change the conclusion reached by the Court in paragraph 33 above.

36 First, the fact that point 8.1 of the contract, under Article 8 entitled 'Fiscal provisions', states that the 'contracting party is solely responsible for complying with fiscal provisions applicable to it' does not lead to the conclusion that the Parliament has an obligation to pay the contribution to the other contracting party, that is to say, the applicant.

37 Secondly, bearing in mind the general scheme of the contract and, in particular, the provisions of paragraph 3.2 referred to above, the reference in paragraph 2 of Annex 2 to the contract to a price increase linked to the 'supply' does not lead to the conclusion that the Parliament has an obligation to pay the contribution to the other contracting party, that is to say, the applicant.

38 It follows from the above that the first plea in law must be rejected as manifestly unfounded.

Second plea in law

39 The applicant submits that the Parliament is required to pay it the contribution under Article 26 of the Electricity Order.

40 It must be noted that, even though the Electricity Order sets out the tax obligations of electricity suppliers with regard to a national authority, the Brussels-Capital Region, it does not contain any obligation on the end consumer to pay the contribution to its electricity supplier. Therefore, the applicant is not justified in claiming that the Parliament has failed to fulfil such an obligation.

41 It should be stated that this finding does not contradict the conclusion that the tax regime relating to the contribution was conceived and laid down with a view to the contribution being passed on to the end consumer (judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4, paragraph 48). There is a need to distinguish between the aims of a tax regime, on the one hand, and the existence of a binding obligation arising from that regime, failure to comply with which could lead to contractual or non-contractual liability on the part of the end consumer towards its electricity supplier, on the other hand. In the absence of any such binding obligation, the ability to pass on the contribution to the end consumer depends solely on the contractual relationship agreed between the supplier and the end consumer.

42 Even if the Electricity Order could be interpreted as requiring the end consumer to pay to its electricity supplier the contribution based on the power made available to it, the plea in law would in any event have to be rejected.

43 The fact that the Electricity Order does not provide for the EU institutions to be exempted from the contribution led to the Court of Justice finding in its judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4) that the Kingdom of Belgium had failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol.

44 On the basis of Article 19 of the contract, it is for the General Court, as the court with jurisdiction over the contract, to apply the national law as the national court would do.

45 Consequently, since the judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4) has the authority of a judgment delivered, the Court is required not to apply the Electricity Order to oblige an EU institution to pay the contribution (see, by analogy, concerning obligations of national authorities, the judgment of 13 July 1972, *Commission* v *Italy*, 48/71, EU:C:1972:65, paragraph 7).

46 Even if it were the applicant's intention, by this plea in law, to call into question the Parliament's non-contractual liability, such an argument cannot be successfully invoked in the context of an action based on Article 272 TFEU. In any event, the above considerations mean that the plea in law may be rejected to the extent that it was intended in that way.

47 In addition, the conclusion reached by the Court in paragraph 40 above cannot be called into question by a requirement for the applicant to pay the contribution. That situation has no bearing on the interpretation of the provisions of the Electricity Order.

48 In that respect, it should be noted that the applicant may, if it believes it has adequate justification, ask the national court before which it has brought proceedings to rule on the question of whether the exemption that the Kingdom of Belgium is required to grant to EU institutions means that electricity suppliers are themselves exempted from such a contribution when their client is an EU institution.

49 Finally, the conclusion set out in paragraph 40 is not affected by the fact that the Parliament and other EU institutions have agreed to pay the contribution to other electricity suppliers. That situation, which will be considered further in the context of the third plea in law, has no bearing on the interpretation of the provisions of the Electricity Order.

50 It follows from the above that the second plea in law must be rejected as manifestly unfounded.

Third plea in law

51 The applicant submits that the Parliament was wrong to refuse to pay it the contribution while the EU institutions apparently paid the contribution to Electrabel, another electricity supplier. In so doing, the Parliament allegedly breached the principle of equal treatment.

52 It must be stated that, in the present case, this plea in law, which does not allege any breach by the Parliament of its contractual obligations or of the law applicable to the contract, cannot be successfully invoked (see, to that effect, judgment of 16 March 2016, *Hydrex* v *Commission*, T-45/15, not published, EU:T:2016:151, paragraph 24 and the case-law cited).

