



Reports of Cases

Case T-4/20

Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii

v

European Commission

Judgment of the General Court (First Chamber), 27 April 2022

(Arbitration clause – Grant agreement concluded in the context of the Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Eligible costs – Request for reimbursement – Financial audit – OLAF investigation – Conflict of interest on account of family or emotional ties – Principle of good faith – Principle of non-discrimination on grounds of marital status – Legitimate expectations – Action for annulment – Debit notes – Acts inseparable from the contract – Act not open to challenge – Right to effective judicial review – Inadmissibility)

1. *Judicial proceedings – Publication of decisions – Duty of the EU judicature to ensure a fair balance between making decisions public and the right to the protection of personal data – Application for omission of information allowing persons to be identified or relating to employment contracts, an organisational structure or management practices – Rejection – Omission that may have a detrimental effect on access to and the understanding of judgments (Art. 15 TFEU)*

(see paragraphs 29-33)

2. *EU budget – EU financial assistance – Obligation on the beneficiary to comply with the conditions for grant of the assistance – Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Grant agreement – Audit procedure and control procedure – Audit carried out by an external firm, an authorised representative of the Commission – Control procedure initiated by the European Anti-Fraud Office (OLAF) after acceptance of the final audit report – Recovery by the Commission of sums due on the basis of the irregularities identified at the end of the control procedure – Whether permissible – Control procedure independent of the audit procedure (Council Regulation No 1605/2002, Art. 119; Commission Regulation No 2342/2002, Art. 183(1)(a) and (2))*

(see paragraphs 43-65)

3. *EU budget – EU financial assistance – Obligation on the beneficiary to comply with the conditions for grant of the assistance – Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Grant agreement –*

*Financial audit – Final audit report validated by the institution – Binding and immutable nature of that report – Precluded
(Council Regulation No 1605/2002, Art. 119)*

(see paragraphs 70-74)

4. *EU budget – EU financial assistance – Obligation on the beneficiary to comply with the conditions for grant of the assistance – Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Grant agreement – Risk of a conflict of interest relating to family or emotional ties – Rebuttable presumption as to the existence of a conflict of interest – Allocation of the burden of proof – Scope*

(see paragraphs 81-84)

5. *EU budget – EU financial assistance – Obligation on the beneficiary to comply with the conditions for grant of the assistance – Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Grant agreement – Risk of a conflict of interest relating to family or emotional ties – Wife responsible for approving her husband's timesheets without being able to alter them – Risk of a conflict of interest liable to influence the impartial and objective performance of the project – No relationship of administrative subordination between the spouses in the work environment – Irrelevant*

(see paragraphs 85-96)

6. *EU institutions – Exercise of powers – Obligation to respect fundamental rights, including in contractual matters – Arbitration clause conferring jurisdiction on the EU judicature to hear disputes relating to a contract – Applicable law stipulated in that contract other than EU law – No impact on the powers concerned – Limitation on the exercise of fundamental rights – Conditions
(Art. 317 TFEU; Charter of Fundamental Rights of the European Union, Art. 52)*

(see paragraphs 98-100)

7. *EU budget – EU financial assistance – Obligation on the beneficiary to comply with the conditions for grant of the assistance – Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Grant agreement – Risk of a conflict of interest relating to family ties liable to influence the impartial and objective performance of the project – Recovery by the Commission of sums due – Obligation to observe the principle of sound financial management – No infringement of the rights recognised by Articles 7 and 9 of the Charter of Fundamental Rights
(Charter of Fundamental Rights of the European Union, Arts 7 and 9)*

(see paragraph 101)

8. *Action for annulment – Actionable measures – Concept – Measures producing binding legal effects – Debit note issued by an institution relating to sums due under a grant agreement – Preparatory act – Not included*
(Art. 263 TFEU)

(see paragraphs 147, 152, 153)

Résumé

The applicant, Sieć Badawcza Łukasiewicz, is a research institute which acceded, as a beneficiary, to three grant agreements under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013).

In 2013, certain grant agreements concluded in that context were the subject of an audit carried out by an external auditing firm engaged by the Commission. Later on, in the context of an investigation, the European Anti-Fraud Office (OLAF) accused the applicant of complicity in the false declarations made on the timesheets of certain of its employees. On the basis of OLAF's conclusions, the Commission issued debit notes requiring the payment of certain amounts by way of damages. The Commission did not accept the personnel costs of an employee ('the employee in question') whose timesheets had been signed, indicating approval, by his wife. The amounts claimed were paid in full by the applicant, which nevertheless brought an action before the General Court seeking, inter alia, a declaration that the Commission's contractual claim was non-existent and repayment of the amounts contained in the debit notes.

The General Court dismisses that action and examines, first, the legality of the recovery effected by the Commission and, secondly, the existence in the case at hand of a conflict of interest on account of family ties.

