Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

18 November 2015*

(Arbitration clause — Sixth and Seventh Framework Programmes for research, technological development and demonstration activities — Early termination of contracts — Legitimate expectations — Proportionality — Good faith — Non-contractual liability — Reclassification of the action — Coexisting applications to establish contractual and non-contractual liability — Early warning system (EWS) — Sufficiently serious breach of a rule of law conferring rights on individuals — Causal link)

In Case T-106/13,

d.d. Synergy Hellas Anonymi Emporiki Etaireia Parochis Ypiresion Pliroforikis, established in Athens (Greece), represented by M. Angelopoulos and K. Damis, lawyers,

applicant,

v

European Commission, represented by R. Lyal and A. Sauka, acting as Agents, L. Athanassiou and G. Gerapetritis, lawyers,

defendant,

APPLICATIONS to establish contractual and non-contractual liability made in connection with the performance of a number of contracts which the Commission concluded with the applicant under the Sixth and Seventh Framework Programmes for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation,

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek, President, I. Labucka and V. Kreuschitz (Rapporteur), Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2015,

gives the following

* Language of the case: Greek.

EN

Judgment[1] …

Law

I – *The application to establish contractual liability* …

B — *Admissibility* …

2. Admissibility of arguments concerning projects other than the ARTreat project

44 The Commission asserts that the applicant cannot reasonably rely on arguments concerning projects other than the ARTreat project, to which the present case relates. In addition, it maintains that the claims concerning the J-WeB project have already been put forward in the action in Case T-365/12, which the applicant withdrew (order in *Synergy Hellas* v *Commission*, cited in paragraph 22 above, EU:T:2012:461). It submits that it is contrary to the sound administration of justice and the principle of procedural economy to permit parties to resubmit requests and claims which they have abandoned. The applicant has thus lost any legitimate interest in challenging the conclusions of the audit conducted in connection with the J-WeB contract. The applicant disputes that such arguments are inadmissible.

45 In the light of these arguments, it should be noted that the Commission terminated the ARTreat contract with the applicant pursuant to Article II.38(1)(c) of that contract on account of irregularities committed by the applicant in the performance of the J-WeB contract. Because improper performance of the J-WeB contract is the cause of the termination of the ARTreat contract, the applicant must be able to challenge that improper performance in an action to establish contractual liability against the decision to terminate the contract. Consequently, the Commission is wrong to claim that the applicant cannot rely on arguments relating to the J-WeB project in the context of an action to establish contractual liability based on the ARTreat contract.

46 The withdrawal by the applicant in Case T-365/12 *Synergy Hellas* v *Commission* (see paragraph 22 above), which concerned the J-WeB contract, does not affect its right, in the context of the present heads of claim relating to the Commission's contractual liability based on the termination of the ARTreat contract, to rely on irregularities in respect of the performance of the J-WeB contract.

47 In the event of withdrawal, the Court does not rule either on admissibility or on the substance, but takes note of the applicant's wish not to continue the judicial proceedings. The order concerning withdrawal does not constitute *res judicata*. It has thus been ruled that where an applicant has withdrawn his action which was pending, the dispute arising from it ceases to exist and therefore the situation of *lis alibi pendens* with another action disappears. The Court stated that the interest in avoiding the situation where parties use that possibility in a manner contrary to the principle of procedural economy does not require a situation of *lis alibi pendens* to persist even in relation to an action which the applicant has withdrawn, as that interest is sufficiently protected by the applicant being ordered to pay the costs (see, to that effect, judgment of 9 June 2011 in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, ECR, EU:C:2011:368, paragraph 32).

