



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 February 2015 *

(Appeals — Article 340, first paragraph, TFEU — Contractual liability of the European Union — Article 272 TFEU — Arbitration clause — Sixth framework programme for research, technological development and demonstration activities — Contracts relating to the Ontogov, FIT and RACWeb projects — Eligible costs and amounts advanced by the Commission — Declaratory action — No vested and current interest in bringing proceedings)

In Case C-564/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 31 October 2013,

Planet AE Anonimi Etairia Parokhis Simvouleftikon Ipiresion, established in Athens (Greece), represented by V. Khristianos and S. Paliou, dikigori,

appellant,

the other party to the proceedings being:

European Commission, represented by R. Lyal, B. Conte and D. Triantafyllou, acting as Agents, assisted by S. Drakakakis, avocat,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), A. Rosas, E. Juhász and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 September 2014,

after hearing the Opinion of the Advocate General at the sitting on 6 November 2014,

gives the following

* Language of the case: Greek.

Judgment

- 1 By its appeal, Planet AE Anonimi Etairia Parokhis Simvouleftikon Ipiresion seeks to have set aside the order of the General Court of the European Union in *Planet v Commission* (T-489/12, EU:T:2013:496, ‘the order under appeal’), in which the latter rejected as manifestly inadmissible the action brought by Planet under Article 272 TFEU and the first paragraph of Article 340 TFEU seeking a declaration that the European Commission had breached several contracts concluded with Planet by rejecting the personnel costs appropriate for high ranking staff that it employs and that those costs were therefore eligible and did not have to be repaid to the Commission.

Background to the dispute

- 2 The background to the dispute was set out as follows in paragraphs 1 to 22 of the order under appeal:
 - ‘1 The applicant, Planet AE Anonimi Etairia Parokhis Simvouleftikon Ipiresion is a business and projects management consultancy company. It collaborates with international and European partners, including the Commission ..., in the field of strategy consultancy, data-processing and project management.
 - 2 The present case concerns the Commission’s rights and obligations under the contracts concluded with the applicant for three research projects. Those contracts were based on Decision No 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006) (OJ 2002 L 232, p. 1).
 - 3 It concerns, more specifically, the contracts concluded between the European Community, represented by the Commission, and:
 - the applicant, acting as coordinator and member of a consortium, signed on 17 December 2003, for the project “Ontology enabled E-Gov Service Configuration” (Ontogov, No 507237);
 - the Forschungszentrum Informatik an der Universität Karlsruhe, acting as coordinator of a consortium of which the applicant was a member, signed on 21 December 2005 for the project “Fostering self-adaptive e-government service improvement using semantic technologies” (FIT, No 27090);
 - the applicant, acting as coordinator and member of a consortium, signed on 18 December 2006 for the project “Risk Assessment for Customs in Western Balkans” (RACWeb, No 45101) (taken together, “the contracts at issue”).
 - 4 Article II.24(1)(a) of the contracts at issue provides that the financial contribution of the European Union is based on the eligible costs declared by the contracting parties.
 - 5 In accordance with Article II.8 of the contracts at issue, the Commission must, before reimbursing the costs declared by the consortium and/or the contracting parties at the end of each reporting period, evaluate and approve the reports and the deliverables. Under Article II.8(4), the approval of a report by the Commission does not imply exemption from any audit or review, which may be carried out in accordance with the provisions of Article II.29.

6 Article II.29 of the contracts at issue provides as follows:

“1. The Commission may, at any time during the contract and until five years after the end of the project, arrange for audits to be carried out, either by outside scientific or technological reviewers or auditors, or by the Commission departments themselves including OLAF. Such audits may cover scientific, financial, technological and other aspects (such as accounting and management principles) relating to the proper execution of the project and the contract. Any such audit shall be carried out on a confidential basis. Any amounts due to the Commission as a result of the findings of any such audit may be the subject of a recovery as mentioned in Article II.31 ...

2. The contractors shall make available directly to the Commission all the detailed data that may be requested by the Commission with a view to verifying that the contract is being properly managed and performed.

3. The contractors shall keep the original or, in exceptional cases, duly substantiated, authenticated copies, of all documents relating to the contract for up to five years from the end of the project. These shall be put at the Commission’s disposal where requested during the execution of any audit under the contract.”

7 In accordance with Article II.31(1), of the contracts at issue, “if any amount is unduly paid to the contractor or if recovery is justified under the terms of the contract, the contractor undertakes to repay the sum in question on whatever terms and by whatever date it may specify”.

8 Finally, according to Article 12 of the contracts at issue, those contracts are governed by Belgian law. Article 13 provides that “the [General Court or the Court of Justice of the European Union] as is appropriate in the specific case shall have sole jurisdiction to hear any disputes between the Community and the Contractors as regards the validity, the application or any interpretation of this contract”.

