Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

3 May 2018 *

(Arbitration clause — Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) and 'Horizon 2020 — the Framework Programme for Research and Innovation' — Suspension of payments and termination of grant contracts following a financial audit — Action seeking to obtain payment of the amounts owed by the Commission in the context of the implementation of the grant contracts — Non-contractual liability)

In Case T-48/16,

Sigma Orionis SA, established in Valbonne (France), represented by S. Orlandi and T. Martin, lawyers,

applicant,

v

European Commission, represented by F. Dintilhac and M. Siekierzyńska, acting as Agents,

defendant,

APPLICATION, first, under Article 272 TFEU seeking an order directing the Commission to pay to the applicant the amounts owed pursuant to contracts concluded under the Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) and 'Horizon 2020 — the Framework Programme for Research and Innovation' and, secondly, under Article 268 TFEU seeking compensation for the damage allegedly suffered by the applicant as a result of the breach by the Commission of its obligations,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, P. Nihoul (Rapporteur) and J. Svenningsen, Judges,

Registrar: M. Marescaux,

having regard to the written part of the procedure and further to the hearing on 27 June 2017,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 The applicant, Sigma Orionis SA, is a company incorporated under French law engaged in the dissemination and communication of results of European projects in the field of information technology.

2 It concluded with the European Commission 36 grant agreements under the Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) ('FP7') adopted by Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning FP7 (OJ 2006 L 412, p. 1).

3 The same parties also concluded eight grant agreements under 'Horizon 2020 — the Framework Programme for Research and Innovation' ('H2020') established by Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing H2020 and repealing Decision No 1982/2006 (OJ 2013 L 347, p. 104).

Investigation by OLAF

4 On 24 January 2014, the European Anti-Fraud Office (OLAF) initiated an investigation against the applicant into claims of manipulation of time sheets and excessively high hourly wages in FP7 projects.

5 That investigation was based on Article 3 of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by OLAF and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1).

6 On 14 April 2014, OLAF informed the applicant that an investigation had been initiated against it. At that time, the applicant was asked to provide a number of documents. Witness statements were also taken from the applicant's former employees.

7 That evidence persuaded OLAF of the need to conduct an on-the-spot check under Article 5 of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292, p. 2).

8 By letter of 14 November 2014, OLAF informed the public prosecuting authority in Grasse (France) of its intention to carry out on-the-spot checks and inspections at the applicant's headquarters. OLAF also requested all necessary assistance from the French authorities, including the adoption of precautionary measures under national law in order to safeguard evidence.

9 OLAF carried out those on-the-spot checks and inspections between 2 and 5 December 2014. The investigators collected documents and information. They heard two persons concerned and five witnesses in the presence of the applicant's lawyer.

10 On 28 April 2015, OLAF gave the two persons concerned the opportunity to comment on evidence concerning them.

11 Subsequently, OLAF forwarded its final report to the Commission services. In that report, OLAF recommended to the Commission that it should recover the sum of EUR 1 545 759 and consider adopting administrative and financial penalties as provided for in Article 109 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1).

Action by the Commission

12 By letter of 7 October 2015, the Commission informed the applicant of its intention to adopt an administrative penalty consisting in excluding the applicant from participating in all contract or grant award procedures of the European Union for 5 years, suspending payments under 15 FP7 projects and 5 H2020 projects, putting an end to its participation in 12 FP7 projects and all H2020 projects, and terminating its participation in the preparation of 6 H2020 grant agreements.

13 In that same letter, the applicant was invited to submit comments on the proposed measures.

14 In its reply by letter of 28 October 2015, the applicant disputed OLAF's report. It maintained that OLAF had not adduced any evidence of fraud. It also stated in that letter that OLAF's findings were incorrect and unreasonable.

15 Following those exchanges, the Commission notified the applicant of the termination of its participation in three sets of agreements and the suspension of payments in respect of some of those agreements.

16 The first set comprises two grant agreements concluded under FP7, one bearing the reference 612451 — CRe-AM and the other 610947 — RAPP. By letter of 1 December 2015, the Commission decided to suspend current and future payments and terminate the applicant's participation in those two agreements. By letter of 21 December 2015, the applicant submitted a complaint to the Redress II committee, an appeals committee within the Commission to which reference is made in point 5.3 of the Annex to Commission Decision 2011/161/EU, Euratom of 28 February 2011 amending Decision C(2008) 4617 related to the rules for proposals submission, evaluation, selection and award procedures for indirect actions under FP7 and under the Seventh Framework Programme of the European Atomic Energy Community (Euratom) for nuclear research and training activities (2007-2011) (OJ 2011 L 75, p. 1). The Redress II committee rejected that complaint on 29 January 2016. It took the view that the procedures concerning suspension, prior information and termination of participation had been conducted with due regard to the applicable principles and rules. By letter of 2 February 2016, after the Redress II committee's rejection of the complaint, the Commission confirmed its decision to terminate the applicant's participation in those two agreements.

17 The second set of agreements concerns those bearing the reference 609154 — Performer and 314671 — Resilient, which were also concluded under FP7. In respect of those agreements, the suspension of payments and the termination of the applicant's participation were notified on 26 and 28 January 2016, respectively.

18 The third set relates to the H2020 project and, in that context, the agreement bearing the reference 645775 — Dragon Star Plus. On 27 January 2016, the Commission informed the project coordinator that the applicant's participation was the subject of a termination measure.

National proceedings

19 After sending its report to the Commission, OLAF forwarded that report to the French authorities with the recommendation that they initiate criminal proceedings at national level, based on French law, in respect of the conduct found to have occurred, in so far as such conduct was covered by French law.

20 Following that correspondence, the procureur de la République de Grasse (public prosecutor, Grasse) initiated a judicial investigation against X for swindling in respect of acts committed between 14 November 2011 and 10 April 2015 to the detriment of the European Union. On 15 October 2015, the applicant, its director and two of its executives were charged with swindling.

21 The case was brought before the chambre de l'instruction (Indictment Division) of the cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence, France) ('the Indictment Division'), which delivered judgment on 17 December 2015 ruling that the documents used by the French authorities in the criminal proceedings brought in France against the applicant, its director and the two executives mentioned above were invalid. According to the court, those documents had been obtained in breach of a number of procedural safeguards designed to protect the rights of the defence. The documents held to be invalid included the final report sent by OLAF to the French authorities.

22 By judgment of 19 February 2016, the tribunal de commerce de Grasse (Commercial Court, Grasse, France) initiated court-supervised administration proceedings against the applicant and appointed an administrator.

23 On 27 April 2016, that court ordered the winding up of the applicant.

24 On 4 May 2016, the Commission entered as claims in the inventory of the applicant's liabilities the amounts it considered were owed by the applicant in respect of all the terminated grant agreements. The applicant challenged those claims, totalling EUR 2 639 815,40.

25 On 8 September 2017, the tribunal de commerce de Grasse (Commercial Court, Grasse) rejected, in two orders, the claims entered by the Commission in the inventory of the applicant's liabilities on the ground that the investigation conducted by OLAF as a result of which the Commission found that the applicant should not have received payment for some services had been 'invalidated' by judgment of the Indictment Division of 17 December 2015.

Procedure and forms of order sought

26 By application lodged at the Court Registry on 2 February 2016, the applicant brought the present action.

27 By separate document lodged at the Court Registry on the same day, the applicant made an application for interim measures.

28 By letter of 30 September 2016 sent to the Court Registry on 3 October 2016, the liquidator appointed by the tribunal de commerce de Grasse (Commercial Court, Grasse) authorised the applicant's lawyer to continue proceedings before the Court.

29 By order of 25 August 2017, *Sigma Orionis* v *Commission* (T-48/16 R, not published, EU:T:2017:585), the President of the Court rejected the application for interim measures and ordered that the costs be reserved.

30 On a proposal from the Judge-Rapporteur, the Court (First Chamber) decided to open the oral part of the procedure.

31 The parties presented oral argument and answered the questions put by the Court at the hearing on 27 June 2017.

32 The oral part of the procedure was closed on 27 June 2017.

33 By order of 25 October 2017, the Court ordered the reopening of the oral part of the procedure in accordance with Article 113 of the Rules of Procedure of the General Court.

34 By decision of 25 October 2017, the President of the First Chamber of the Court decided to place in the file the two orders of the tribunal de commerce de Grasse (Commercial Court, Grasse) of 8 September 2017 referred to in paragraph 25 above together with an annex, documents that the applicant had lodged at the Court Registry by letter of 22 September 2017.

35 Pursuant to Article 85(4) of the Rules of Procedure, the Court gave the parties the opportunity to comment on those documents, which they did within the prescribed period.

36 By decision of 17 November 2017, the Court again closed the oral part of the procedure and began its deliberations.

37 The applicant claims that the Court should:

– declare that, by suspending all payments due to the applicant on the basis of an OLAF investigation report that was drawn up unlawfully, the Commission failed to fulfil its contractual obligations under the FP7 and H2020 grant contracts;

– declare that, by terminating those contracts on the basis of that report, the Commission failed to fulfil its contractual obligations under the FP7 and H2020 grant contracts;

– consequently, order the Commission to pay the amounts due to the applicant under the FP7 contracts, that is, EUR 607 404,49 together with interest on late payment in accordance with Article II.5.5, calculated from the due date of the amounts payable, at the rate fixed by the European Central Bank (ECB) for main refinancing operations, increased by 3,5 points;

– consequently, order the Commission to pay the amounts due to the applicant under the H2020 contracts, that is, EUR 226 688,68 together with interest on late payment in accordance Article II.21.11.1, calculated from the due date of the amounts payable, at the rate fixed by the ECB for main refinancing operations, increased by 3,5 points;

– consequently, order the Commission to pay damages and interest, of a non-contractual nature, in the amount of EUR 1 500 000;

– consequently, order the Commission to pay the costs;

– in the alternative, appoint an expert whose task will be to determine the amounts indisputably payable to the applicant under the grant contracts.

38 The Commission contends that the Court should:

– dismiss the action as inadmissible or, at the very least, as unfounded;

– order the applicant to pay the costs.

Law

Action for breach of contractual obligations

39 In support of its first, second, third, fourth and seventh heads of claim, the applicant submits that the payment suspensions and agreement terminations at issue ('the contested measures') were carried out by the Commission in breach of the contract terms.

Jurisdiction of the Court

40 As a preliminary point, it is necessary to ascertain whether the Court has jurisdiction to settle the dispute before it.

41 It must be pointed out, as the applicant did without being contradicted by the Commission, that according to Article 272 TFEU read in conjunction with Article 256 TFEU, the Court has jurisdiction to give judgment at first instance pursuant to any arbitration clause contained in a contract governed by private law concluded by or on behalf of the European Union.

42 In the present case, such a clause appears in Article 9 of the FP7 agreements and Article 57 of the H2020 agreements.

43 On that basis, it must be held, as the parties agree, that the Court's jurisdiction is established in respect of the applicant's claim concerning the breach of contractual obligations by the Commission.

Applicable law

44 The applicant has brought an action before the Court on the basis of Article 272 TFEU under the arbitration clauses contained in the FP7 and H2020 grant agreements, so that the subject matter of this dispute is not the legality of a decision adopted by the Commission and of the administrative procedure leading to that adoption, but the resolution of a contractual dispute between two contracting parties, which must take account of the law applicable to those agreements (see, to that effect, judgment of 12 July 2016, *Commission* v *Thales développement et coopération*, T-326/13, not published, EU:T:2016:403, paragraph 73).

45 Under Article 9 of the FP7 agreements, the following apply in the order in which they appear: the contractual provisions; acts of the European Community and European Union concerning the research programme giving rise to the agreements; the financial regulation relating to the EU general budget; any other rules of the European Community and European Union; and lastly, in the alternative, Belgian law. The same rule appears, in essence, in Article 57 of the H2020 grant agreements, which provides that the agreements are governed by the applicable EU law and, in the alternative, Belgian law. It follows from those provisions that in the absence of any objection to the application of the financial regulation relating to the EU general budget, the rules applicable to the present dispute are, in so far as they are relevant, those of EC and EU law, as appropriate, and, in the alternative, those of Belgian law.

Admissibility

– Interest in bringing proceedings

46 The Commission states that when the application was lodged, it had terminated only one grant agreement linking it to the applicant.

47 It should be recalled that according to the case-law, the applicant must demonstrate that it has a vested and present interest in bringing proceedings at the time it lodges the action in order for that action to be examined on its merits (judgment of 26 February 2015, *Planet* v *Commission*, C-564/13 P, EU:C:2015:124, paragraph 31).