53 In any event, it should be recalled that, according to settled case-law, the principle of non-discrimination or equal treatment, which is a fundamental principle of law, prohibits comparable situations from being treated differently or different situations from being treated in the same way, unless such difference in treatment is objectively justified (see, to that effect, judgment of 8 October 1986, *Christ-Clemen and Others* v *Commission*, 91/85, EU:C:1986:373, paragraph 19; see, also, judgment of 8 January 2003, *Hirsch and Others* v *BCE*, T-94/01, T-152/01 and T-286/01, EU:T:2003:3, paragraph 51 and the case-law cited).

54 In the present case, the applicant must therefore provide evidence for the existence of comparable situations between itself and Electrabel.

55 In that regard, it is clear from the Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium* (C-163/14, EU:C:2015:441, paragraphs 19 and 24) that the contract entered into with Electrabel provided for the EU institutions to pay the contribution. The applicant, who in fact disputes certain paragraphs of that Opinion, has not provided any evidence to suggest that that is not the case.

56 As stated above (see paragraph 30), the contract entered into between the applicant and the Parliament does not provide for the Parliament to pay the contribution.

57 Therefore, the applicant and Electrabel are not in comparable situations since the contract signed by the applicant did not provide for the Parliament to pay the contribution.

58 The fact that the applicant asked the Parliament to pay the contribution is irrelevant in that respect.

59 For the sake of completeness, it should be recalled that compliance with the principle of equal treatment must be reconciled with compliance with the principle of legality, according to which no person may rely, in support of his claim, on an unlawful act committed in favour of another (judgment of 4 July 1985, *Williams* v *Court of Auditors*, 134/84, EU:C:1985:297, paragraph 14). Since a

requirement for EU institutions to pay the contribution is contrary to EU law, as is clear from the judgment of 14 January 2016, *Commission* v *Belgium* (C-163/14, EU:C:2016:4), the present plea in law cannot be accepted.

60 It is clear from the foregoing that the third plea in law must be rejected as being manifestly unfounded. Therefore, all of the forms of order sought by the applicant must be dismissed.

Claim by the Parliament for a declaratory judgment

61 The Parliament is seeking a declaration by the Court that 'the Brussels-Capital Region is responsible for refunding the sum in question to the applicant'.

62 It is settled case-law that the jurisdiction of the General Court under Article 256(1) TFEU and Article 272 TFEU to deal with an action based on an arbitration clause necessarily implies jurisdiction to deal with a counterclaim made in the context of the same action which derives from the contractual relationship or the situation on which the main application is based or has a direct link with the obligations deriving therefrom (see judgment of 16 July 2014, *Isotis* v *Commission*, T-59/11, EU:T:2014:679, paragraph 265 and the case-law cited).

63 However, in the present case, the claim made by the Parliament has no link with the contract, since it does not relate to the reciprocal obligations between the parties to the contract and arising from that contract, but concerns possible obligations that the Brussels-Capital Region, which is party to neither the contract nor the proceedings, might have towards the applicant.

64 The Court therefore has no jurisdiction on the basis of the present action based on an arbitration clause to hear the claim made by the Parliament.

65 The foregoing conclusion would apply, for the same reasons, even if it were held that the wording of the arbitration clause appearing in Article 20 of the contract, which states that 'any dispute between the Parliament and the contracting party relating to this contract which cannot be settled amicably shall be referred to the Court of First Instance of the European Communities under Article 255(1) of the EC Treaty', rendered that clause capable of establishing the jurisdiction of the General Court or the Court of Justice to hear a declaratory action concerning a dispute between the Parliament and the applicant in relation to the validity, application or interpretation of the contract (see, to that effect, judgment of 26 February 2015, *Planet* v *Commission*, C-564/13 P, EU:C:2015:124, paragraph 26).

66 It follows from all the foregoing that the action must be dismissed as manifestly unfounded in law and that the Parliament's claim for a declaratory judgment must also be dismissed since the Court manifestly has no jurisdiction to hear that claim, without there being any need to take further steps in the proceedings.

Costs

67 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.

68 In the present case, since the applicant has been unsuccessful in all essential respects, it must be ordered to pay the costs, in accordance with the form of order sought by the Parliament.

69 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs.

70 The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby orders:

1. The action is dismissed.

2. The Parliament's claim for a declaratory judgment is dismissed.

3. EDF Luminus is ordered to bear its own costs and those incurred by the Parliament.

4. The European Commission is ordered to bear its own costs.

Luxembourg, 13 September 2016.

Registrar
E. Coulon

President
M.E. Martins Ribeiro