9 In the period from 17 to 21 November, and on 4 December 2008, external auditors carried out, on behalf of the external audit unit of the Directorate-General (DG) “Information Society and Media” of the Commission (‘DG Information’), a financial audit of the applicant, focused on the costs declared for certain periods in respect of the Ontogov, FIT and RACWeb projects.

10 By email of 8 April 2009, the auditors transmitted to the applicant a provisional audit report which, in particular, called into question the personnel costs of three of [its] senior managers (“the disputed costs”).

11 On 29 May 2009, the applicant submitted its observations on the provisional audit report.

12 On 10 July 2009, the applicant submitted a declaration of revised costs, accepting certain recommendations by the auditors.

13 By letter of 11 November 2009, the external audit unit of DG Information set out the reasons why it maintained the conclusions contained in the provisional audit report and transmitted to the applicant the final audit report.

14 By letter of 23 December 2009 the applicant challenged the compliance of the audit and invited the Commission to a meeting in order to provide detailed information as to its objections.

15 On 4 March 2010, a meeting took place between the applicant and the external audit unit of DG Information. It was agreed that the applicant would provide the Commission with additional information with respect to the involvement of its senior managers.

- 16 By letter of 19 April 2010, the applicant transmitted to the Commission the additional documentation that it had undertaken to provide.
- 17 By letter of 10 May 2010, the external audit unit of DG Information informed the application of its intention to carry out a follow-up audit at its seat and transmitted a list of supporting evidence that was required to be produced during the audit. That audit took place between 20 and 22 July 2010.
- 18 On 3 September and 9 December 2010, the applicant submitted the additional information requested during the follow-up audit.
- 19 By letter of 22 December 2010, the external audit unit of DG Information informed the applicant that it had decided to partially revise the conclusions of its report by accepting certain expenses, but to maintain the conclusions as regards the disputed costs.
- 20 By letter of 11 February 2011, the applicant submitted its observations on the revised conclusions of the audit report.
- 21 By letter of 10 April 2012, the external audit unit of DG Information replied that it maintained almost all of its conclusions as regards the disputed costs.
- 22 By letter of 21 May 2012, the applicant reaffirmed its position as regards the eligibility of the disputed costs.'

The procedure before the General Court and the order under appeal

- 3 By application lodged at the Registry of the General Court on 8 November 2012, the appellant lodged an action under Article 272 TFEU and the first paragraph of Article 340 TFEU, seeking a declaration that the Commission had breached a number of contracts concluded with it by rejecting the disputed costs and that, therefore, those costs were eligible and did not have to be repaid to the Commission.
- 4 On 24 January 2013, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the General Court. On 11 March 2013, the appellant lodged observations on the Commission's objection of inadmissibility.
- 5 By the order under appeal, the General Court upheld the objection of inadmissibility raised by the Commission, ruling that the appellant had no vested and present interest in bringing proceedings at the date that its action was lodged.

Forms of order sought before the Court

- 6 The appellant claims that the Court should:
 - set aside the order under appeal;
 - refer the case back to the General Court for judgment on the merits, and
 - order the Commission to pay the costs.
- 7 The Commission claims that the Court should reject the appeal as manifestly unfounded.

The appeal

Arguments of the parties

- 8 By a single ground for having the order set aside, the appellant submits that the General Court has committed an error of law in ruling, at paragraphs 31 to 35, 37, 38, 42 to 45 and 50 of the order under appeal, that it did not have a vested and present interest in bringing proceedings at the date that its action was lodged under Articles 272 and 340, first paragraph, TFEU.
- 9 The appellant submits that the interest in bringing proceedings required in the context of an declaratory action seeking to have the European Union's contractual duty recognised under Article 272 TFEU and Article 340, first paragraph, TFEU, such as the application lodged before the General Court, has a different content from the interest in bringing proceedings required in the context of other actions that exist in EU law, such as an action for annulment or an action for damages.
- 10 According to the appellant, the interest in bringing proceedings required in the context of an action seeking a declaration as to the European Union's contractual duty exists when it is found, by the contracting partner or his qualified representative, that there is a serious, systematic and repeated denial of a contractual right, which reasonably gives rise to uncertainty as to the existence, scope and free exercise of the right of the party concerned. Consequently, the interest in bringing proceedings required in the context of an action concerning contractual liability does not require a final act giving rise to a cause of action to have been adopted by the Commission or damage to exist.
- 11 In the present case, the appellant submits that its interest in bringing proceedings is not hypothetical, but is indeed vested and current, since the Commission's repeated denials have created uncertainty as to the existence of its right to register the remuneration of the senior managers as directly eligible costs.
- 12 In the light of those principles, the appellant considers that the General Court wrongly applied the criterion of interest in bringing proceedings required when lodging an action for annulment, namely the existence of a final act, at paragraph 34 of the order under appeal, read in conjunction with paragraphs 45, 35, 37, 38 and 42 thereof. The appellant also considers that the General Court wrongly applied the criterion for the interest in bringing proceedings required when lodging an action for damages, namely, the existence of definite damage, at paragraphs 42 to 44 of the order under appeal.
- 13 The appellant submits that the General Court wrongly held, at paragraph 50 of the order under appeal, that its interest in bringing proceedings could not be vested and current until after the Commission had issued an order for recovery or any other act. The appellant submits that that requirement leads to long-term legal uncertainty for private parties, inasmuch as they are forced to wait for an order for recovery to be issued even though the Commission has already seriously, repeatedly and systematically disputed their contractual right.
- 14 The Commission submits that the General Court committed no error of law in holding that the appellant did not have a vested and current interest in bringing proceedings at the date of lodging its action seeking a finding of failure to comply with contractual obligations under Article 272 TFEU and Article 340, first paragraph, TFEU.
- 15 In the first place, the Commission submits that the General Court did not base the order under appeal on the conditions for admissibility of an action for annulment. In particular, the Court did not base its assessment on the fact that there was no act giving rise to a cause of action within the meaning of Article 263 TFEU.

- 16 In the second place, the Commission asserts that it has not challenged the appellant's contractual rights, given that it has not issued a debit note requiring the repayment of the costs at issue. The Commission notes, in that respect, that Article II.29(1) of the contracts at issue with the appellant provides that 'amounts due to the Commission as a result of the findings of any such audit may be the subject of a recovery'. In accordance with that provision, the drafting of an unfavourable final report does not automatically lead to the recovery of the disputed costs, for the competent services of the Commission retain the discretionary power as to whether or not to require their repayment. A fortiori, in the present case, the drafting of an unfavourable report by one of the Commission's internal services, at a time when the audit procedure has not been closed, cannot be considered to be a decision as regards the appellant's contractual rights. The Commission submits, in short, that no dispute as yet exists between the contracting parties because neither of them has taken concrete measures to require the application of a contractual clause as to which the parties are in disagreement.
- 17 In the third place, the Commission considers that the fact that it has not yet issued a debit note does not lead to any negative consequence for the appellant. That circumstance does not create any legal uncertainty because, on the one hand, the possibility for the Commission of requiring repayment is subject to a limitation period in accordance with the provisions of national law in respect of contracts and, on the other hand, were an order for recovery to be made, it would be subject to full judicial review.

Findings of the Court

- 18 At the outset, it must be pointed out that, by its application lodged at the Registry of the General Court on 8 November 2012, the appellant brought a declaratory action under, in particular, Article 272 TFEU. As the Advocate General has noted at point 16 of her Opinion, the action brought by the applicant before the General Court does not seek the performance of an action by the Commission but rather a declaration by the EU judicature authorising it to keep sums already paid by the Commission under the contracts at issue.
- 19 Having regard to the declaratory nature of the action brought by the appellant before the General Court, it must be determined whether the courts of the European Union have jurisdiction to hear this type of claim, notwithstanding the fact that the Commission has not pleaded that the General Court lacked jurisdiction, either in the course of the procedure before that court or in the present proceedings.
- 20 A question relating to the jurisdiction of the courts of the European Union must be raised by the Court of its own motion even if none of the parties has asked it to do so (see, to that effect, judgments in *Germany v High Authority*, 19/58, EU:C:1960:19, p. 488, and *Ferriera Valsabbia and Others v Commission*, 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79, EU:C:1980:81, paragraph 7). In addition, the parties were invited to submit their observations on that question, which was raised by the Court of its own motion.
- 21 In that regard, the Court has already had occasion to rule that, while, under an arbitration clause entered into pursuant to Article 272 TFEU, the Court may be called on to decide a dispute on the basis of the national law governing the contract, its jurisdiction to determine a dispute concerning that contract falls to be determined solely with regard to Article 272 TFEU and the terms of the arbitration clause, and this cannot be affected by provisions of national law which allegedly exclude its jurisdiction (see judgments in *Commission v Zoubek*, 426/85, EU:C:1986:501, paragraph 10, and *Commission v Feilhauer*, C-209/90, EU:C:1992:172, paragraph 13).
- 22 Under Article 272 TFEU, read in conjunction with Article 256 TFEU, the General Court has jurisdiction to give judgment, at first instance, pursuant to any arbitration clause contained in a contract governed by public or private law concluded by or on behalf of the European Union.

- 23 It follows from the foregoing that Article 272 TFEU is a specific provision allowing the courts of the European Union to be seised under an arbitration clause agreed by the parties for contracts governed by either public or private law, and without restriction as regards the nature of the action to be brought before the courts of the European Union.
- 24 Nevertheless, it is appropriate to consider whether, in the present case, the arbitration clause included in the contracts at issue confers jurisdiction on the General Court to hear and determine the declaratory action brought by the appellant.
- 25 Under the arbitration clause set out in Article 13 of the contracts at issue, the General Court or the Court of Justice, as the case may be, has jurisdiction to hear disputes between the European Union and the contractors as regards the validity, application or interpretation of those contracts. Nor does that arbitration clause limit the jurisdiction of the General Court or the Court of Justice on the basis of the nature of the action.
- 26 Having regard to its wording, that arbitration clause is thus capable of establishing the jurisdiction of the General Court or the Court of Justice to hear a declaratory action, such as that at issue, concerning a dispute between the European Union and the appellant in relation to the application or interpretation of those contracts.
- 27 In that regard, there is no doubt that the action brought by the appellant before the General Court concerns the interpretation of the contracts at issue and, more specifically, the eligibility of the disputed costs having regard to those contracts.
- 28 The General Court held, however, at paragraph 33 of the order under appeal, that the applicant had not established that, at the date on which the action was lodged, it had a vested and current interest requiring judicial protection.
- 29 The appellant considers that, in so doing, the General Court committed an error of law inasmuch as, in the context of a declaratory action, it suffices, in order to give rise to such an interest, that a contractual right should be seriously, systematically and repeatedly disputed by one of the parties to the contract, thus creating uncertainty for one of the other parties to the contract as to the existence or scope of that right. According to the appellant, that condition is satisfied in the present case, because the Commission has seriously, systematically and repeatedly disputed the appellant's right to reimbursement of the disputed costs.
- 30 The Commission states that it has not disputed the appellant's contractual rights, for the reasons summarised at paragraph 16 of this judgment. In essence, the Commission submits that, at the date that the appellant's action was lodged before the General Court, it had not yet demanded repayment of the disputed costs by issuing a debit note, and that the eligibility of those costs was the subject of an audit procedure that had not been closed, the final report of which would not, in any event, be binding on the Commission's recovery services under Article II.29(1) of the contracts at issue.
- 31 In that regard, it should be recalled that an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible (see, by analogy and as regards an action for annulment, judgments in *Wunenburger v Commission*, C-362/05 P, EU:C:2007:322, paragraph 42, and *Cañas v Commission*, C-269/12 P, EU:C:2013:415, paragraph 15).
- 32 According to the findings of the General Court at paragraph 34 of the order under appeal, at the date on which the action was lodged no demand for repayment of the amounts advanced under the contracts at issue had yet been issued by the competent service of the Commission. Furthermore, the General Court pointed out, at paragraph 35 of the order under appeal, that the eligibility of the

disputed costs was the subject of an audit, which is a merely preliminary and preparatory procedure, separate from the procedure that could eventually lead to a recovery of the costs, which would be carried out by the operational services of the Commission.

- 33 In addition, it is apparent from paragraphs 36 to 39 of the order under appeal that the audit procedure had not yet been concluded at the date on which the appellant's action was lodged and that the Commission's service responsible for that audit had continued to communicate with the appellant, even after that date, regarding a possible amendment of the preliminary conclusions of the audit.
- 34 In the light of the circumstances recalled at paragraphs 32 and 33 of this judgment, the appellant is not justified in submitting that, at the date on which its action was lodged before the General Court, it had a vested and current interest requiring judicial protection.
- 35 Given that the eligibility of the disputed costs remained the subject of an audit procedure, the final report of which would not, in any event, be binding on the Commission's recovery services, it must be held that the Commission had not yet definitively decided which costs it would find to be ineligible having regard to the relevant clauses of the contracts at issue. The question whether, and if so to what extent, those costs would actually give rise to a request by the Commission for repayment remained uncertain. Therefore, the appellant had no interest in bringing proceedings at the date on which it lodged its action.
- 36 In view of the foregoing, the General Court did not commit an error of law in holding that the appellant did not have a vested and current interest requiring judicial protection at the date on which it lodged its action.
- 37 It follows from all the foregoing that the plea relied on by the appellant in support of its appeal cannot be accepted and that the appeal must therefore be dismissed in its entirety.

Costs

- 38 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 39 As the Commission has not applied for an order that the appellant must pay the costs, the appellant and the Commission shall bear their own costs.

On those grounds, the Court (Fifth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Planet AE Anonimi Etairia Parokhis Simvouleftikon Ipiresion and the European Commission to bear their own costs.**

[Signatures]