48 The Commission does not formally raise a plea of inadmissibility alleging that the applicant has no interest in bringing proceedings. However, according to the case-law, that does not prevent the Court from examining the question of admissibility of its own motion and, where appropriate, declaring the action to be inadmissible, since the lack of interest in bringing proceedings is an absolute bar to proceedings (see order of 4 December 2014, *Talanton* v *Commission*, T-165/13, not published, EU:T:2014:1027, paragraph 69 and the case-law cited).

49 In its written pleadings, the applicant adds together the amounts it claims are owed to it pursuant to the 22 grant agreements concluded with the Commission under FP7 and H2020.

50 When the application was lodged, the applicant's participation had been terminated in one of the H2020 agreements and in four other FP7 agreements. The H2020 agreement that was terminated bears the reference 645775 — Dragon Star Plus while the FP7 agreements that were terminated bear the references 610947 — RAPP, 612451 — CRe-AM, 609154 — Performer and 314671 — Resilient.

51 In respect of those five agreements, a decision had therefore been adopted by the Commission at the time the application was lodged, from which it follows that, so far as those agreements are concerned, the applicant had an interest in bringing proceedings as required by the case-law when it brought its action.

52 The situation is different for the 17 other FP7 and H2020 agreements, in respect of which no decision had yet been taken by the Commission when the application was lodged. As regards those agreements, there was no interest on the date the application was lodged and, in consequence, the action must be declared inadmissible, in accordance with the case-law cited in paragraph 47 above.

– *Plea of inadmissibility alleging that the application lacks clarity and precision*

53 The Commission contends that the application does not meet the requirements of clarity and precision mentioned in Article 76(d) of the Rules of Procedure since the applicant bases its arguments on non-compliance with unidentified national provisions.

54 It should be noted that according to Article 76(d) of the Rules of Procedure, the application must state the subject matter of the proceedings and a summary of the pleas in law and that statement must be clear and precise enough to enable the defendant to prepare its arguments and the Court to rule on the application (judgment of 15 September 2016, *European Dynamics Luxembourg and Evropaïki Dynamiki* v *EIT*, T-481/14, not published, EU:T:2016:498, paragraph 460).

55 In the present case, it is apparent from the application submitted by the applicant that the subject matter of the proceedings is a challenge to the contested measures taken by the Commission. The pleas in law put forward by the applicant allege that the Commission failed to comply with its contractual obligations because the contested measures infringe the principle of *res judicata* attaching to the judgment of the Indictment Division (first plea); that OLAF's report on which the Commission relied in order to take those measures was drawn up using evidence gathered in breach of national law (second plea) and EU fundamental rights (third plea); that the Commission was not entitled to suspend and terminate H2020 agreements on the basis of checks and inspections conducted in connection with FP7 agreements (fourth plea); and that the Commission infringed the principle of proportionality by taking the contested measures (fifth plea).

56 It should also be pointed out that in view of the arguments submitted by it in the defence and the rejoinder, the Commission was able to understand clearly the criticism levelled against it by the applicant.

57 Accordingly, the conditions governing admissibility laid down in the Rules of Procedure should be considered to be met and the plea of inadmissibility raised by the Commission must be rejected.

First and second heads of claim

58 The applicant's first two heads of claim — the suspension of payments under the FP7 and H2020 grant contracts and the termination of those contracts, respectively — should be considered together.

59 In support of those claims, the applicant puts forward five pleas in law: first, the OLAF report cannot be used as the basis for the contested measures because it was annulled by the Indictment Division; secondly, the contested measures are contrary to the agreements concerned as they are based on a report drawn up using evidence gathered in breach of national law; thirdly, those measures are also contrary to the agreements since the evidence was gathered in breach of the Charter of Fundamental Rights of the European Union; fourthly, in order to suspend and terminate H2020 agreements, the Commission is not entitled to rely, as it did, on checks and inspections conducted in connection with FP7 agreements; and fifthly, the Commission infringed the principle of proportionality.

– First plea in law alleging breach of the principle of res judicata *attaching to the judgment of the Indictment Division*

60 The applicant submits that the contested measures could not be based on the final report drawn up by OLAF because that report had been annulled by the Indictment Division.

61 In response to that argument, the Commission states that the report drawn up by OLAF cannot be regarded as challengeable since it was preparatory to the decisions to be taken by the former. Even if it were to be regarded as challengeable, it could not be annulled by a national court as jurisdiction to annul acts adopted by EU authorities lies exclusively with the EU courts.

62 In that regard, it should be recalled that according to the case-law, the EU courts alone have jurisdiction to determine that an act of the European Union is invalid (see judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 48 and the case-law cited).

63 Therefore, irrespective of the findings made by the Indictment Division in its judgment, OLAF's report continues to be lawful in the EU legal order in so far as it has not been invalidated by the EU judicature.

64 According to the wording of the judgment delivered by the Indictment Division, the court held that 'the entire preliminary investigation, including the investigation [of] OLAF and its subsequent measures … [had to] be annulled, except the initial referral notifying the public prosecuting authority in Grasse, the referral sent to the police in order to have it investigate and the bills of indictment which fall within the exclusive purview of the assessment by the Procureur de la République [(public prosecutor)] of the appropriateness of bringing proceedings'.

65 However, the finding made in that judgment, as the Commission points out, is not that the report drawn up by OLAF should be annulled in the EU legal order, but only that, according to the court, 'there [was] no necessity or justification for an investigation conducted by OLAF in breach of Article 6 … TEU and the preliminary article of the code of criminal procedure, according to which a balance between the parties' rights must be maintained, to be present even purely for information

purposes in criminal proceedings concerning the method of calculating time spent to implement calls for tender relating to programmes financed by the European Commission without the content of the work performed being questioned by OLAF at that stage of the proceedings'.

66 Accordingly, although, pursuant to the judgment of the Indictment Division, OLAF's report could not be used in criminal proceedings brought in France against the applicant's leadership, the fact remains that in administrative proceedings under EU law circumscribed by contractual provisions, the Commission was entitled to rely on that report in order to take the contested measures, in so far as it had not been invalidated by the EU judicature.

67 The applicant cites the judgment of 30 September 2009, *Sison* v *Council* (T-341/07, EU:T:2009:372, paragraph 116), to demonstrate that the Commission was in any event required to take the judgment of the Indictment Division into account.

68 It should be observed that the judgment of 30 September 2009, *Sison* v *Council* (T-341/07, EU:T:2009:372), concerns the implementation of legislation in which the deliberations of the EU institution had to be based on decisions by national authorities, in particular domestic courts. The situation is different here, as there are no provisions requiring the Commission to rely on a decision to be taken by a national authority, even a court. In any event, the Court did not confer on national courts in its judgment of 30 September 2009, *Sison* v *Council* (T-341/07, EU:T:2009:372), a power enabling them to determine that an act of the European Union is invalid and thereby require the EU institutions to take account of such invalidity in their deliberations.

69 Those considerations are not undermined by the orders delivered by the tribunal de commerce de Grasse (Commercial Court, Grasse) on 8 September 2017, which were sent to the Court by the applicant and led to the oral part of the procedure being reopened so that they could be examined, as described in paragraphs 33 to 35 above. According to those orders, the claims submitted by the Commission could not be accepted because they were based on an investigation, namely that carried out by OLAF, which had been 'invalidated' by the Indictment Division.

70 The proceedings before the tribunal de commerce de Grasse (Commercial Court, Grasse) cannot have any bearing on the present action because, in so far as that action concerns the compatibility of the contested measures with the agreements at issue and the rules made applicable by them, it falls within the exclusive jurisdiction of the Court under Article 272 TFEU read in conjunction with the arbitration clause set out in those agreements.

71 Moreover, the two sets of proceedings pursue different objectives, since the present action concerns the compatibility of the contested measures with the relevant agreements and rules while, according to the explanations provided by the applicant, the proceedings before the tribunal de commerce de Grasse (Commercial Court, Grasse) sought to determine whether any claims held by the Commission could be taken into account in the context of the undertaking's winding up.

72 In the light of the foregoing, the first plea must be rejected.

– *Second plea in law alleging infringement of French law*

73 The applicant maintains that, under the regulations applicable to OLAF, namely Regulation No 883/2013 and Regulation No 2185/96, that body is required to comply with national law when it carries out checks and inspections in the territory of a Member State.

74 In support of its argument, the applicant relies on:

– Article 3(3) of Regulation No 883/2013, according to which 'during on-the-spot checks and inspections, the staff of [OLAF] shall act, subject to the Union law applicable, in compliance with the rules and practices of the Member State concerned and with the procedural guarantees provided for in this Regulation';

– the third subparagraph of Article 6(1) of Regulation No 2185/96, which provides that subject to EU law, OLAF's investigators must comply with the rules of procedure laid down by the law of the Member State concerned;

– Article 11(2) of Regulation No 883/2013, under which, 'in drawing up [OLAF's] reports and recommendations, account shall be taken of the national law of the Member State concerned'.

75 The applicant claims that national law was infringed in the instant case on the following three counts:

– before conducting its operation at the applicant's premises, OLAF should have obtained a warrant from a national court;

– during that operation, its investigators should have been accompanied by national police officers;

– they should have informed the applicant of its right to resist on-the-spot checks and inspections.

76 In answer to those arguments, it should be observed that as stated in paragraphs 62 to 66 above, OLAF's report continues to be lawful in the EU legal order in so far as it has not been invalidated by the EU judicature, without prejudice to any decisions that might be taken by the national authorities or courts concerning the use that can be made of such a report in proceedings under national law.

77 It follows from the third provision relied on by the applicant, namely Article 11(2) of Regulation No 883/2013, that reports drawn up by OLAF may be used in national proceedings to the extent that they were drawn up in accordance with the rules and procedures laid down by national law. If national law was infringed, as the applicant claims here, the result is that it will not be possible to use the report drawn up by OLAF in national proceedings, but that does not affect the possibility for the Commission to base its decisions on that document.

78 Under the other provisions mentioned by the applicant, namely Article 3(3) of Regulation No 883/2013 and the third subparagraph of Article 6(1) of Regulation No 2185/96, on-the-spot checks and inspections are carried out by OLAF in accordance with the rules and practices applicable in the Member State concerned, subject to the EU law in force.

79 It follows from those provisions that the backdrop to the on-the-spot checks and inspections carried out by OLAF is characterised by the application of national law. However, national law must, on any view, yield to EU law whenever required by Regulation No 883/2013 or Regulation No 2185/96.

80 It should be pointed out that as regards the first count on which French law was allegedly infringed, there is no obligation under Regulations No 883/2013 and No 2185/96 for national requirements to be met before OLAF conducts checks and inspections at the premises of an economic operator, unless the latter resists.

81 Only in the event of resistance does Article 9 of Regulation No 2185/96 provide, in the first paragraph thereof, that the Member State concerned, acting in accordance with national rules, is to give OLAF's inspectors such assistance as they need to allow them to discharge their duty in carrying out an

on-the-spot check or inspection, and, in the second paragraph, that it is for the Member States to take any necessary measures, in conformity with national law. It is apparent from the file that the applicant did not resist the on-the-spot checks and inspections in the case before the Court.

82 The applicant's argument must therefore be rejected, since Regulations No 883/2013 and No 2185/96 make no provision for compliance with national requirements such as those concerning the need for a warrant to be obtained beforehand from a national court where there is no resistance on the part of the operator concerned, as those regulations make on-the-spot checks and inspections conducted by OLAF conditional solely on the existence of written authorisation from its Director-General (Article 7(2) of Regulation No 883/2013 and the second subparagraph of Article 6(1) of Regulation No 2185/96).

83 The applicant contends that in the judgment of 22 October 2002, *Roquette Frères*, (C-94/00, EU:C:2002:603, paragraph 48), the Court imposed on the Commission, in the field of competition, obligations to be complied with concerning judicial warrants in administrative proceedings.

84 That argument lacks any basis in fact since, contrary to the applicant's assertions, the judgment cited by it does not require recourse to be had to a national court before carrying out on-the-spot checks and inspections; it only states that the administrative authority must specify the subject matter of the search before conducting such checks and inspections. In the present case, authorisation was issued on 27 November 2014 by the Director-General of OLAF and was produced by the investigators upon arriving at the applicant's headquarters, where it was countersigned by the director of the applicant, who retained a copy. Furthermore, no objections were made to the content of that authorisation.

85 As regards the second count on which French law was allegedly infringed, it should be noted that, according to the applicable EU regulations:

– investigations are conducted by OLAF's investigators under the direction of the Director-General of OLAF (Article 7(1) of Regulation No 883/2013 and Articles 4 and 6(1) of Regulation No 2185/96);

– those investigators must notify the national authorities before carrying out on-the-spot checks and inspections (first paragraph of Article 4 of Regulation No 2185/96);

– they may be accompanied by national officials sent by their national authorities or acting as national experts on secondment to the Commission (first paragraph of Article 4 of Regulation No 2185/96);

– the presence of those officials must be accepted if they wish to be present (second paragraph of Article 4 of Regulation No 2185/96);

– in the event of resistance to an on-the-spot check or inspection, the national authorities must take the necessary measures to ensure that OLAF is able to discharge its duty in conformity with national law (Article 9 of Regulation No 2185/96).

86 It follows from those provisions that the presence of national officials is governed by Regulation No 2185/96 and is required under that regulation in two circumstances, which did not arise in the present case, when on-the-spot checks and inspections are conducted by OLAF. First, their presence is necessary where an operator resists a check or inspection by OLAF. According to the information provided by the applicant, no such resistance was offered by the applicant. Secondly, the presence of national officials must be accepted if those officials ask to be present.

87 The file shows that, in the instant case, three national officials were present during part of the operations; that those officials informed the applicant's managing director that a preliminary investigation of a criminal nature had been initiated against the applicant, based on French law, in

parallel to the proceedings under EU law; and that, against that background, they performed a number of actions before leaving the applicant's headquarters at the end of the morning without expressing the wish to be present during the on-the-spot checks and inspections carried out under EU law.

88 Accordingly, it is not as a result of conduct attributable to OLAF that the national officials were not present during the whole operation; rather, their absence was due to a decision taken by them which, in consequence, cannot affect the validity of the contested measures taken by the Commission on the basis of the report drawn up by OLAF.

89 The applicant relies on the judgment of 21 September 1989, *Hoechst* v *Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 34), in which the Court held that the Commission was required to respect the procedural guarantees laid down by national law when carrying out on-the-spot checks and inspections.

90 That argument lacks any basis in fact since, as is apparent from the file, the applicant did not resist the on-the-spot checks and inspections in the case before the Court, while the judgment relied on concerns the situation where the assistance of the national authorities is sought to deal with the resistance offered by an economic operator to an on-the-spot check or inspection carried out by the Commission in a competition investigation.

91 Regarding the third point raised by the applicant, it should be noted that under the second paragraph of Article 5 of Regulation No 2185/96, economic operators are required to grant access to premises, land, means of transport and other areas used for business purposes in order to facilitate checks and inspections.

92 As a complement, Article 9 of that regulation provides that where economic operators under investigation resist an on-the-spot check or inspection, the Member State concerned, acting in accordance with national rules, is to give the inspectors such assistance as they need to allow them to discharge their duty in carrying out an on-the-spot check or inspection. Under that provision, it is for the Member States to take any necessary measures, in conformity with national law.

93 The obligation of economic operators to submit to on-the-spot checks and inspections is also laid down in paragraphs 2 to 4 of Article II.22. of Annex II to the FP7 agreements signed by the applicant, establishing the framework for the contractual relationship between it and the Commission.

94 It is true that, as stated in paragraph 92 above, Regulation No 2185/96 envisages the situation where an economic operator resists on-the-spot checks and inspections by OLAF and, in those circumstances, states that the assistance of the national authorities might be required and that the operations they conduct must be in accordance with national law.

95 However, that provision does not give economic operators the right to resist OLAF's planned operations; it merely states that, in the event of resistance, they may be forced to accept those operations and that national law enforcement authorities may be called upon for that purpose under the conditions laid down by national law.

96 The file shows that that provision was not applicable here since, as the applicant itself conceded, it did not resist the on-the-spot checks and inspections carried out by OLAF.

97 In the light of all the foregoing, the plea must be rejected.

– *Third plea in law alleging infringement of fundamental rights*

98 In the third plea, the applicant claims that the contested measures could not be taken by the Commission because they were based on a report drawn up using evidence gathered in breach of Article 47 of the Charter of Fundamental Rights.

99 At the hearing, the applicant stated, in response to a question put by the Court, that in its view the Commission is bound, in performance of the agreements concluded by it, to respect rights the existence of which is recognised in the Charter of Fundamental Rights. For its part, the Commission argued that those rights cannot be applied to the conduct of the EU institutions in contractual matters across the board, but that their application must be examined on a case-by-case basis in the light of, in particular, the content of the contractual provisions.

100 In that regard, it should be pointed out that according to settled case-law, fundamental rights are in the nature of general principles in the EU legal order (judgments of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4; of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 68; and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 69).

101 Those rights are enshrined in the Charter of Fundamental Rights, which forms part of the EU Treaty and provides, in Article 51(1), without exception, that its provisions 'are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity'.

102 As such, fundamental rights are designed to preside over the exercise of the powers conferred on the EU institutions, including in contractual matters, in the same way as they apply to measures taken by the Member States within the scope of EU law.

103 The result of that general application of fundamental rights is, as the Commission conceded, that the Commission may not, on the basis of information gathered by OLAF in breach of fundamental rights, suspend payments due to an economic operator or terminate the agreements linking it to such an operator.

104 It is moreover clear from the legislation that OLAF is required to respect fundamental rights when it conducts investigations within the scope of the duties entrusted to it.

105 Under Regulation No 883/2013, investigations carried out by OLAF must comply with fundamental rights. That obligation follows from recital 51 of the regulation.

106 Regulation No 2185/96 states, in recital 12, that 'on-the-spot checks and inspections are carried out with due regard to the fundamental rights of the persons concerned'.

107 In the present case, the applicant argues that in carrying out its on-the-spot checks and inspections, OLAF infringed Article 47 of the Charter of Fundamental Rights, which essentially provides that individuals in the EU have the right to an effective remedy before a court, meaning, among other things, that they are entitled to a public hearing in the event of a dispute in conditions guaranteeing independence and impartiality.

108 According to the applicant, Article 47 of the Charter of Fundamental Rights was infringed in so far as the on-the-spot checks and inspections were carried out by OLAF without its investigators being accompanied by national police officers, without the applicant having been informed of its right to resist those operations and without the operations having been authorised beforehand by a national court.

109 As regards the applicant's first two complaints, it should be noted that the applicant has not adduced any evidence in support of its arguments, in particular to show that the escort by national police officers and the right to be informed about the possibility of resisting an operation conducted by OLAF are covered by Article 47 of the Charter of Fundamental Rights.