1 — Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

3. Admissibility of the second part of the first head of claim

48 According to the Commission, the heads of claim relating to payment of a sum of EUR 343 828.88 must be rejected as inadmissible on the ground that the audit of the ARTreat project is still ongoing. The Commission states that the comments, the new cost declarations and the voluminous additional documentation submitted by the applicant following the communication of the provisional audit report for the ARTreat project are currently being examined by the relevant auditors. The Commission infers that on the date when the present action was brought, its non-payment of the sum claimed of EUR 343 828.88 is uncertain and hypothetical (see, to that effect, order of 9 September 2013 in *Planet* v *Commission*, T-489/12, EU:T:2013:496, paragraphs 38 and 42). The applicant cannot rely upon future and uncertain situations to justify a direct and existing interest in the result of the case. In addition, the Court is being asked to rule on a matter, or act, which does not exist. The applicant disputes that view and submits that it was owed the sum of EUR 343 828.88.

49 It should be noted in this regard that any person who takes legal action must have a direct and existing interest in bringing proceedings (judgment of 30 September 2009 in *Lior* v *Commission* and *Commission* v *Lior*, T-192/01 and T-245/04, EU:T:2009:365, paragraph 247) and that that legitimate interest must be construed as an advantage which the action is capable, if successful, of procuring to the applicant (see, to that effect, judgment of 6 October 2009 in *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECR, EU:C:2009:610, paragraph 23 and the case-law cited).

50 In the present case, the heads of claim in question seek an order that the Commission make a payment pursuant to the ARTreat contract. The applicant claims that the Court should order the Commission to pay it the sum of EUR 343 828.88 in respect of the payments which are owed for the ARTreat project, together with interest.

51 The fact that the Commission is currently assessing whether the costs presented by the applicant are eligible and thus whether payment of the sum of EUR 343 828.88 is owed does not permit a finding to be made that the applicant has no direct and existing interest in bringing proceedings in accordance with the case-law cited above. From the time the action was brought, it is clear that the applicant has had an advantage from his action being successful. The applicant therefore has a direct and existing interest in obtaining from the Court an order that the Commission pay the sum of EUR 343 828.88 together with interest pursuant to the ARTreat contract.

52 Furthermore, the Commission cannot claim that the applicant has no interest in bringing proceedings on the ground that, at the time the action was brought, its non-payment to the applicant of the sum of EUR 343 828.88 was uncertain or hypothetical. When the action was brought, it was certain that the Commission had not paid the sum in question.

53 The questions whether the Commission was required to pay the sum in question before the action was brought, whether it could suspend payment on account of the ongoing audit and whether the Court should suspend the judicial proceedings pending the end of the Commission audit or, on the other hand, whether it should rule directly on the eligibility of the costs require an assessment of aspects relating to the substance of the action and not to its admissibility. Thus, it has already been ruled, in the context of an action based on an arbitration clause, that under the Belgian law applicable to the dispute it is a condition for the proper foundation of the claim for payment made by the creditor that the amount receivable is certain, of a fixed amount and due (see, to that effect, judgment of 16 July 2014 in *Isotis* v *Commission*, T-59/11, ECR, EU:T:2014:679, paragraph 280).

54 The admissibility of the applicant's heads of claim seeking that the Commission be ordered to pay a sum of money is not called into question by the order in *Planet* v *Commission* (cited in paragraph 48 above, EU:T:2013:496) relied on by the Commission. Unlike the present case, where the action brought by the applicant is seeking the performance of an action by the Commission, the action brought by the

applicant before the General Court in *Planet* sought a declaration by the EU judicature authorising it to keep sums already paid by the Commission under the contracts at issue (see judgment of 26 February 2015 in *Planet* v *Commission*, C-564/13 P, EU:C:2015:124, paragraph 18).

55 As Advocate General Kokott stated in her Opinion in *Planet* v *Commission* (C-564/13 P, ECR, EU:C:2014:2352), while, in the case of actions for performance intended to obtain satisfaction of specific claims, the interest in bringing proceedings may be inferred automatically from the context of the applicant's claim itself, an interest worthy of protection on the part of the applicant in an abstract judicial declaration that a legal relationship or a particular right does or does not exist usually requires specific reasoning. It is not for the Union judicature to issue abstract legal opinions (Opinion of Advocate General Kokott in *Planet* v *Commission*, EU:C:2014:2352, point 41).