Findings of the Court

After rejecting the application for omission of certain information vis-à-vis the public submitted by the applicant, on the ground that that information is not contained in the judgment or is information the omission of which would be liable to have a detrimental effect on the public's access to and understanding of the judgment, the General Court examines the legality of the Commission's recovery orders.

In that regard, it notes, first of all, that the grant agreements provide for audit procedures, on the one hand, and control procedures, on the other. The control procedures, as provided for in the agreements at issue, are measures falling within the contractual framework linking the parties which are juxtaposed with the audit procedures as independent procedures. The procedure conducted by OLAF comes under those control procedures.

In that context, the General Court takes the view that, first, at the end of the control procedure, the Commission was entitled to demand recovery of the sums due, after having identified irregularities committed by the applicant, in accordance with the grant agreements at issue.¹ Secondly, no particular and specific procedural requirement is imposed as to how irregularities are to be identified in the context of control procedures initiated after the acceptance of the final

¹ Article II.22(6) and the second subparagraph of Article II.21(1) of Annex II to the grant agreements at issue.

reports and accounts.² Thus, contrary to the applicant's claim that there is no power for the Commission to ignore a final audit report under the grant agreements at issue, the procedure followed in the case at hand was independent of the audit procedure referred to by the applicant. In that context, the General Court states that it follows from the provisions of the grant agreements at issue and from the Financial Regulation that the audits are not binding.³ Accordingly, the final audit report, even after validation by the Commission, cannot be regarded as being binding and immutable in relation to it, and the Commission is not bound by the findings of a financial audit where a subsequent check calls into question its results.

Next, regarding the risk of a conflict of interest on account of the existence of family ties, the General Court finds that the grant agreements at issue give rise to a rebuttable presumption as to the existence of a risk of a conflict of interest where, in particular, persons with family or emotional ties are involved in one way or another in the same project.⁴ In the case at hand, the marital relationship between the employee in question and his wife leads to the application of that presumption.

The General Court takes the view that the fact that the wife of the employee in question was responsible for approving her husband's timesheets without being able to alter them, while appearing as 'supervisor' on those records, is sufficient for the review system put in place by the applicant to be regarded as failing to satisfy the requirement that it take every necessary precaution to avoid any risk of a conflict of interest relating to family or emotional ties liable to influence the impartial and objective performance of the project concerned, in accordance with the grant agreements at issue. According to the General Court, the influence of the family situation cannot be ruled out merely because there was no relationship of administrative subordination in the work environment. Consequently, the proper performance of the project concerned may have been jeopardised.

Furthermore, as regards the applicant's argument that the Commission's position constitutes discrimination on grounds of marital status, contrary to Articles 7 and 9 of the Charter of Fundamental Rights of the European Union ('the Charter'),⁵ the General Court takes the view that the requirement to avoid any conflict of interest on account of family or emotional ties is intended to prevent a serious and manifest breach of the requirement of impartiality and objectivity, to which the person responsible for certifying the timesheets of researchers working on an EU-funded project is subject. Therefore, even if a rule intended to ensure that there is no conflict of interest might affect the rights protected by Articles 7 and 9 of the Charter, those rights would not be affected in terms of their content; rather, at most, they would be subject to a limitation on their exercise.

On that point, the General Court holds that, in the case at hand, such a limitation would seek to ensure observance of the principle of sound financial management⁶ and would be necessary, since the Commission has no other means of checking the accuracy of the personnel costs declared by the grant beneficiary than those which should be engendered by, *inter alia*, the production of reliable timesheets. That limitation would not be disproportionate, since, first, the rights

² Article 119 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation').

³ In particular, Article II.22(1) of Annex II to the grant agreements at issue recognises the possibility of carrying out new audits during the five years after completion of the project concerned. Moreover, paragraph 1 of Article 119 of the Financial Regulation states that acceptance by the institution of final reports and accounts is 'without prejudice to subsequent checks by the institution'.

⁴ Article II.3(n) of Annex II to the grant agreements at issue.

⁵ Articles 7 and 9 of the Charter concern the right to respect for private and family life, the right to marry and the right to found a family.

⁶ That principle is enshrined in Article 317 TFEU.

protected by Articles 7 and 9 of the Charter would not be affected in terms of their actual content and, secondly, the requirement to avoid any conflict of interest on account of family or emotional ties could be satisfied by means of minimal organisational adjustments.

Lastly, the General Court dismisses as inadmissible the action brought by the applicant on the basis of Article 263 TFEU seeking annulment of the Commission's letter of 12 November 2019, by which the Commission had informed the applicant of the issue of debit notes. The General Court finds, in that context, that the applicant's right to effective review has not been infringed since the applicant has brought an action on a contractual basis pursuant to Article 272 TFEU and the pleas raised in support of that action have been examined by the court with jurisdiction.