110 Furthermore, suffice it to recall that as stated in paragraphs 85 to 96 above, the rules applicable to those operations do not require OLAF's investigators to be accompanied by national police officers in the circumstances of the instant case and those rules do not confer on economic operators, such as the applicant, the right to resist such operations and, a fortiori, be informed about the existence of such a right.

111 Concerning the applicant's third complaint, it should be pointed out that the applicant has not provided the Court with any evidence supporting the view that, in the circumstances of the case in point, a requirement to secure a judicial warrant could flow from an individual's right to have his case heard by an independent and impartial tribunal, particularly since the applicant was able to bring proceedings, first, before a national court to determine whether the evidence gathered by OLAF in the course of the impugned operations could be used against it in the domestic legal order and, secondly, before the EU judicature in order to have the measures taken by the Commission on the basis of the information obtained in the operations challenged by it reviewed in the EU legal order.

112 Lastly, it must be recalled that under the rules applicable to operations conducted by OLAF, the need to obtain a judicial warrant, if prescribed by national law, applies only in the event of resistance by the economic operator, in which case OLAF is required to call on national law enforcement authorities which, in accordance with the rules applicable to them, must comply with the rules of the domestic legal order.

113 However, as stated in particular in paragraph 81 above, the applicant did not resist the on-the-spot checks and inspections carried out by OLAF.

114 Finally, the applicant submits that Article 53 of the Charter of Fundamental Rights contains a 'minimum safeguards' clause under which OLAF, in its investigations, is required to comply with national rules where they afford individuals more extensive safeguards than those provided for in EU law.

115 It should be observed that according to the case-law, that provision cannot be construed as allowing a Member State to disapply EU legal rules which are fully in compliance with the Charter on the ground that they infringe the fundamental rights guaranteed by that State's constitution (judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 58).

116 As the Court pointed out, that case-law derives from the principle of primacy of EU law, which is an essential feature of the EU legal order and in consequence of which rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 59 and the case-law cited).

117 Lastly, contrary to the applicant's assertions, individuals enjoy protection from the standpoint of fundamental rights during on-the-spot checks and inspections by OLAF, since OLAF must comply with EU rules requiring its actions to be compliant with those rights and the Commission cannot take measures like those at issue here based on evidence obtained during such operations if they were conducted in breach of those rights, as stated in paragraph 103 above.

118 For the above reasons, the third plea must be rejected.

– *Fourth plea in law alleging that OLAF's investigation report has no effect on the H2020 grant agreements*

119 By its fourth plea, the applicant argues that in order to take measures in relation to the H2020 grant agreements, the Commission was not entitled to rely on evidence or proof gathered by OLAF in the context of an investigation into the implementation of FP7 projects.

120 It should be recalled that in the case of the H2020 grant agreements, the measures taken by the Commission involved terminating the applicant's participation in the agreement bearing the reference 645775 — Dragon Star Plus, as indicated in paragraph 50 above.

121 It must also be pointed out that the rights and obligations of the Commission under an agreement signed by it are governed by the clauses set out in that agreement.

122 Article 50.3.1(m) of the agreement at issue provides for the possibility of terminating a beneficiary's participation in the agreement in the case of systemic or recurrent errors, irregularities, fraud or serious breach of undertakings in other agreements.

123 It follows from that provision that the Commission may terminate the applicant's participation in the agreement at issue where such errors, irregularities, fraud or serious breach of undertakings have been committed in the performance of an agreement, regardless of the programme to which that agreement relates and even if the programme is not H2020.

124 According to the investigation carried out by OLAF, the applicant engaged in conduct consisting in the manipulation of time sheets and the award of excessively high salaries which allowed it to fund non-eligible activities and contravene the 'no-profit' rule to the detriment of the budget and image of the EU. The investigation found that the conduct had occurred repeatedly over a number of years and was widespread, since it involved the applicant's director and its executives. In those circumstances, that conduct — based on the information available to the Commission which was not disputed by the applicant before the Court — amounted to a serious breach of the undertakings entered into by the applicant under the FP7 agreements, with the result that the conditions were met for the Commission to be able to terminate the applicant's participation in the H2020 agreement at issue.

125 It follows that the fourth plea put forward by the applicant must be rejected as unfounded.

– *Fifth plea in law alleging infringement of the principle of proportionality*

126 In its fifth plea, the applicant claims that the contested measures are contrary to the principle of proportionality.

127 It should be recalled that, as enshrined in Article 5(4) TEU, the principle of proportionality is a general principle of Union law under which the EU institutions may not exceed the limits of what is appropriate and necessary for attaining the objective pursued in the actions they undertake (judgment of 26 January 2017, *Diktyo Amyntikon Viomichanion Net* v *Commission*, T-703/14, not published, EU:T:2017:34, paragraph 156).

128 According to the case-law, that principle is intended to regulate all the means of action used by the European Union, whether contractual or non-contractual. In the context of the performance of contractual obligations, respect for that principle contributes to the more general obligation of the parties to a contract to perform it in good faith (judgment of 26 January 2017, *Diktyo Amyntikon Viomichanion Net* v *Commission*, T-703/14, not published, EU:T:2017:34, paragraph 157).

129 In the present case, it is necessary to examine whether the Commission complied with that obligation when, within the contractual framework of the present dispute, it took the contested measures.

130 According to the evidence and proof gathered by OLAF, the conduct alleged against the applicant consists in the manipulation of time sheets and the award of excessively high salaries. As stated in paragraph 124 above, that conduct is said to have enabled the applicant to fund non-eligible activities and infringe the 'no-profit' rule to the detriment of the budget and image of the EU. It is alleged that the conduct occurred repeatedly over a number of years and was widespread, since it involved the applicant's director and its executives.

131 The applicant was heard by the Commission before the adoption of each of the contested measures. However, it failed to show that it did not commit the irregularities of which the Commission had accused it in detail by letter of 7 October 2015, findings that that institution confirmed and supplemented in its decisions to suspend payments and terminate contracts, having regard to the arguments put forward by the applicant in its written comments, and in the decisions adopted by the Redress II committee in the context of FP7 and the subsequent confirmatory decisions of the Commission.

132 In addition, in the application, the applicant did not submit any pleas seeking to call in question the merits of the Commission's analysis, particularly with regard to its practice of overstating the hours actually worked by its managing executives and its practice of retroactively drawing up the hours worked by staff members. Furthermore, the arguments put forward in support of its heads of claim are not such as to cast doubt on the Commission's statements in its letter of 7 October 2015 in relation to the irregularities committed by the applicant.

133 That conduct must be examined in the light of the constraints on the Commission, particularly those deriving from Article 317 TFEU, under which the Commission is duty-bound to ensure the sound management of EU resources, and Article 325 TFEU, which requires the European Union and the Member States to combat fraud and any other illegal activity affecting the EU's financial interests.

134 Against that background, it should be noted that by taking the contested measures, the Commission sought to prevent further resources from the EU budget being entrusted to the applicant. The data collected by OLAF indicated that the prohibited conduct in which the applicant had engaged was recurrent and widespread. Having received that information, it was reasonable for the Commission to be concerned that, if further resources were transferred to the applicant, they would be used in the same way as previous resources, that is to say in breach of the applicable contractual provisions.

135 In its written pleadings, the applicant puts forward two arguments in support of its plea alleging breach of the principle of proportionality by the Commission.

136 In the first place, it claims that the measures taken by the Commission were decided on without taking into account the quality of the work performed by the applicant even though, according to prior technical audits carried out on its work, it had used the resources given to it in line with the principles of economy, efficiency and sound financial management.

137 It must be pointed out that the technical audits to which the applicant referred pursued a different objective from that of OLAF in its investigation. Their aim was to assess, on an intellectual level, the research conducted by the applicant with the resources provided by the Commission. On the other hand, OLAF's investigation sought to establish whether, in financial terms, the resources received from the European Union had been used in accordance with the contractual rules.

138 Moreover, regardless of the law applicable to the grant contracts at issue, the Commission is bound, under Article 317 TFEU, by the obligation of sound financial management of EU resources. Under the arrangements for the award of EU grants, the use of those grants is subject to rules which may result in

the partial or total suspension of a grant that has already been awarded. The beneficiary of a grant does not thereby acquire any definitive right to full payment of the grant if he does not satisfy the conditions to which the support was subject (see, to that effect, judgment of 22 May 2007, *Commission* v *IIC*, T-500/04, EU:T:2007:146, paragraph 93).

139 According to a fundamental principle governing the award of grants by the European Union, only expenses which have actually been incurred can be subsidised. Accordingly, in order for the Commission to be able to carry out checks, the beneficiaries of those grants must show that the costs attributed to subsidised projects are eligible. It is not sufficient to show that a project has been carried out for the allocation of a specific grant to be justified. The beneficiary of the aid must, in addition, produce evidence that he has incurred the expenses declared in accordance with the conditions laid down for the award of the grant concerned. His obligation to satisfy the prescribed financial conditions is one of his essential commitments and accordingly determines the allocation of EU grants (see, to that effect, judgment of 22 May 2007, *Commission* v *IIC*, T-500/04, EU:T:2007:146, paragraph 94).

140 Therefore, in view of the observations set out in OLAF's investigation report concerning the practices implemented by the applicant and the abovementioned case-law principles, it cannot be claimed that the Commission infringed the principle of proportionality by taking the contested measures.

141 In the second place, in its arguments relating to the principle of proportionality, the applicant maintains that the Commission acted in an unacceptable manner by taking measures affecting all the agreements between them when the prohibited conduct was found to exist in only a limited number of situations. The applicant contends that a more appropriate response would have been to inform it of the existence of difficulties and ask it to adjust the items recording ineligible expenditure.

142 It should be noted that the measures taken by the Commission which were criticised by the applicant form part of a context in which evidence had been disclosed to that institution by the body officially responsible for combating the misuse of EU funds, such evidence showing that the applicant had committed serious and recurring fraud in the use of those funds.

143 Against that background, the Commission was entitled to take the view that if it limited the suspension to certain payments or terminated only some of the agreements between it and the applicant, the EU's financial interests would not receive sufficiently effective protection, in breach of its obligation under Article 317 TFEU mentioned above. Since the investigations were conducted in the form of samples, the existence of irregularities in an agreement could affect the Commission's trust in its contractor and lead it to call in question the applicant's participation in all of the agreements concluded with it.

144 It follows from the above that the fifth plea raised by the applicant, namely that claiming breach of the principle of proportionality, must be rejected.

145 Based on those considerations, the five pleas in law put forward by the applicant in support of its first and second heads of claim must be rejected.

Third and fourth heads of claim

146 By its third and fourth heads of claim, the applicant asks the Court to order the Commission to pay the sums it claims were suspended unlawfully under the FP7 and H2020 contracts, amounting, respectively, to EUR 607 404.49 and EUR 226 688.68, together with interest on late payment.

147 It must be pointed out, as the Commission concedes, that during the period preceding termination, the applicant could incur eligible costs for which it would be entitled to claim payment in accordance with the applicable contractual provisions.

148 However, the provision of funding by the European Union under grant contracts does not constitute remuneration for work performed by the applicant, but a grant awarded to projects run by the latter the payment of which is subject to clear conditions defined in those contracts. EU funding is intended to cover only eligible costs, as defined in the contracts at issue.

149 The general conditions of the FP7 grant agreements provide, in Article II.39(1), that in the event of termination, any contribution from the Commission is limited to the eligible costs incurred and accepted up to the actual date of termination. Regarding the H2020 grant agreements, Article 50.3.3(b) provides that the Commission is to check, based on the periodic reports, the final report and the report on the distribution of payments, that the payments received by the beneficiary do not exceed the EU's contribution (calculated by applying the reimbursement rate to the eligible costs declared by the beneficiary and approved by the Commission) and that only the costs incurred by the beneficiary prior to termination of the agreement are eligible.

150 The applicant may therefore demand the sums claimed provided that it demonstrates, among other things, that those sums correspond to eligible costs which were incurred and accepted prior to the actual date of termination of the contract.

151 However, in the present case, the applicant did not put forward any specific evidence or arguments in that respect. It simply seeks payment of the amounts referred to in paragraph 146 above without explaining what they correspond to and without submitting any evidence to justify those figures in the light of the requirements set out in the contractual provisions.

152 It follows that the Court must reject the third and fourth heads of claim as unfounded, without it being necessary to examine the applicant's interest in bringing proceedings inherent in those heads of claim.

Seventh head of claim

153 By its seventh head of claim, the applicant asks the Court 'in the alternative' to appoint an expert whose task would be to carry out a financial audit of the grant contracts in dispute in order to determine the amount of eligible costs which were not reimbursed and which should be regarded as indisputably payable. That request should be construed as a suggestion that the Court adopt a measure of inquiry under Article 91(e) of the Rules of Procedure.

154 It must be pointed out that it is for the applicant, under its contractual commitments, to adduce evidence of its expenditure in accordance with the evidential requirements laid down in Article II.14(1) of the general conditions of the FP7 grant agreements and Article 6 of the H2020 grant agreements (judgments of 22 May 2007, *Commission* v *IIC*, T-500/04, EU:T:2007:146, paragraphs 104 and 105; of 17 June 2010, *CEVA* v *Commission*, T-428/07 and T-455/07, EU:T:2010:240, paragraph 141; and of 5 October 2016, *European Children's Fashion Association and Instituto de Economía Pública* v *EACEA*, T-724/14, not published, EU:T:2016:600, paragraph 137).

155 Moreover, the Court is the sole judge of whether the information available concerning the cases before it needs to be supplemented by ordering a measure of inquiry such as that applied for here, which cannot be intended to make up for the omission of the applicant in the taking of evidence (see judgment of 16 July 2009, *SELEX Sistemi Integrati* v *Commission*, C-481/07 P, not published, EU:C:2009:461, paragraph 44 and the case-law cited). In the present case, although the applicant has not established the amounts it claims should be paid to it, it is not appropriate to adopt the requested measure of inquiry (see, to that effect, judgment of 9 November 2016, *Trivisio Prototyping* v *Commission*, T-184/15, not published, EU:T:2016:652, paragraph 102).

Application to establish non-contractual liability

156 By its fifth head of claim, the applicant raises the issue of the Commission's non-contractual liability.

157 In the application, the applicant claims that it suffered damage to its reputation and its order book. It states that it was the subject of a verification warning in the Commission's early warning system on the basis of the information provided by OLAF. However, that information was gathered in disregard of the applicant's fundamental rights, which constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals, namely a manifest and grave disregard by the institution concerned of the limits on its discretion.

158 In the reply, the applicant seeks compensation for the additional material damage suffered as a result of the wrongful conduct by the Commission, which used a report by OLAF drawn up on the basis of unlawfully obtained evidence in order to take the contested measures. It states that the failure to pay the amounts owed represented a significant loss of turnover as the company generated most of its turnover from projects subsidised by the Commission and its agencies. It also submits that its winding up exacerbated the material damage caused and that the exclusion warning in the early warning system to which it was subject as a result of its court-supervised administration prevented it in any event from receiving further funding under FP7 or H2020 grant contracts.

159 In response to a question put by the Court, the applicant stated at the hearing that it confined its arguments concerning the Commission's alleged wrongful conduct to the breach of national law and fundamental rights by OLAF's investigators during the checks and inspections carried out between 2 and 5 December 2014. According to the applicant, the consequence of that wrongful conduct was that, due to the payment suspensions, agreement terminations and the fact that no new contracts were entered into, it was unable to meet its debts and was therefore ordered to be wound up. By harming the applicant's reputation and preventing it from resuming its business in any form in the short or medium term, the winding up aggravated the material damage suffered by the applicant.

160 It should be recalled that the non-contractual liability of the European Union, within the meaning of the second paragraph of Article 340 TFEU, for unlawful conduct on the part of its bodies depends on fulfilment of a set of conditions, namely the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see judgment of 2 March 2010, *Arcelor* v *Parliament and Council*, T-16/04, EU:T:2010:54, paragraph 139 and the case-law cited).

161 Given the cumulative nature of those conditions, the action must be dismissed where one of those conditions is not satisfied (see judgment of 2 March 2010, *Arcelor* v *Parliament and Council*, T-16/04, EU:T:2010:54, paragraph 140 and the case-law cited).

162 Furthermore, it should be observed that the infringement of a contractual provision by an institution cannot in itself establish the non-contractual liability of that institution with regard to one of the parties with which it concluded the contract containing that provision. In such a case, the unlawful conduct attributable to the institution is purely contractual in nature and stems from its undertaking as a contracting party and not from any other status, such as its capacity as an administrative authority. Consequently, in those circumstances, the claim of infringement of a contractual provision in support of an application to establish non-contractual liability must be declared ineffective (judgment of 18 November 2015, *Synergy Hellas* v *Commission*, T-106/13, EU:T:2015:860, paragraph 149).

163 However, it cannot be ruled out that the contractual and the non-contractual liability of an EU institution may coexist in respect of one of the parties with which it has concluded a contract. The nature of unlawful conduct attributable to an institution which causes damage and may be the subject of a claim seeking compensation for non-contractual damage is not predefined (see, to that effect,

judgments of 23 March 2004, *Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2004:174, paragraph 59 and the case-law cited, and of 18 December 2009, *Arizmendi and Others* v *Council and Commission*, T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04, EU:T:2009:530, paragraph 65).

164 Assuming that such coexisting liability for the institutions exists, it would be possible only if the unlawful conduct attributed to the institution in question constitutes a breach of not only a contractual obligation, but also of a general obligation incumbent on it, and that unlawful conduct in respect of the general obligation has caused damage other than damage stemming from the improper performance of the contract (judgment of 18 November 2015, *Synergy Hellas* v *Commission*, T-106/13, EU:T:2015:860, paragraph 150).

165 In the present case, the claim made by the applicant in support of its application to establish non-contractual liability, summarised in paragraph 159 above, is the same as the alleged infringements of a contractual nature put forward by the applicant in its first and second heads of claim and no damage other than damage stemming from the improper performance of the contract has been put forward.

166 In any event, it has been held in this judgment, following the examination of the first and second pleas in law raised by the applicant in support of its action for breach of the Commission's contractual obligations, that the applicant's claims, set out in paragraph 159 above, had to be rejected.

167 Since the applicant thus failed to demonstrate that the Commission engaged in wrongful conduct capable of rendering it liable, the application to establish non-contractual liability lodged by the applicant is, in any event, unfounded.

168 In the light of all of the foregoing, the action must be dismissed in its entirety.

Costs

169 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. In the present case, since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission, including those relating to the interlocutory proceedings.

On those grounds,

THE GENERAL COURT (First Chamber),

hereby:

1. **Dismisses the action;**

2. **Orders Sigma Orionis SA to pay the costs, including those relating to the interlocutory proceedings.**

Pelikánová Nihoul Svenningsen

Delivered in open court in Luxembourg on 3 May 2018.

[Signatures]

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