



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber)

9 June 2021 \*

(Arbitration clause – Grant agreements concluded under the Information and Communication Technologies (ICT) Policy Support Programme – Audit report – Debit notes issued by the Commission – OLAF investigation – Action for annulment – Counterclaim – Full repayment of grants – Damages)

In Case T-235/19,

**Health Information Management (HIM)**, established in Brussels (Belgium), represented by P. Zeegers, lawyer,

applicant,

v

**European Commission**, represented by J. Estrada de Solà and M. Ilkova, acting as Agents,

defendant,

APPLICATION based on Article 272 TFEU, first, for a declaration that debit notes No 3241901815 and No 3241901886, of 4 February 2019, relating to repayment of EUR 94 445 and EUR 121 517, respectively, under grant agreements No 225023, relating to the project ‘EIDeRly frieNdly Alarm handling and monitorING (Dreaming)’, and No 250449, relating to the project ‘Health monitoring and sOcial integration environMEnt for Supporting Wide ExTension of independent life at HOME (HOME SWEET HOME)’, concluded under the Information and Communication Technologies (ICT) Policy Support Programme provided for in the Framework Programme established by Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Competitiveness and Innovation Framework Programme (2007 to 2013), were issued by the Commission in breach of its contractual obligations and that, therefore, those sums are not due and, in so far as is necessary, an application based on Article 263 TFEU for a declaration that those debit notes are invalid, and, second, a counterclaim by the Commission seeking an order that HIM must repay in full the grants received under the abovementioned agreements and pay the sum of EUR 58 876.50 in damages,

THE GENERAL COURT (Tenth Chamber),

composed of A. Kornezov, President, E. Buttigieg and G. Hesse (Rapporteur), judges,

Registrar: E. Coulon,

\* Language of the case: French

gives the following

## Judgment<sup>1</sup>

### Background to the dispute

...

2 The applicant is a member of two consortia composed of the beneficiaries of two grant agreements concluded under the Information and Communication Technologies (ICT) Policy Support Programme provided for by the Competitiveness and Innovation Framework Programme (2007 to 2013), established by Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 (OJ 2006 L 310, p. 15; ‘the IC Framework Programme’).

3 The first agreement, No 225023, was concluded on 10 October 2008 between the European Community, represented by the European Commission, and Tesan Televita Srl, acting as the coordinator of the project ‘ElDeRly friEndly Alarm handling and MonitorING (Dreaming)’ (‘the Dreaming agreement’ and ‘the Dreaming project’ respectively). The second agreement, No 250449, was concluded on 31 May 2010, between the Community, represented by the Commission, and Digipolis SCRL, acting as coordinator of the project ‘HOME SWEET HOME: Health monitoring and sOcial integration environMENT for Supporting Wide ExTension of independent life at HOME’ (‘the HOME SWEET HOME agreement’ and ‘the HOME SWEET HOME project’, respectively).

4 The objective of the Dreaming and the HOME SWEET HOME projects was to enable older persons who are losing their independence to remain in their own homes thanks to a combination of equipment and technology, including an adapted mobile phone and a user-friendly videoconferencing system, connected to hubs providing socio-medical assistance.

...

24 In connection with the implementation of those two projects, the Commission requested a firm of auditors, PKF Littlejohn LLP, to conduct an audit, which took place between 18 April 2014 and 27 May 2015.

25 In the meantime, on 30 April 2015, OLAF initiated an investigation into, among other things, allegations of fraud committed by the applicant in the performance of the agreements at issue.

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35 In a pre-information letter dated 20 September 2018, the Commission stated that, in order to give effect to the conclusions of the audit report, it was necessary to recover EUR 94 445 in respect of the Dreaming project and EUR 121 517 in respect of the HOME SWEET HOME project, sums representing ineligible costs, in so far as they had been funded by the Commission and paid by the latter to the applicant. It requested the applicant to comment within 30 days from receipt of that letter, failing which it would issue debit notes in order to initiate the process for the recovery of those sums.

<sup>1</sup> Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

...

37 The OLAF report was finalised on 13 November 2018. In the conclusions of that report, OLAF held, in essence, that, between 2008 and 2014, the applicant had committed a number of irregularities, particularly in connection with the Dreaming and the HOME SWEET HOME projects. Three types of irregularity were found. The first concerned, in essence, a conflict of interest so far as the applicant was concerned, in that it had influenced its partners in the consortia carrying out those projects ('the consortium partners') to select as their supplier a company that was linked to the applicant, and that it received commissions on that company's sales. The second irregularity mentioned in the report was that the applicant had overcharged for personnel costs. The third type of irregularity consisted, in essence, of overcharging for certain products required in order to carry out the projects in question.

...

39 On 4 February 2019, the Commission sent the applicant two debit notes for the recovery of that part of the EU's financial contribution that was considered to be unjustified with regard to the Dreaming project and the HOME SWEET HOME project, namely, debit note No 3241901815, for EUR 94 445, and debit note No 3241901886, for EUR 121 517, respectively. In both debit notes the Commission set 18 March 2019 as the final date for payment.

#### **Procedure and forms of order sought**

40 By application lodged at the Court Registry on 4 April 2019, the applicant brought the present action.

41 On 12 July 2019, the Commission lodged at the Court Registry the defence containing a counterclaim.

42 The applicant lodged the reply on 5 September 2019.

43 On 7 November 2019, the applicant lodged an additional statement containing a further application that the Commission should be ordered to remove the applicant's name from the Early Detection and Exclusion System database (EDES).

44 On 6 January 2020, the Commission lodged the rejoinder, which contained its observations on the applicant's additional statement.

45 By way of measures of organisation of procedure adopted on 9 June and 4 August 2020 on the basis of Article 89(3) of the Rules of Procedure of the General Court, the Court put a number of questions to the parties, who answered them within the prescribed period.

46 As a Member of the Tenth Chamber was unable to sit in the present case, on 10 August 2020 the President of the General Court designated another judge to complete the Chamber pursuant to Article 17(2) of the Rules of Procedure.

- 47 No request for a hearing having been made by the parties within three weeks after service of notification of the close of the written part of the procedure, the Court, considering that it had sufficient information available to it from the material in the file, decided, pursuant to Article 106(3) of the Rules of Procedure, to rule on the action without an oral part of the procedure.
- 48 The applicant claims that the Court should:
- rule that the applicant is not liable to pay debit notes Nos 3241901815 and 3241901886, issued on 4 February 2019;
  - in so far as necessary, declare those debit notes invalid;
  - order the Commission to remove the applicant’s name from the EDES database;
  - dismiss the counterclaim as inadmissible or, in the alternative, as unfounded;
  - order the Commission to pay the costs.
- 49 The Commission contends that the Court should:
- dismiss the applicant’s primary claim for a declaration that there are no debt claims against it;
  - dismiss as inadmissible the applicant’s further claim for a declaration that debit notes Nos 3241901815 and 3241901886, issued on 4 February 2019 are invalid;
  - dismiss as inadmissible the applicant’s claim, made in its additional statement of 7 November 2019, that the Commission should be ordered to remove the applicant’s name from the EDES database;
  - rule that the breaches of contract attributed to the applicant in the counterclaim are irregularities;
  - order the applicant to repay to the Commission all the grants received, amounting to EUR 230 348 in respect of the Dreaming project and EUR 282 451 in respect of the HOME SWEET HOME project;
  - order the applicant to pay the sum of EUR 58 876.50 in damages;
  - order the applicant to pay the costs.

## Law

### *The jurisdiction of the General Court and the admissibility of the action and the counterclaim*

#### *The jurisdiction of the General Court*

- 50 The Court has jurisdiction to hear and determine the present action, brought under Article 272 TFEU, by virtue of the arbitration clause contained in the third paragraph of Article 10 of each of the agreements at issue, which confers on it jurisdiction to give judgment in any dispute concerning the interpretation, application or validity of those agreements.
- 51 The Court also has jurisdiction, on the same basis, to give judgment on the Commission's counterclaim. According to case-law, the jurisdiction of the Court, at the date on which the action is brought, to deal with an action based on an arbitration clause necessarily implies jurisdiction to deal with a counterclaim made by an institution 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, to that effect, judgment of 16 July 2014, *Isotis v Commission*, T-59/11, EU:T:2014:679, paragraph 265 and the case-law cited). Like the applicant's action, the Commission's counterclaim stems from the contractual link established between the parties by the agreements at issue. Moreover, that counterclaim concerns the repayment in full of all the sums paid to the applicant under the agreements at issue, so it covers the amounts to which the debit notes referred to in the applicant's action relate.

...

## Substance

### *The counterclaim*

- 76 It is appropriate to examine the counterclaim first, since it seeks repayment of all the sums paid to the applicant under the agreements at issue and so it covers the amounts to which the debit notes referred to in the applicant's action relate.
- 77 The purpose of the counterclaim is to obtain an order for the applicant to pay the sum of EUR 571 675.5 under the agreements at issue. That claim is based on the conclusions of the OLAF report.
- 78 Regarding that report, the Commission points out that the applicant was found to have committed irregularities in connection with implementation of the Dreaming and HOME SWEET HOME projects. The Commission highlights the two most blatant irregularities in its view, that is to say, first, the existence of a conflict of interest and, second, overcharging for equipment and charging of sales commissions.
- 79 With regard to the first irregularity alleged, the Commission notes that the applicant holds 25% of the shares in company XJ. In that context, the Commission contends that the applicant encouraged its consortium partners to purchase in connection with those projects the equipment

needed to implement them from XJ. In addition, it complains that the applicant failed to declare the risk of a conflict of interest, either to the Commission or to its consortium partners. Moreover, it alleges that the applicant submitted two false statements to the effect that there was no conflict of interest before it was accepted as a beneficiary of grants in connection with the two projects at issue.

- 80 With regard to the second irregularity alleged, the Commission maintains, in particular, that the applicant received sales commissions from XJ of between 5% and 10% on sales of equipment made through the applicant to its consortium partners in connection with those projects. Moreover, the applicant contributed to increasing the prices of some equipment artificially. In that regard, the Commission points out that it was intended that model Z mobile phones would be purchased for the projects, at a unit price of EUR 1 018. Subsequently, however, that model was replaced by a cheaper model, model Y, at a unit price of EUR 616. The Commission quotes from correspondence which makes clear that, in that context, the applicant, XJ and a third-party company decided to increase artificially the prices of other equipment intended for the projects at issue, in order to share between them the cost saving of EUR 70 350. Thus, the price of a set-top box was increased from EUR 438.50 to EUR 577 and the price of videoconferencing software from EUR 200 to EUR 422.

...

*The irregularities alleged*

- 117 The Commission alleges that the applicant breached, in particular, its contractual obligations as laid down in Article II.3(g) and (i) of the general conditions of each of the agreements at issue, and the principle of good faith in the performance of contracts, as set out in Belgian law, applicable on a subsidiary basis to the agreements at issue. To that end, it cites the existence of a conflict of interest linked to a shareholding in a supplier of certain equipment, and the charging of sales commissions and overcharging.

...

- 124 It must be observed at the outset that, in the context of a contract containing an arbitration clause within the meaning of Article 272 TFEU, it is necessary for a party that has declared costs to the Commission in order to be granted a financial contribution by the European Union to provide evidence that those costs were genuine costs that had actually been necessary and been incurred in order to implement the project and during the course of the latter. However, if the Commission claims repayment of a debt following a financial audit, it must, provided the beneficiary has submitted cost statements and other relevant information, prove that the service provided under the contract was defective or the cost statements were inaccurate or not credible (see judgment of 13 July 2017, *Talanton v Commission*, T-65/15, not published, EU:T:2017:491, paragraph 54 and the case-law cited).

- 125 In the present case, since the applicant has submitted the cost statements and other relevant information, the Commission must provide specific evidence that the services provided by the applicant under the contract were defective in the light of the obligations it entered into under the agreements at issue.

126 It must be observed, first of all, that it is clear from Article II.3(g) of the general conditions of the agreements at issue that the risk of a conflict of interest presupposes the existence of a convergence of economic interests, political or national affinities, family or emotional ties or some other type of interest. Such convergence, affinities or ties must therefore be found actually to exist, following a specific assessment of the subject of the contract and the situation of the parties concerned (see, by analogy, judgment of 22 January 2019, *EKETA v Commission*, T-166/17, not published, EU:T:2019:26, paragraph 100 and the case-law cited)

127 However, to the extent that article of the general conditions refers to a ‘risk’ of a conflict of interest ‘which could affect’ the impartial and objective implementation of the project, it does not require evidence to be provided that such conflict clearly has, or has had, an influence on the performance of the contract or on its costs (see, by analogy, judgment of 22 January 2019, *EKETA v Commission*, T-166/17, not published, EU:T:2019:26, paragraph 100 and the case-law cited).

128 In the present case, the conflict of interest situation is alleged to exist on the basis of two pieces of evidence, namely, the fact that the applicant received sales commissions from XJ and the fact that the applicant was a minority shareholder in that company.

– *Allegations of a conflict of interest linked to the applicant’s shareholding in a supplier*

129 First of all, it is common ground that the applicant held 25% of the shares in XJ and that it had not declared that to the Commission.

130 Next, the Commission has demonstrated that the applicant’s specific actions in connection with the implementation of the two projects at issue affected their impartial and objective implementation within the meaning of Article II.3(g) of the general conditions of the agreements at issue.

131 In that regard, it must be stated that the choice of XJ’s products and solutions had already been made, on the applicant’s initiative, before the Dreaming agreement was signed, as is clear from the description of the project given in Annex I to that agreement. As the Commission pointed out in paragraph 72 of the defence, since the HOME SWEET HOME project was a continuation of the Dreaming project the same products were used.

132 The applicant’s lack of transparency over its links with XJ should also be noted. As stated in paragraphs 108 and 109 above, it is established that at least some of the consortium partners were not informed of the nature of those links. The applicant also failed to inform the Commission about its links with the supplier of the equipment referred to in the description of the Dreaming project, and even produced false statements that there was no conflict of interest, as already stated in paragraph 121 above.

133 Lastly, the applicant strongly encouraged its consortium partners to purchase equipment from J on the grounds, in particular, that there was no other equipment on the market suitable for implementing the projects. It is clear from the email exchanges contained in Annex B.20, in particular from the email of 10 August 2010 sent by the applicant to its consortium partners responsible for the HOME SWEET HOME project, that the applicant, in conjunction with XJ, made every effort to obtain orders from those partners for the purchase of that company’s products, in particular by sending them pre-prepared order forms.

- 134 Accordingly, it must be stated that the Commission did submit specific evidence that the applicant was involved in a conflict of interest that could affect the impartial and objective performance of the agreements, in breach of Article II.3(g) of the general conditions of each of the agreements at issue, in accordance with the case-law referred to in paragraphs 124 to 127 above.
- 135 The applicant's contentions do not alter the above.
- 136 The applicant maintains, in essence, that the links between itself and XJ had no adverse effect on the budget for the projects and that, therefore, it did not fail to comply with its contractual obligations in respect of the existence of a conflict of interest. It contends, in particular, that the items of equipment supplied by XJ were the only products suitable for implementing the projects.
- 137 It must be observed that the alleged exclusive suitability of XJ's equipment has not been proven to the requisite legal standard, in view, in particular, of the fact that, as is clear from paragraph 76 of the Commission defence and Annex B.25, the procurement procedure held by XL resulted in the submission of at least four tenders offering a product that was competitive with XJ's for the HOME SWEET HOME project. Moreover, as the Commission rightly stated, the applicant replaced the model of phone initially planned with another model, which shows that at least some of the items of equipment used in connection with the two projects were interchangeable. Also, assuming that XJ's solution was indeed the only one possible, the applicant does not explain why it sent letters to the socio-medical partners responsible for purchasing equipment urging them to initiate processes that would result in the purchase of that company's products (see paragraph 133 above). In fact, the absence of a technical solution to compete with XJ's should have meant that the latter was placed in a strong negotiating position. There is no explanation for the applicant's involvement in those procurement procedures apart from that given by the Commission.
- 138 None of the other arguments put forward by the applicant are capable of invalidating the specific evidence submitted by the Commission.
- 139 Accordingly, although it is true that the Commission was aware of the intention to purchase equipment from XJ before it undertook to fund the projects, as the applicant states, the fact remains that the Commission was not aware of the applicant's links with XJ before the OLAF investigation.
- 140 The applicant's argument that its minority shareholding in one of the suppliers connected with the two projects at issue does not create the risk of a conflict of interest is also unacceptable. Being a shareholder, even a minority shareholder, in the main supplier of equipment in connection with those projects involves a risk of convergence of economic interests falling under the provisions of Article II.3(g) of the general conditions of the agreements at issue.
- 141 In those circumstances, the Court must find that the applicant has failed to provide adequate grounds in law to rebut the Commission's evidence that there was a conflict of interest so far as the applicant was concerned that could influence the implementation of the projects at issue and the amounts of the grants from the budget managed by the European Union, given that, in view of the applicant's shareholding in XJ, the applicant has not proved that the purchase of the equipment marketed by that company was the only option and, if that was not the case, that that choice was based solely on the value for money of those products.

142 Thus it follows from all those considerations that the Commission's allegations of the existence of an undeclared conflict of interest regarding the applicant's shareholding in a supplier are proven.

*– Allegations of a conflict of interest linked to the applicant's charging of commission on sales made by a supplier, and the alleged overcharging*

143 As regards, first, the sales commissions which the applicant is alleged to have charged, it is not disputed that the latter issued XJ with an invoice for EUR 45 991 in respect of sales commission in connection with the Dreaming project for years 2008 and 2009. In that regard, XJ confirmed that it paid sales commissions of between 5% and 10% on sales made involving the applicant. The Commission refers to a letter from the applicant which makes clear that the latter acknowledged charging sales commissions, in particular on sales made in connection with the Dreaming project, and that it should have declared that income.

144 The Commission maintains that charging a sales commission constitutes an infringement of several rules applicable in the present case, namely Article II.3(g) and (i) of the general conditions of the agreements at issue and the principle of good faith in the performance of agreements, and therefore Article 1134 of the code civil belge (Belgian Civil Code). The actions at issue should also be classified as irregularities within the meaning of Article II.1 of those general conditions.

145 The applicant retorts that no law, regulation or contractual provision was infringed by the fact that it charged sales commissions in connection with the Dreaming project. It is common business practice. In any event, it has not been established that receiving such commissions resulted in an increase in the prices of the products purchased for the implementation of that project.

146 The fact that the applicant received sales commissions is a factor contributing to a conflict of interest for the applicant resulting from its links with XJ, as established in paragraphs 126 to 140 above. First, as stated in paragraph 137 above, the applicant has failed to demonstrate that the choice of the equipment marketed by that company was based on the value for money of the equipment concerned, and not solely on the applicant's own economic interests. Thus, the charging of sales commissions by the applicant was at the very least liable to influence the choice of that equipment. Second, the payment of sales commissions by XJ to the applicant was likely to increase the total cost of the equipment and, as a result, adversely affect the budgets allocated to the projects at issue.

147 The applicant merely argues that the fact that XJ was able to sell a certain number of products through the applicant's intervention resulted in a reduction of the unit prices. However, that claim is not based on any specific evidence. In particular, it has by no means been established that the charging of sales commissions had a positive effect on the budgets allocated to the projects at issue.

148 It follows that the applicant has failed to undermine the conclusion that the charging of sales commissions could affect the impartial and objective implementation of the projects at issue.

149 As regards, second, the alleged overcharging, the Commission states that the Dreaming project initially involved installing model Z mobile phones in the homes of elderly persons, the unit price of a phone being EUR 1 018. In the course of implementation of the project, that model was replaced by a cheaper model of mobile phone, model Y, sold at a unit price of EUR 616.

- 150 The Commission complains that the applicant did not pass on that cost saving to the project by reducing the cost of the technology equipment for each of the participants, but rather, with the complicity of XJ and of the company XM, it retained the savings resulting from the difference in costs – described as unexpected – and it was shared out evenly between the applicant and those two companies. The Commission relies in particular in that regard on an email of 17 November 2008 that XJ sent to both the applicant and XM.
- 151 To that end, the applicant and the two abovementioned companies artificially increased the prices of other equipment needed in order to carry out the project, as shown in the table in paragraph 90 of the defence. Thus, for no objective reason, the price of a set-top box rose from EUR 438.50 to EUR 577 and the price of videoconferencing software from EUR 200 to EUR 400.
- 152 In order to calculate the amount of the alleged overcharging, the Commission calculated the number of units that were over-priced on the basis of an analysis of the invoices contained in the file submitted by the Commission. Overcharging concerned an amount of EUR 45 697.50 in respect of the Dreaming project and EUR 26 064.50 in respect of the HOME SWEET HOME project, which is a total of EUR 71 762.
- 153 According to the applicant, the Commission's allegations are not consistent with the facts. During the implementation of the Dreaming project, it appeared that the Z phone was no longer being marketed. In its capacity as a supplier of technical equipment, XJ therefore suggested using another product, the Y phone, being sold at a price of EUR 616. Meanwhile, the cost of other equipment rose. In any event, XJ incurred a heavy loss on the deal overall.
- 154 The applicant admits that the price alterations were discussed with XM, also a beneficiary of a grant in the context of the Dreaming project, and XJ, in particular in an email of 16 December 2008. However, the proposals contained in that email, to offset the reduction in the price of one product by an increase in the prices of other products, were not implemented. Moreover, the applicant's objective was not to make a profit. According to the applicant, no contractual provision, law or regulation, nor honest practices in commercial matters or implementation of agreements in good faith, requires a supplier to lower the cost of its offer in the event of a reduction in the price of one of the items to be supplied. That is all the more so when the prices of other products have also increased and the overall cost remains the same.
- 155 The Court considers that the Commission has proved to the requisite legal standard that the applicant, working closely with XJ and XM, artificially increased the prices of the set-top box and the software following the replacement of the Z model phone by the Y model, at a lower price, by means of the documents submitted, in particular on the basis of the correspondence exchanged between the directors of the three companies concern, constituting Annex B.21. That correspondence states that, 'when the Z model was replaced by the Y model, the difference of EUR 402 was moved to the XM budgets for the software and the set-top box' and that 'it is fair to share the EUR 402 savings evenly among [XJ, XM and the applicant]'.
- 156 The applicant's assertion that that proposal for sharing the savings was never carried out cannot be accepted in the light of the evidence adduced by the Commission. Thus, it is apparent from the table annexed to one of the emails exchanged between the applicant, XM and XJ (Annex B.21, p 1124) that the prices of the set-top boxes and the videoconferencing software were increased. Next, it is clear from invoices Nos 151, 157, 158, 165 and 179 sent by XJ to the purchasers of the equipment concerned that the increased prices were actually invoiced. The

applicant's contention that the increase in the prices of the software and the set-top box corresponds to a genuine increase in the prices of those products on the market is not supported by any evidence.

157 The Commission is therefore right to claim that the applicant infringed Article II.3(g) and (i) of the general conditions and breached the principle of good faith in the performance of agreements.

*Classification of the breach of contractual obligations as irregularities within the meaning of Article II.1 of the general conditions of the agreements at issue*

158 In its third head of claim, the Commission seeks a ruling from the Court that the breaches of contractual obligations attributed to the applicant are irregularities within the meaning of Article II.1 of the general conditions of the agreements at issue.

159 Article II.1 defines 'irregularity' as follows:

“'irregularity': means any infringement of a provision of [EU] law or a provision of this grant agreement resulting from an act or omission on the part of one of the contracting parties which causes or might cause a loss to the [EU's] budget.’

160 The concept of irregularity is therefore defined by two cumulative criteria: a breach of a rule of law or of a contractual provision and the fact that that breach has had, or may have, financial consequences by charging unjustified expenditure to budgets managed by the EU. That definition, however, includes no threshold of gravity (see, by analogy, judgment of 2 October 2012, *ELE.SIA v Commission*, T-312/10, not published, EU:T:2012:512, paragraph 107).

161 In that regard, the Commission has proved to the requisite legal standard that the actions alleged against the applicant could entail negative consequences for budgets managed by the EU. Indeed, by reason of the conflict of interest so far as the applicant was concerned and the charging of commissions on sales of certain items of equipment purchased by the consortium partners in connection with implementation of the projects at issue, there was a serious risk that the value for money of that equipment would not be equivalent to that which might result from a transparent bargaining process. As regards, next, the overcharging for the software and the set-top box, it is clear that it gave rise to unjustified expense, since it resulted in the reduction in the price of the phones not being passed on to benefit the budget for the project.

162 Accordingly, the Court finds that, by its actions, the applicant infringed its contractual obligations in a way that could entail financial consequences for budgets managed by the EU. The actions concerned must therefore be classified as irregularities within the meaning of Article II.1 of the general conditions of each of the agreements at issue.

163 The Court must therefore rule that the breaches of contract attributed to the applicant relating to the existence of a conflict of interest, the charging of sales commissions and overcharging constitute irregularities within the meaning of that contractual provision.

*Repayment in full of the sums paid*

164 The Commission seeks, in the first place, repayment in full of the sums paid to the applicant, in particular on the basis of Article 119 of the Financial Regulation and Article 183 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002 (OJ 2002 L 357, p. 1), in conjunction with Article II.26(6) and Article II.28(5) of the general conditions of the agreements at issue and with Article 9(1) of Decision No 1639/2006.

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166 The applicant contends, in essence, that, assuming that the existence of a conflict of interest is established, that fact does not justify the recovery of all of the grants, especially since, in its view, that situation had no negative impact on the budget for the projects at issue. It also notes that those projects were completed and that the results achieved were described as satisfactory. Moreover, it states that recovery of the grants would lead to its bankruptcy.

167 First of all, it must be observed that, under the first paragraph of Article 10 of each of the agreements at issue, the latter, and therefore the award of the grant to which they relate, were governed by the provisions of those agreements, by the EU acts concerning the IC Framework Programme, by the Financial Regulation and its implementing rules and by other provisions of EU law, and, on a subsidiary basis, by Belgian law.

168 In the first place, with regard to the relevant contractual provisions, it must be observed that, according to Article II.26(6) of the general conditions of the agreements at issue, any payment may be subject to an audit or review and may be adjusted or recovered based on the results of that audit or review. According to Article II.28(5) of those general conditions, on the basis of the conclusions of the audit the Commission is to take all appropriate measures, including the issuing of a recovery order regarding all or part of the payments made by it and the application of any applicable sanction.

169 Those provisions do not therefore exclude the possibility for the Commission to recover in full the sums paid under those agreements. To the contrary, it is abundantly clear that all payments may be recovered.

170 Second, Article 119 of the Financial Regulation provides:

‘1. The amount of the grant shall not become final until after the institution has accepted the final reports and accounts, without prejudice to subsequent checks by the institution.

2. Should the beneficiary fail to comply with his/her obligations, the grant shall be suspended and reduced or terminated in the cases provided for by the implementing rules after the beneficiary has been given the opportunity to make his/her observations.’

171 The use of the term ‘terminated’ in that Article 119(2) thus refers to a case where the sums received are recovered in full.

- 172 That conclusion is also consistent with the principle of sound financial management of the EU's resources laid down in Article 317 TFEU. Thus, in the event of non-compliance with the conditions laid down in a grant agreement, EU institutions, bodies, offices or agencies are required to recover the grant paid up to the amounts considered unreliable or unverifiable.
- 173 Moreover, the EU judicature has already ruled that, in the system of granting EU financial assistance, the use of that assistance is subject to rules which may require the partial or full repayment of assistance already granted (judgments of 7 July 2010, *Commission v Hellenic Ventures and Others*, T-44/06, not published, EU:T:2010:284, paragraph 85, and of 16 December 2010, *Commission v Arci Nuova associazione comitato di Cagliari and Gessa*, T-259/09, not published, EU:T:2010:536, paragraph 61).
- 174 It is also clear from case-law that the beneficiary of assistance does not acquire any definitive right to full payment of the assistance if he or she does not satisfy the conditions to which the support was subject (see judgment of 10 October 2019, *Help – Hilfe zur Selbsthilfe v Commission*, T-335/17, not published, EU:T:2019:736, paragraph 200 and the case-law cited).
- 175 It follows that the contractual provisions and the relevant provisions of the Financial Regulation do not prevent the Commission from recovering the full amounts paid to the applicant under the agreements at issue.
- 176 Next, it is necessary to determine whether, in the circumstances of the case, the Commission is entitled to obtain full repayment of those sums.
- 177 In that regard, it must be observed, as stated in paragraph 162 above, that the facts alleged against the applicant may be classified as 'irregularities' within the meaning of Article II.1 of the general conditions of the agreements at issue.
- 178 Moreover, as regards the context in which that contractual provision was agreed, it must be observed that it follows from Article II.10(3)(f) of those general conditions that committing an irregularity is an act or omission that is so serious that it may justify immediate termination of the agreement in question. In addition, the fourth indent of Article II.5(3)(d) of those general conditions provides that the Commission may suspend payment at any time, in whole or in part, of the amount intended for the beneficiary concerned if there is a suspicion of an irregularity committed by one or more beneficiaries.
- 179 In the present case, it must be held that the applicant, by not declaring the risk of a conflict of interest, by charging sales commissions and by its involvement in overcharging for certain equipment, failed to comply with the principle of good faith in the performance of contracts, as established in Belgian law by the third paragraph of Article 1134 and Article 1135 of the Belgian Civil Code.
- 180 It has been established in paragraphs 128 and 129 above that the applicant was in a conflict of interest situation in relation to XJ that underlay the choice of the latter to supply equipment. As the Commission rightly stated, it is impossible to assess the effects of that conflict of interest on the budget for the projects at issue because the price, and even the need to purchase the equipment, cannot be determined in the absence of that conflict of interest. It is also clear from paragraph 141 above that the applicant has failed to demonstrate that its actions did not have negative effects on the budget for those projects. Thus, the applicant has failed to prove that XJ's products were the only ones suitable for implementing the projects and that, therefore, the choice

of those products had been based on objective considerations. Likewise, it has failed to demonstrate that its charging of sales commissions did not influence the price of the products concerned. In view of that conflict of interest, it has not been established that the equipment purchased offered the best value for money. In those circumstances, the Court must hold that that conflict of interest had an overall influence on the contractual relationship between the applicant and the Commission.

181 Moreover, it is important to note that the breaches of contractual obligations committed by the applicant were so serious that full repayment of the grants is justified. The applicant seriously damaged its contractual relationship with the Commission by failing to declare the existence of a conflict of interest and the charging of sales commissions and by overcharging for certain products.

182 In those circumstances, full recovery of the sums paid under the agreements at issue is not disproportionate.

183 That finding is not altered by the fact that the projects at issue were actually implemented by the applicant, or by the results achieved.

184 It is not sufficient to show that a project has been implemented in order for the allocation of a specific grant to be justified. The beneficiary of the aid must, in addition, adduce evidence that it has incurred the expenses declared in accordance with the conditions laid down for the grant of the aid concerned. Its obligation to satisfy the prescribed financial conditions is an essential commitment and accordingly determines the allocation of the EU grant (judgment of 10 October 2019, *Help – Hilfe zur Selbsthilfe v Commission*, T-335/17, not published, EU:T:2019:736, paragraph 201).

185 Accordingly, the claim for full repayment of the sums paid under the agreements at issue is well founded, so that the form of order in the Commission's counterclaim must be granted.

#### *Claim for damages*

186 In addition to the repayment of the grants, the Commission seeks payment of damages in the sum of EUR 58 876.50.

187 According to the Commission, the three conditions are met for the applicant's contractual liability to be incurred, namely, breach of one or more contractual provisions, the fact of damage and the existence of a causal link between the conduct at issue and the damage complained of.

188 The Commission submits that the applicant's charging of EUR 45 991 in sales commissions is proven. It proceeds from the premiss that XJ would have reduced its prices by at least that amount if those commissions had not had to be paid. In any event, fair and proper performance of the contract should have led the applicant to declare and pass on that discount to the consortium partners responsible for implementing the project concerned.

189 As regards the overcharging for the set-top box and the software, the Commission infers from the evidence contained in the OLAF report that 135 units of the set-top box and the software were sold in connection with the Dreaming project. A sum of EUR 338.50 was overcharged per unit, thus making a total of EUR 45 697.50. In connection with the HOME SWEET HOME project, 77 units were sold, which resulted in EUR 26 064.50 being overcharged.

- 190 Because the Commission funded only half of those projects it suffered a total loss of EUR 58 876.50.
- 191 According to the applicant, assuming that it did infringe the legal or contractual rules as alleged, which it disputes, the fact of damage and the causal link between its actions and the alleged damage have not been proven. In that regard, it contends that the price of the products concerned would not have been lower had it not acted as an intermediary, since, thanks to the applicant, XJ was able to sell a larger number of products at a lower unit price. As regards the increase in the price of the set-top box and the software, the price of those items of equipment was actually increased on the market, so there was no overcharging.
- 192 It must be observed first of all that the purpose of the claim in question is to engage the applicant's contractual liability. The Commission maintains that the damage in respect of which compensation is sought was caused by the applicant's breach of its contractual obligations. Therefore, the Court has jurisdiction, on the basis of Article 272 TFEU, to give judgment in that claim, which stems from the same contractual link as that on which the counterclaim is based.
- 193 Next, it must be observed out that, where proceedings have been instituted pursuant to an arbitration clause under Article 272 TFEU, the Court must resolve the dispute on the basis of the substantive rules of the law applicable to the contract (see judgments of 29 November 2016, *ANKO v REA*, T-270/15, not published, EU:T:2016:681, paragraph 43 and the case-law cited, and of 1 March 2017, *Universiteit Antwerpen v REA*, T-208/15, not published, EU:T:2017:136, paragraph 53 and the case-law cited). The law applicable to the contract is that which is expressly provided for in the contract, since contractual provisions expressing the common intention of the parties must take precedence over any other criterion which might be used only where the contract is silent (see judgment of 8 September 2015, *Amitié v Commission*, T-234/12, not published, EU:T:2015:601, paragraph 74 and the case-law cited).
- 194 It must be observed that Article 10 of each of the agreements at issue provides that the latter are to be governed by their own provisions, by the relevant provisions of EU law and, on a subsidiary basis, by Belgian law.
- 195 It must be held that the Commission does not cite any clause in those contracts which provides for contractual liability on the part of the applicant.
- 196 Furthermore, EU law does not contain any substantive provision governing contractual liability for damage caused by a party contracting with the European Union.
- 197 In that regard, the Commission refers, in paragraph 99 of the defence, to the judgment of 12 April 2018, *PY v EUCAP Sahel Niger* (T-763/16, EU:T:2018:181), which concerns the contractual liability of the European Union under Article 340 TFEU and the law applicable in such a situation. In paragraph 66 of that judgment the Court held that contractual liability could be examined 'on the sole basis of the employment contracts at issue ... in the light of the general principles of European Union law concerning the establishment of contractual liability' and that 'according to those principles, three conditions must be satisfied if an action for contractual liability is to be successful: first, the institution concerned must have failed to fulfil its contractual obligations; secondly, the applicant must have suffered damage; and, thirdly, there must be a causal link between the institution's conduct and the damage'.

- 198 The Commission's assumption is that that case-law is applicable by analogy to the contractual liability of a contracting party of an EU institution, in the present case the applicant. However, the situation in the case that gave rise to the judgment of 12 April 2018, *PY v EUCAP Sahel Niger* (T-763/16, EU:T:2018:181), is different from the situation at issue in the present case. It is clear from paragraph 62 of that judgment that the employment contracts at issue in the former case do not specify the law applicable to them, whilst in the present case the agreements at issue contain a provision relating to the law applicable.
- 199 That being so, in the present case, the conditions for establishing the contractual liability of the applicant must be sought in Belgian law, applicable on a subsidiary basis to the agreements at issue.
- 200 With regard to contractual liability, Article 1142 of the Belgian Civil Code, which comes within Title III of Book III, entitled 'Contracts or contractual obligations in general', provides that 'any obligation to do something or not to do something shall result in payment of damages where that obligation is not performed by the debtor'.
- 201 Furthermore, according to Article 1147 of the Belgian Civil Code, 'the debtor shall, where appropriate, be ordered to pay damages either for non-performance of the obligation or for a delay in performing it, whenever it is not shown that the reason for non-performance was not attributable to the debtor, and that there was no bad faith on his part'.
- 202 It follows from Article 1147 of the Belgian Civil Code that three conditions must be satisfied in order for damage of a contractual origin to be compensated, namely non-performance of the contract in whole or in part, harm and a causal link between the non-performance and the harm (see, to that effect, judgment of 4 May 2017, *Meta Group v Commission*, T-744/14, not published, EU:T:2017:304, paragraph 271 and the case-law cited).
- 203 The Court considers that in the present case the Commission has not established to the requisite legal standard the existence of a sufficiently direct causal link between non-performance of contractual obligations attributed to the applicant and the alleged harm, assuming that the latter is proven.
- 204 In the first place, it is settled that the applicant did not sell equipment to the consortium partners concerned under the agreements at issue, or claim repayment of expenditure relating to the purchase of equipment. The equipment to which overcharging or sales commissions related was purchased not by the applicant but by other entities unconnected with the applicant, to which the Commission repaid the expenditure incurred in respect of such purchases.
- 205 In the second place, it is also settled that liability in respect of the purchases of equipment to which overcharging or sales commissions related lay not with the applicant but with the consortium members which made those purchases. That is confirmed by the Commission's reply to a question put by the Court by way of a measure of organisation of procedure, in which it stated that 'full liability for the choice of products or materials used in the beneficiary's projects lies with the beneficiary, even if the description of an item of equipment appears in Annex I to the agreement'.
- 206 However, the Commission, which, according to the principle *actori incumbit probatio*, is required to prove that the three conditions listed in paragraph 202 above are met, has failed to demonstrate the existence of a direct causal link. Indeed, it merely states in that regard, in one sentence and

without any specific evidence, that the causal link is ‘clear’ since the applicant ‘actively’ participated in the breaches of contract at issue, without which the alleged damage would not have occurred.

- 207 Such general statements are not, however, sufficient to demonstrate to the requisite legal standard the existence of a direct causal link between the alleged damage and the breaches of contract at issue in a situation in which a number of third parties are involved, such as that described in paragraphs 204 and 205 above.
- 208 Furthermore and in any event, it must be observed that, in the context of performance of contractual obligations, respect for the principle of proportionality contributes to the more general obligation of the parties to a contract to perform it in good faith. Moreover, under Belgian law, the obligation to perform contracts in good faith, laid down in Article 1134 of the Belgian Civil Code, prohibits a party from exercising a right in a manner that manifestly exceeds the limits of the normal exercise of that right by a person exercising all due care (Cour de Cassation (Court of Cassation, Belgium), 16 November 2007, AR nr C.06.0349.F.1) (see, to that effect, judgment of 24 October 2018, *Nova v Commission*, T-299/15, not published, EU:T:2018:713, paragraph 140).
- 209 Taking into account, first, the fact that the projects to which the agreements at issue relate were performed without delay and in accordance with the objectives of those projects, which is not disputed, and, second, the particularly serious consequences that will result for the applicant from full recovery of the grants, the Court considers that the claim for damages, coming in addition to such full recovery, manifestly exceeds the limits of the normal exercise of the right at issue.
- 210 The claim for damages must therefore be dismissed as unfounded.

### ***Conclusion***

- 211 It follows from the abovementioned considerations that the sums paid to the applicant under the agreements at issue must be repaid in full by the applicant on account of the irregularities it has committed. Therefore, the applicant’s claim for a ruling that it is not liable to pay debit notes Nos 3241901815 and 3241901886 is ineffective.
- 212 In the light of all the foregoing, on the one hand, the principal claim must be rejected and, on the other hand, the Commission’s counterclaim must be upheld in so far as it seeks a ruling that the breaches of contract attributed to the applicant are irregularities within the meaning of Article II.1 of the general conditions of the agreements at issue and also seeks repayment of the sums paid to the applicant in the context of those agreements. The counterclaim must be dismissed as to the remainder.

...

On those grounds,

THE GENERAL COURT (Tenth Chamber)

hereby:

- 1. Dismisses the main action.**
- 2. Declares that the breaches of grant agreements No 225023, relating to implemetatiion of the project entitled ‘EIDeRly friEndly Alarm handling and monitorING (Dreaming)’, and No 250449, relating to implementation of the project entitled ‘Health monitoring and sOcial integration environMEnt for Supporting WidE ExTension of independent life at HOME (HOME SWEET HOME)’, committed by Health Information Management (HIM) constitute irregularities within the meaning of Article II.1 of the general conditions of those agreements.**
- 3. Orders HIM to repay the sum of EUR 512 799 to the European Commission.**
- 4. Dismisses the Commission’s counterclaim as to the remainder.**
- 5. Orders HIM to bear its own costs and to pay half of the costs incurred by the Commission.**

Kornezov

Buttigieg

Hesse

Delivered in open court in Luxembourg on 9 June 2021,

[Signatures]