56 Consequently, the plea of inadmissibility raised in this regard by the Commission must be rejected.

C — *Substance*

1. Preliminary considerations

57 Article II.38(1) of Annex II to the ARTreat contract provides that:

'… The Commission may terminate the grant agreement or the participation of a beneficiary in the following cases: …

(c) where the beneficiary has deliberately or through negligence committed an irregularity in the performance of any grant agreement with the Commission.'

58 The concept of irregularity is defined in Article II.1(10) of Annex II to the ARTreat contract as 'any infringement of a provision of Community law or any breach of contractual obligation resulting from an act or omission by a contractor which has, or would have, the effect of prejudicing the general budget of the European Communities or budgets managed by it through unjustified expenditure'.

59 The Commission terminated the contract with the applicant for the ARTreat project pursuant to Article II.38 on the ground that the financial audit of the J-WeB contract conducted for it by Kypris & Associates revealed that a large proportion of the costs declared by the applicant were ineligible (see final audit report for the J-WeB contract).

60 The applicant maintains that this termination is unlawful because the Commission wrongly considered its costs for the J-WeB project to be ineligible. It bases its application to establish contractual liability on the claim that that termination infringes, first, the principle of protection of legitimate expectations and, second, the principle of proportionality (see paragraph 42 above). According to the applicant, the unlawful termination of the ARTreat contract caused it damage amounting to EUR 343 828.88. Of that sum, EUR 94 112.93 is owed in respect of loss of revenue for the period between the date of termination of the ARTreat contract and the end of the ARTreat project and EUR 249 715.95 is owed in respect of costs incurred before the termination of the ARTreat contract.

2. Infringement of the principle of protection of legitimate expectations

61 In support of its plea that the termination of the ARTreat contract infringes the principle of protection of legitimate expectations, the applicant disputes, first, the reliability of the final audit report for the J-WeB project. The audit reports by Ernst & Young for the Metabo project and the audit reports by BDO for the J-WeB project confirm the reliability of the applicant's time-recording system and the eligibility of its expenditure. Second, the applicant submits that, in ruling on the need to protect its

legitimate expectations, the Court must take account of the fact that the rejection of its declarations of expenditure 16 months after the audit of the Metabo contract conducted by Ernst & Young exceeds a reasonable time. Third, the applicant asserts that, as is shown by the minutes of the meeting on 22 August 2012 and the email of 24 September 2012, it had reached an agreement with the Commission not to terminate the ARTreat contract. However, the Commission unlawfully went back on that agreement, thereby causing it considerable material and non-material damage.

62 The Commission disputes the applicant's arguments. First, in view of its clearly contractual relationship with the applicant, the Commission asserts that the applicant cannot complain that it infringed the principle of protection of legitimate expectations, with which it is required to comply as an administrative authority vis-à-vis its citizens. In addition, it maintains that the applicant has not raised any pleas in law concerning expressions of the protection of legitimate expectations in contract law. Second, the complaints based on infringement of the principle of good faith and on abuse of rights are inadmissible because they were raised for the first time at the reply stage and are too vague. Lastly and in any event, the Commission submits that it did not give the applicant any legitimate expectations and that it did not infringe the principle of reasonable time.

63 With regard to these arguments it should be noted that the FEU Treaty established a system of autonomous legal remedies. Article 272 TFEU provides that the Court of Justice has jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

64 The applicant brought an application to establish contractual liability on the basis of the arbitration clause contained in Article 9 of the ARTreat contract, which provides that the General Court alone has jurisdiction to hear at first instance any dispute between the Commission and the beneficiary as regards the interpretation, the application and the validity of that grant agreement (see paragraph 38 above).

65 In the context of that application to establish contractual liability, the applicant has claimed infringement of the principle of protection of legitimate expectations on the grounds mentioned in paragraph 61 above. The applicant states that the legitimate expectations invoked are 'examined from the point of view of the citizen' and 'require the protection of the citizen's expectations in continuous and reliable State action on which he can rely in undertaking certain actions and as the basis for certain expectations'. In addition, according to the applicant, that principle constitutes a 'limitation of the right of revocation of illegal administrative acts'.

66 In this regard, the principle of protection of legitimate expectations invoked by the applicant must be considered to govern the relationship of subordination between a citizen and the authorities and it must be recalled that, according to established case-law, the right to rely on the principle of the protection of legitimate expectations vis-à-vis the EU authorities extends to any individual in a situation where those authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources. However, a person may not plead breach of the principle unless he has been given precise assurances by the administration (see judgment of 19 March 2003 in *Innova PrivaT-Akademie* v *Commission*, T-273/01, ECR, EU:T:2003:78, paragraph 26 and the case-law cited). That principle is therefore subject to a review of legality under Article 263 TFEU, which the Court may conduct in respect of acts adopted by the institutions.

67 However, the Court is hearing the present case as the court having jurisdiction over the contract. Although, under Article 9 of the ARTreat contract (see paragraph 39 above), that contract is governed inter alia by EU law, that fact cannot change the jurisdiction of the Court as defined by the legal remedy chosen by the applicant. In its application to establish contractual liability, the applicant can therefore make complaints against the Commission only in respect of infringements of the law applicable to the contract, that is to say, infringements of contractual provisions, the Financial

Regulation or principles of EU contract law and, as a subsidiary plea, principles of Belgian contract law (see, to that effect, judgment of 3 June 2009 in *Commission* v *Burie Onderzoek en Advies*, T-179/06, EU:T:2009:171, paragraph 118).

68 Consequently, in the context of the application to establish contractual liability made by the applicant, the Court must declare inadmissible a claim alleging that, in its performance of the ARTreat contract, the Commission infringed the principle of protection of legitimate expectations as defined in paragraph 66 above.

69 Nevertheless, the applicant states in the reply that its claim alleging infringement of the principle of protection of legitimate expectations must be considered in the context of performance of agreements in good faith and the prohibition on the abusive application of contractual terms.

70 Contrary to the assertion made by the Commission in its replies to the Court's written questions, that claim is not inadmissible on grounds of its lateness or lack of precision. A submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (see judgment of 14 March 2007 in *Aluminium Silicon Mill Products* v *Council*, T-107/04, ECR, EU:T:2007:85, paragraph 60 and the case-law cited). In the present case, in its application the applicant invoked Article 1134 of the Belgian Civil Code, to which the ARTreat contract is subject under Article 9 thereof. That article of the Belgian Civil Code establishes the obligation for the parties to an agreement to perform it in good faith. In addition, a form of legitimate expectations may be relied on in contract law as it contributes to respect for the obligation on the parties to a contract to perform it in good faith.

71 Furthermore, the Commission cannot rely on the lack of precision of the applicant's claim because in the rejoinder it argued that a beneficiary of financial assistance from the Union which did not comply with an essential condition to which the grant of the assistance was subject could not invoke the principle of protection of legitimate expectations in order to challenge the Commission's refusal to grant it the sum initially agreed and that the applicant cannot invoke the principle of protection of legitimate expectations because it did not comply with the financial obligations to which the financial contribution is subject.

72 It cannot be ruled out that a form of legitimate expectations may be relied on in contract law as it contributes to respect for the obligation on the parties to a contract to perform it in good faith because that principle of performance of agreements in good faith precludes any performance of the contract which constitutes an abuse of rights.

73 The Belgian Cour de Cassation (Court of Cassation) has thus ruled that the principle established by Article 1134 of the Belgian Civil Code, under which agreements must be performed in good faith, prohibited a party from abusing a right conferred on it by the agreement. An abuse of rights consists in 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, 16 November 2007, AR nr C.06.0349.F.1). It is possible that it constitutes an abuse of rights where the holder of a right invokes it after having caused the other party to entertain the legitimate expectation that it will not exercise it by conduct which is objectively incompatible with the normal exercise of that right.

74 However, in this case, the Commission did not give the applicant a legitimate expectation that it would not terminate the ARTreat contract pursuant to Article II.38(1)(c) of Annex II to that contract following the findings of the audit of the J-WeB contract by Kypris & Associates, which identified a large number of ineligible costs.

75 In so far as the applicant asserts that it was entitled to entertain a legitimate expectation that its costs for the J-Web project were eligible, as Ernst & Young had conducted a similar audit for the Metabo project and had found that its costs were eligible, it should be noted that the audit report for the Metabo project on which the applicant relies was only a draft audit report. The provisional nature of that report prevents any legitimate expectations being entertained by the applicant.

76 Moreover, the applicant fails to explain with sufficient precision why it maintains that the assessment of costs for the Metabo contract could be transposed to the costs for the J-WeB project. It also fails to indicate on what basis it submits that the audit report for the Metabo project was accepted by the Commission. That draft audit report states that the report was prepared at the request of the Commission but that the views expressed are those of the independent auditor and do not represent the official point of view of the Commission. In addition, the Commission stated in the rejoinder that the draft report had never been finalised, as it had not been accepted, and that it had to be replaced by the audit report for the ARTreat project.

77 These conclusions are not affected by the fact adduced by the applicant that 16 months passed between the adoption of the draft audit report by Ernst & Young concerning the performance of the Metabo contract and the rejection of a large number of costs following the audit of the performance of the J-WeB contract. The time which passed between the two evaluations has no bearing on whether or not the assessments contained in the audits in question were accurate. The passing of that time does not give any greater credibility to the assessment contained in the first audit report.

…

3. Infringement of the principle of proportionality

(a) Proportionality of the termination

87 The applicant maintains, in essence, that the termination of the ARTreat contract following the audit report for the J-Web contract is disproportionate. In support of that claim, it submits, first, that the audit report for the J-WeB project incorrectly finds financial irregularities, as is shown by the audit reports conducted by BDO and Ernst & Young, and that the audit report for the J-WeB project is based on an arbitrary assessment because of the lack of impartiality of Kypris & Associates. Second, the applicant asserts that the termination in question was contrary to the agreement made with the Commission at the meeting on 22 August 2012. Third, it claims infringement of the time limits laid down in section 5.3 of the Annex to Decision 2011/161 for the review of the termination of the ARTreat contract by the redress committee and in Article II.22 of Annex II to the ARTreat contract for sending the final audit report. Fourth, the applicant asserts that the termination of the ARTreat and Metabo contracts is unlawful because it took place before both the expiry of the time limit for making a redress request to the redress committee and the decision by that committee. The Commission disputes these claims and asserts that the termination was proportionate.

88 With regard to these claims, it should be noted that the principle of proportionality constitutes a general principle of EU law, which is enshrined in Article 5(4) TEU. That principle requires that the measures adopted by the EU institutions do not exceed what is appropriate and necessary for attaining the objective pursued (see judgment of 13 September 2013 in *Makhlouf* v *Council*, T-383/11, ECR, EU:T:2013:431, paragraph 98 and the case-law cited).

89 That principle is intended to regulate all the Union's means of action, whether contractual or non-contractual (judgment of 25 May 2004 in *Distilleria Palma* v *Commission*, T-154/01, ECR, EU:T:2004:154, paragraph 44). In the context of the performance of contractual obligations, respect for that principle contributes to the more general obligation of the parties to a contract to perform it in good faith. Under the Belgian law applicable to the ARTreat contract (see paragraph 39 above), the

obligation to perform agreements in good faith 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 (see paragraph 73 above).

90 In the present case, the Commission unilaterally terminated the applicant's participation in that contract under Article II.38(1)(c) of Annex II to the ARTreat contract following the final audit report for the J-WeB contract. According to the Commission, the final audit report for the J-WeB project showed that the applicant had committed an irregularity in accordance with Article II.1 of Annex II to the ARTreat contract, which permitted it unilaterally to terminate the contract under Article II.38(1)(c) of Annex II thereof.

91 In assessing whether the Commission applied Article II.38(1)(c) of Annex II to the ARTreat contract in a proportionate manner, it should be noted that in the final audit report for the contract concluded by the Commission with the applicant concerning the grant for the J-WeB project, the auditors from Kypris & Associates rejected all the personnel costs declared, regarding them as ineligible. They reached that conclusion on the basis of the following findings:

— the unreliability of the applicant's working-time recording system;

— the absence of sufficient, appropriate evidence confirming the number of hours and the personnel contribution to the performance of the project declared by the applicant, and

— the existence of a subcontracting contract concluded between the applicant and a third company giving rise to invoices that made reference to the J-WeB contract which was not notified to or approved by the Commission and which raises doubts over the entity which actually implemented the J-WeB project.

92 Accordingly, the declaration of these costs by the applicant with a view to their reimbursement by the Commission was not reliable and the applicant failed to fulfil its contractual obligations in relation to declaring only eligible costs. Those failures constitute irregularities within the meaning of Article II.1(10) of Annex II to the ARTreat contract. They have, or would have, the effect of prejudicing the general budget of the European Union. In accordance with Article II.38(1)(c) of Annex II to the ARTreat contract, they justify the termination of that contract without such termination being regarded as disproportionate or constituting an abuse of rights. The lawfulness of the grounds for termination provided for in Article II.38(1)(c) of Annex II to the ARTreat contract is not challenged by the applicant. In addition, the irregularities found by the audit are sufficiently serious, so that the termination of the ARTreat contract does not constitute exercise of the right to unilateral termination which manifestly exceeds the limits of the normal exercise of that right by a person exercising all due care.

…

II – *The application to establish non-contractual liability* …

C — *Substance* …

2. Infringements of the duty of confidentiality and of the agreement mentioned in the minutes of 22 August 2012, failure to accept the comments on the provisional audit of the ARTreat and Metabo contracts, failure to adopt a final audit report and infringement of the principle of 'sound administration'

141 The Commission asserts that the subject matter of the applicant's application to establish non-contractual liability in this case relates to damage arising from a contract. It infers that the applicant's claims in support of its application to establish non-contractual liability will have to be assessed in the light of the contractual terms.

142 It should be noted in this regard that the FEU Treaty establishes a complete system of legal remedies. Each of these legal remedies is an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose (see, to that effect, judgments of 23 March 2004 in *Ombudsman* v *Lamberts*, C-234/02 P, ECR, EU:C:2004:174, paragraph 59, and 3 September 2008 in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, ECR, EU:C:2008:461, paragraph 281).

143 The action to establish non-contractual liability enshrined in Article 268 TFEU seeks compensation for damage resulting from a measure or from unlawful conduct attributable to an EU institution or body (judgment in *Ombudsman* v *Lamberts*, cited in paragraph 142 above, EU:C:2004:174, paragraph 59). As is stated in paragraph 124 above, the Union's non-contractual liability depends on fulfilment of a set of conditions as regards the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between that conduct of the institution and the damage complained of.

144 The action to establish contractual liability mentioned in Article 272 TFEU seeks compensation for damage resulting from a contract concluded by the Union or on its behalf. The jurisdiction of the EU Courts and the liability of the contracting parties depend on the scope of the contractual terms, in particular choice of jurisdiction clauses and clauses designating the law applicable to the contract. That jurisdiction derogates from the ordinary rules of law and must therefore be given a restrictive interpretation (judgments of 18 December 1986 in *Commission* v *Zoubek*, 426/85, ECR, EU:C:1986:501, paragraph 11, and 16 December 2010 in *Commission* v *Arci Nuova associazione comitato di Cagliari and Gessa*, T-259/09, EU:T:2010:536, paragraph 39). Thus, the Court may hear and determine only claims arising from the contract which contains the arbitration clause or claims that are directly connected with the obligations arising from that contract (judgment in *Commission* v *Zoubek*, EU:C:1986:501, paragraph 11).

145 Given the autonomy of the abovementioned legal remedies and the specific conditions governing liability in each of these remedies, the Court is required to determine whether the action before it has as its subject matter a claim for damages based objectively on rights and obligations of a contractual nature or of a non-contractual nature (see, by analogy, judgment of 18 April 2013 in *Commission* v *Systran and Systran Luxembourg*, C-103/11 P, ECR, EU:C:2013:245, paragraph 66).

146 It has thus been held that the mere invocation of legal rules or principles not flowing from a contract between the parties, but which are binding on them, cannot have the consequence of altering the contractual nature of the dispute (see judgments of 20 May 2009 in *Guigard* v *Commission*,

C-214/08 P, EU:C:2009:330, paragraph 43; *Commission* v *Systran and Systran Luxembourg*, cited in paragraph 145 above, EU:C:2013:245, paragraph 65, and 19 May 2010 in *Nexus Europe (Ireland)* v *Commission*, T-424/08, EU:T:2010:211, paragraph 60).

147 However, since under the FEU Treaty the EU Courts have jurisdiction, in principle, to decide both on an action concerning the non-contractual liability of the institutions and on an action concerning the contractual liability of the institutions where they have concluded a contract containing an arbitration clause, it has been ruled that where an action to establish non-contractual liability is brought before the General Court, when the dispute is, in point of fact, contractual in nature, the Court reclassifies the action, provided that the conditions for such a reclassification are satisfied (judgment of 19 September 2001 in *Lecureur* v *Commission*, T-26/00, ECR, EU:T:2001:222, paragraph 38; order of 10 May 2004 in *Musée Grévin* v *Commission*, T-314/03 and T-378/03, ECR, EU:T:2004:139, paragraph 88, and judgment of 24 October 2014 in *Technische Universität Dresden* v *Commission*, T-29/11, ECR, EU:T:2014:912, paragraph 42).

148 More specifically, as has been recognised in case-law, when faced with a dispute which is contractual in nature, the Court is unable to reclassify an action either where the applicant's express wish not to base his application on Article 272 TFEU precludes such reclassification (see, to that effect, order in *Musée Grévin* v *Commission*, cited in paragraph 147 above, EU:T:2004:139, paragraph 88; judgment in *CEVA* v *Commission*, cited in paragraph 99 above, EU:T:2010:240, paragraph 59, and order of 6 September 2012 in *Technion and Technion Research & Development Foundation* v *Commission*, T-657/11, EU:T:2012:411, paragraph 55), or where the action is not based on any plea alleging infringement of the rules governing the contractual relationship in question, whether they be contractual clauses or provisions of the national law designated in the contract (see judgment of 16 October 2014 in *Federación Española de Hostelería* v *EACEA*, T-340/13, EU:T:2014:889, paragraph 35 and the case-law cited).

149 In addition, it should be observed that the infringement of a contractual provision by an institution cannot in itself establish the non-contractual liability of that institution with regard to one of the parties with which it concluded the contract containing that provision. In such a case, the unlawful conduct attributable to the institution is purely contractual in nature and stems from its undertaking as a contracting party and not from any other status, such as its capacity as an administrative authority. Consequently, in those circumstances, the claim of infringement of a contractual provision in support of an application to establish non-contractual liability must be declared ineffective.

150 However, it cannot be ruled out that the contractual and the non-contractual liability of an EU institution may coexist in respect of one of the parties with which it has concluded a contract, as the nature of unlawful conduct attributable to an institution which causes damage and may be the subject of a claim seeking compensation for non-contractual damage is not predefined (see, to that effect, judgments in *Ombudsman* v *Lamberts*, cited in paragraph 142 above, EU:C:2004:174, paragraph 59 and the case-law cited, and 18 December 2009 in *Arizmendi and Others* v *Council and Commission*, T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04, ECR, EU:T:2009:530, paragraph 65). Assuming that such coexisting liability for the institutions exists, it would be possible only if the unlawful conduct attributed to the institution in question constitutes a breach of not only a contractual obligation, but also of a general obligation incumbent on it and that unlawful conduct in respect of the general obligation has caused damage other than damage stemming from the improper performance of the contract.

151 In the present case, three of the four claims made by the applicant in support of its application to establish non-contractual liability, summarised in paragraph 125 et seq. above, are based objectively on alleged infringements of a contractual nature and no damage other than damage stemming from the improper performance of the contract has been put forward.

152 With regard to the alleged disclosure of confidential information by the Commission, it should be noted that it consists in having informed the coordinators of the ARTreat and Metabo projects of the termination of the ARTreat contract and of the Metabo contract respectively. The alleged confidential information, namely the termination by the Commission of the ARTreat and Metabo contracts with the applicant, is information which emanates from the Commission and which it holds as a party to the contract and not in its capacity as an administrative authority. Furthermore, the coordinators of the projects in question, to whom the alleged confidential information was communicated, are not third parties in respect of the contracts at issue. They are other parties to the contract with the applicant and the Commission. Lastly, the applicant itself alleges, in support of this claim, infringement of Article II.22(8) of Annex II to those contracts, under which the Commission may carry out on-the-spot inspections in accordance with Regulation No 2185/96 and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by OLAF (OJ 1999 L 136, p. 1), and fails to take account of the fact that Article II.38(2) of Annex II to those contracts provides that the cessation of participation of one or more beneficiaries on the initiative of the Commission is to be notified to the beneficiaries concerned, with a copy being sent to the coordinator. Consequently, the duty of confidentiality which the applicant alleges that the Commission infringed is based objectively on rights and obligations of a contractual nature and not on obligations covered by Article 339 TFEU and Article 41 of the Charter of Fundamental Rights, which have also been invoked.

153 Furthermore, the Court notes that the applicant does not state, let alone demonstrate, that the disclosure of the alleged confidential information to the contract coordinators caused it damage other than damage resulting from the improper performance of the contract, in particular Articles II.22 and II.38 of Annex II to those contracts.

154 With regard to the infringement of the alleged agreement between the applicant and the Commission reported in the minutes of the meeting on 22 August 2012, it must be stated that this claim relates to the manner in which the parties performed the ARTreat and Metabo contracts. The fact that the applicant submits that by failing to respect that agreement the Commission breached the principles of good faith and fairness, abused its powers, practised discrimination and infringed the principles of proportionality and administrative continuity does not call this finding into question. Those claims actually relate to alleged infringements which are connected objectively with rights and obligations of a contractual nature. In addition and in any event, the applicant does not state, let alone demonstrate, that those infringements caused it damage other than damage resulting from the improper performance of the contracts at issue.

155 Lastly, as regards the alleged failure to accept comments on the provisional audit reports for the ARTreat and Metabo projects and the alleged delays in adopting the final audit reports concerning the performance of the ARTreat and Metabo contracts, those claims relate objectively to the performance of the contracts at issue by the Commission as a contracting party. The applicant also alleges, in support of those claims, an infringement of Article II.22(5) of the contracts at issue. The mere invocation of respect for the principles of reasonable time and the rights of the defence, which are binding on the Commission, cannot have the consequence of altering the contractual nature of the dispute. Lastly and in any event, the applicant does not state, let alone demonstrate, that those infringements caused it damage other than damage resulting from the improper performance of the contracts at issue.

156 At the hearing, the Court asked the applicant if it objected to its reclassifying its application to establish non-contractual liability as an application to establish contractual liability for the part of its application to establish non-contractual liability based on claims alleging infringement of the rules of the contracts at issue. In reply to that question, the applicant stated that it did object to such reclassification.

157 In view of that objection by the applicant to reclassification and since the three claims mentioned in paragraph 151 et seq. above, put forward in support of the applicant's application to establish non-contractual liability, relate objectively to the performance of the contracts at issue, the applicant's application to establish non-contractual liability based on those claims must be dismissed as ineffective.

…

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders d.d. Synergy Hellas Anonymi Emporiki Etaireia Parochis Ypiresion Pliroforikis to pay the costs.**

Prek Labucka Kreuschitz

Delivered in open court in Luxembourg on 18 November 2015.

[Signatures]