Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

3 July 2018 *

[Text rectified by order of 3 October 2018]

(EDF — ACP countries — The Cotonou Agreement — Support programme for cultural initiatives in Portuguese-speaking African countries — Sums paid by the Commission to the body entrusted with the financial implementation of the programme in Guinea-Bissau — Recovery following a financial audit — Offsetting of debts — Proportionality — Unjust enrichment — Non-contractual liability)

In Case T-616/15,

**Transtec**, established in Brussels (Belgium), represented by L. Levi, lawyer,

applicant,

v

**European Commission**, represented initially by M.A. Aresu and S. Bartelt, and subsequently by M. Aresu, acting as Agents,

defendant,

APPLICATION, first, under Article 263 TFEU, seeking annulment of the set-off decisions contained in the Commission's letters of 27 August and 7, 16, 23 and 25 September 2015, seeking to recover the sum of EUR 624 388.73, corresponding to the amount of part of the advance paid to the applicant in the context of a support programme for cultural initiatives in Guinea-Bissau, financed by the ninth European Development Fund (EDF), plus late payment interest, and, second, under Article 268 TFEU seeking recovery of sums allegedly linked to unjust enrichment, as well as compensation for damage allegedly suffered by the applicant as a result of the Commission's conduct,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, V. Valančius and U. Öberg (Rapporteur), Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 17 November 2017,

gives the following

* Language of the case: French.

## Judgment

### Background to the dispute

1 Pursuant to the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ 2000 L 317, p. 3) and approved on behalf of the Community by Council Decision 2003/159/EC of 19 December 2002 (OJ 2003 L 65, p. 27), the ninth European Development Fund (EDF) implemented a support programme for cultural initiatives for five African, Caribbean and Pacific (ACP) States, namely the Portuguese-speaking African countries ('the PALOP countries').

2 The PALOP countries are the Republic of Angola, the Republic of Cape Verde, the Republic of Guinea-Bissau, the Republic of Mozambique and the Democratic Republic of São Tomé and Príncipe.

3 As part of the support programme for cultural initiatives for the PALOP countries, those countries were granted EUR 3 million by a Commission financing decision, implemented by the financing agreement reference 9888/REG ('the financing agreement'), which was signed by the Commission on 19 December 2007 and by the PALOP countries, represented by the authorising officer of the Republic of Guinea-Bissau, on 29 February 2008, and entered into force on the same day. That agreement expired on 31 December 2013.

4 Pursuant to the financing agreement, service contract reference FED/2009/210-646 ('the service contract') was signed on 20 July 2009 between the national authorising officer concerned, namely the Minister for the Economy and Finance of the Republic of Guinea-Bissau ('the national authorising officer') in his capacity as contracting authority, and the applicant, Transtec, which is a development consultancy firm providing technical cooperation services to public institutions, the private sector and other organisations in emerging economies.

5 The service contract was also signed, for approval, by the Minister for Education, Culture and Science of the Republic of Guinea-Bissau, as beneficiary, and endorsed by the Head of the Delegation of the European Union to the Republic of Guinea-Bissau ('the Head of Delegation'), as donor.

6 Some of the provisions of and annexes to the service contract were amended in 2011 and 2012. The service contract was originally agreed, under Article 3 thereof, for a total of EUR 344 992 and for a period of 24 months. Following the various amendments, the amount was eventually set at EUR 484 787, with a duration of just over 36 months, that is, until 31 August 2012. The amendments were intended to cover expenditure associated with the performance of the applicant's various tasks, detailed in Annexes II and III to that contract, relating to the provision of technical assistance services to the management unit for the support programme for cultural initiatives in the PALOP countries.

7 Under the service contract, the applicant drafted and signed a document bearing the reference FED/2010/249-005 and entitled 'Orçamento-programa de cruzeiro e de encerramento' (operational programme estimate and closure programme estimate; 'the programme estimate'), approved by the national authorising officer, signed for approval by the beneficiary and endorsed by the Head of Delegation.

8 In order to implement the programme estimate and cover all of its operational aspects, the applicant was entrusted with the management of a financial allocation of approximately EUR 2 531 560.

9 In accordance with the service contract and the programme estimate, the applicant completed the tasks which had been assigned to it within the time allowed. On 31 August 2012, upon the expiry of that contract as amended, the applicant declared expenditure of approximately EUR 475 108.25 under the service contract, and of approximately EUR 1 679 933.71 for the implementation of the programme estimate.

10 The Commission subsequently requested two audits; one of the service contract and the other of the programme estimate. The two draft audit reports, which were issued, respectively, on 12 and 25 May 2014, identified various items of expenditure which they classified as ineligible in the amount of EUR 607 072.24, subsequently corrected to EUR 607 096.08 after an accounting adjustment, for the programme estimate and in the amount of EUR 10 151.17 for the service contract.

11 The applicant submitted its observations on the draft audit reports on 11 June 2014. The final version of those reports, which was released on 25 July 2014, included the auditor's comments on the applicant's observations.

12 Following those reports, the Delegation of the European Union to the Republic of Guinea-Bissau endorsed the conclusions of the auditor. However, before the adoption of a decision on the recovery of the amount relating to the programme estimate, namely EUR 607 096.08, the applicant was invited, by letter of 29 October 2014, to submit its observations to the Commission. The applicant replied to that letter on 7 November 2014.

13 By letter of 12 December 2014 signed by the Head of Delegation and the national authorising officer, the applicant's objections and arguments were rejected. On 14 December 2014, the applicant disputed the content of that letter and reiterated its position.

14 On 26 March 2015, the Delegation of the European Union to the Republic of Guinea-Bissau sent the applicant debit note No 4940150201 for a total of EUR 607 096.08 with the heading 'Repayment of funds, according to audit report'. The debit note was followed by a letter, dated 30 March 2015, according to which:

'As regards the programme estimate … for which the audit report established an ineligible amount of EUR 607 072.24, we are sending by separate letter a debit note for that amount. Article 40 [of Annex I to the service contract, on dispute settlement] does not apply to the programme estimate. We would like to inform you that a technical assessment is underway and that the results of that assessment will be retained on file.'

15 By letter of 6 May 2015, the applicant disputed the debit note and the covering letter of 30 March 2015. It wrote to the Commission again on 22 June 2015. The applicant then received an email message from the Commission, dated 24 June 2015, informing it that a reply would be provided as soon as possible.

16 Since the applicant had some outstanding claims for payment from the Commission, the Commission decided to clear the amounts owed by offsetting the outstanding claims and debts against each other, it being understood that the amount payable under the programme estimate, according to the Commission, was eventually set at EUR 624 388.73, including EUR 17 292.65 in late payment interest.

17 Accordingly, the applicant received six set-off decisions from the Commission's Directorate-General for Budget (DG Budget) seeking to recover the debt consisting of the expenditure classified as 'ineligible' in the audit report relating to the programme estimate ('the disputed debt'). Those decisions are as follows:

– decision of 25 August 2015 to offset EUR 45 581.87 (remaining debt excluding interest: EUR 561 514.21);

– decision of 27 August 2015 to offset EUR 21 639.45 (remaining debt excluding interest: EUR 539 874.76);

– decision of 7 September 2015 to offset EUR 48 715.20 (remaining debt excluding interest: EUR 491 159.56);

– decision of 16 September 2015 to offset EUR 21 857.97 (remaining debt excluding interest: EUR 469 301.59);

– decision of 23 September 2015 to offset EUR 422 302.02 (remaining debt excluding interest: EUR 46 999.57);

– decision of 25 September 2015 to offset EUR 64 292.22, including late payment interest of EUR 17 292.65 (extinguishing the disputed debt).

18 On receipt of the decision of 25 August 2015, the applicant sent the Delegation of the European Union to the Republic of Guinea-Bissau the letter of 26 August 2015, in which it referred to its letter of 6 May 2015 and made an application for suspension of the operation of the debit note pending an examination of its position by the Commission services.

19 By letter dated 2 October 2015, and sent by email on 5 October 2015, the Head of Delegation replied in the negative, concluding with this sentence:

'However, in view of the significant amount in dispute, we are carrying out additional studies about which you will be kept informed.'

## Legal and contractual context

20 The EDF was set up to finance cooperation with the ACP States, initially by means of an annex to the EEC Treaty, and later by means of internal agreements between the Member States meeting in the Council of the European Union. To date, there have been 11 successive EDFs, and the internal agreements relating to those EDFs were each concluded for a period corresponding to the duration of the various agreements and conventions through which the European Union and its Member States have established that special partnership with the ACP States. The amounts paid into the EDF do not come under the general budget of the European Union, which explains why specific financial regulations are adopted to govern the management of each EDF.

21 The present action concerns the application of the Financial Regulation of 27 March 2003 applicable to the 9th European Development Fund (OJ 2003 L 83, p. 1) as amended by Council Regulation (EC) No 309/2007 of 19 March 2007 (OJ 2007 L 82, p. 1) ('the Financial Regulation applicable to the 9th EDF').

22 However, as is apparent from Article 156 of Council Regulation (EC) No 215/2008 of 18 February 2008 on the Financial Regulation applicable to the 10th European Development Fund (OJ 2008 L 78, p. 1) as amended by Council Regulation (EU) No 370/2011 of 11 April 2011 (OJ 2011 L 102, p. 1) ('the Financial Regulation applicable to the 10th EDF'), the provisions of the Financial Regulation applicable to the 10th EDF concerning the financial actors, revenue operations, validation, authorisation and payment of expenditure, IT systems, the presentation of accounts and accounting, as well as external audit and discharge, have been applicable to operations financed from, inter alia, the 9th EDF since the entry into force of the Financial Regulation applicable to the 10th EDF on 20 March 2008.

23 Subsequently, as of 6 March 2015, the provisions of Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund (OJ 2015 L 58, p. 1) have been applicable to operations financed from previous EDFs, without prejudice to existing legal commitments. In the present case, since the operations financed by the Commission under the financing agreement were covered by legal commitments which existed before the entry into force of Regulation 2015/323, the provisions of that regulation are not applicable to them.

***The service contract and programme estimate***

24 The service contract was adopted in accordance with Article 5 of the financing agreement, under which the national authorising officer concerned was required to agree service contracts with selected organisations, responsible for preparing adequate programme estimates (first for the 'start-up' phase, then the 'operational' phase, and finally the 'closure' phase), by 18 December 2010.

25 Under Article 80(4) of the Financial Regulation applicable to the 9th EDF, a programme estimate is defined as 'a document laying down the human and material resources required, the budget and the detailed technical and administrative implementing arrangements for execution of a project'.

26 That definition was also given in section 2.4.1 of the Practical guide to procedures for programme estimates financed by the EDF and the general budget of the European Union for 2009 ('the Guide').

***Checks and audits by the Commission***

27 Articles 12 and 13 of the Financial Regulation applicable to the 9th EDF concerned the scrutiny exercised by the Commission in the context of the financial implementation of the projects and programmes supported by that EDF.

28 Article 13(3) of the Financial Regulation applicable to the 9th EDF provided, inter alia, as follows:

'The implementation by ACP States … of operations financed from EDF resources shall be subject to Commission scrutiny, which may be exercised by prior approval, by *ex post* checks or by a combined procedure …'

29 In that context, a number of systems for the verification and monitoring of the use of the allocated funds were put in place for the Commission under Article 18 of Annex I to the financing agreement. Those included, in particular, the possibility of conducting a full audit, if necessary, on the basis of supporting documents for the accounts, accounting documents and any other document relevant to the financing of the project or programme. This audit could take place up to 7 years after the final payment. Under Article 18.4 of that annex, the checks and audits could 'be extended to contractors and subcontractors who have benefited from Community funding'. