



Reports of Cases

Case T-222/22

Engineering – Ingegneria Informatica SpA

v

European Commission

and

European Research Executive Agency

Judgment of the General Court (Seventh Chamber), 26 July 2023

(Arbitration clause – ‘Horizon 2020’ Framework Programme for Research and Innovation (2014-2020) – ‘aDvanced sOcial enGineering And vulNerability Assessment framework (Dogana)’ Project – Grant agreement – Action for annulment – Final audit report – Debit note – Acts not open to challenge – Acts forming part of a purely contractual context from which they are not separable – Inadmissibility – Identification of the defendant – Lack of jurisdiction – Personnel costs – Bonuses calculated on the basis of commercial targets – Ineligibility – Legitimate expectations)

1. *Action for annulment – Actionable measures – Concept – Acts producing binding legal effects – Final audit report of the Commission – Debit note issued by the European Research Executive Agency (REA) – Not included – Acts forming part of a purely contractual context and being inseparable from that context – Inadmissibility (Arts 263 and 272 TFEU)*

(see paragraphs 38-48)

2. *Judicial proceedings – General Court seised under an arbitration clause – EU judicature not having jurisdiction in the absence of an expression of the intention of the parties to confer jurisdiction upon it to rule on a contractual dispute – Contract concluded between a company and the European Research Executive Agency (REA) – Action brought by the contracting company against the Commission – Action inadmissible (Art. 272 TFEU)*

(see paragraphs 52, 54, 56)

3. *Industry – Action necessary to ensure the competitiveness of industry – Research and technological development – Framework programme for Research and Innovation ‘Horizon 2020’ – Grant agreement – Eligible costs – Meaning – Personnel costs – Bonuses awarded to employees of a beneficiary, calculated on the basis of commercial targets – Not included*

(see paragraphs 63-66, 77-84, 86-92, 104, 105)

Résumé

The applicant, Engineering – Ingegneria Informatica, is a company which carries out research and development activities in the technology sector. In 2015, in the context of the ‘Horizon 2020’ Framework Programme for Research and Innovation,¹ Engineering International Belgium SA and other beneficiaries, on the one hand, and the European Research Executive Agency (REA), on the other hand, concluded a grant agreement relating to the project entitled ‘aDvanced sOcial enGineering And vulNerability Assessment framework’. In 2017, the applicant became a beneficiary of the grant awarded for that project.

During 2021, the European Commission carried out an audit relating to the implementation of the grant agreement. In the course of that audit, the Commission made a number of adjustments to the eligible costs and, more specifically, reduced the costs that were eligible under the grant agreement. In particular, the Commission considered that the costs corresponding to certain bonuses and commissions (‘the bonuses at issue’), paid to two employees of the applicant and declared by the applicant as personnel costs, were neither incurred nor necessary for the implementation of the project, and accordingly did not fulfil the eligibility conditions contained in the grant agreement.²

In January 2022, the REA informed the applicant that, by way of implementation of the audit carried out by the Commission, it intended to recover the sum of EUR 9 049.14. Subsequently, in February 2022, the REA confirmed its intention to recover that sum.

Before the General Court, the applicant contested, on the basis of Article 263 TFEU, the legality of the acts which had been adopted with regard to it by the Commission and the REA. In addition, it sought a declaration, on the basis of Article 272 TFEU, that the bonuses at issue were eligible.

In its judgment, the General Court clarifies the concept of ‘eligible costs’ within the meaning of the standard clauses in grant agreements concluded by the EU institutions and agencies in relation to framework programmes for research and innovation, as regards personnel costs, and more particularly bonuses calculated on the basis of commercial targets.

Findings of the General Court

In the course of its examination of the pleas in law based on breach of the grant agreement, the Court observes, first of all, that it is apparent from the provisions of that agreement³ that actual personnel costs and indirect costs are eligible on condition, inter alia, of having been incurred ‘in connection with the [project]’ and of being ‘necessary for its implementation’.

¹ Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJ 2013 L 347, p. 104).

² By virtue of Article 6.1(a)(iv) of the grant agreement, actual costs are eligible provided, in particular, that they are ‘incurred in connection with the [project] and necessary for its implementation’.

³ Article 6.1(a)(iv), and Article 6.2(A.1) of the grant agreement.

Next, the Court notes that the grant agreement must be interpreted in the light of the explanations given in the annotated model grant agreement.⁴ While that document is not binding, it is published and accessible to all contracting parties, and thus forms part of the context in which the grant agreement was concluded. As regards the present case, the model grant agreement excludes, as ineligible, two distinct categories of costs, namely, first, dividends and profits distributed to employees and, secondly, complements of remuneration calculated on the basis of commercial or fundraising targets. Those two categories of costs cannot be regarded as ‘costs incurred in connection with [the project in question] and necessary for its implementation’.⁵

In relation, first, to dividends and profits distributed to employees, the annotated model grant agreement states that complements of remuneration which are based on the overall financial performance of the organisation may nevertheless be eligible, if they fulfil certain conditions. Thus, a first condition relates to the method used to calculate such complements, as the annotated model grant agreement states that they may take the form of a lump sum or a percentage of basic remuneration, but not that of a certain percentage of company profits.

Secondly, as regards complements of remuneration which are calculated on the basis of commercial or fundraising targets, the Court states that, in accordance with the annotated model grant agreement, fixed or variable bonuses which are granted in consideration of such targets being achieved, such as bonuses taking the form of a lump sum which is conditional on a sales or fundraising target being achieved, or on a certain percentage of sales being achieved or a certain percentage of funds raised, are ineligible.

Thus, the eligible complements of remuneration envisaged in the annotated model grant agreement must, first, be set at the level of the whole organisation, secondly, be based on the overall financial performance of that organisation and, lastly, not refer to commercial or fundraising targets.

Lastly, ruling on whether or not the bonuses at issue were eligible, the Court observes that the bonus scheme put in place by the applicant is based on two types of objectives. First, certain objectives, in particular those relating to the margin on a given order and the contribution margin, are defined in relation either to a specific order, or to the activity of a division of the applicant during the year. Such objectives are commercial in nature and do not relate to the overall financial performance of the applicant. In addition, the bonuses paid in respect of those objectives are conditional on and directly proportional to the margins achieved. Secondly, the objective relating to earnings before interest, taxes, depreciation and amortisation is connected with the overall financial performance of the applicant and the other companies in its group, but is not used to calculate a free-standing bonus. It is used purely to adjust the amount of the bonuses paid in respect of the first set of objectives, an amount which depends on the attainment of commercial targets. Accordingly, the General Court rules that the bonuses paid by the applicant to its employees do not fulfil the eligibility conditions contained in the grant agreement, in so far as they are essentially based on commercial targets and the costs relating to them are neither incurred in connection with the project nor necessary for its implementation.

⁴ That document aims to explain the general model grant agreement produced by the Commission and help users understand and interpret grant agreements drawn up on the basis of that model.

⁵ Within the meaning of Article 6.1(a)(iv) of the general model grant agreement.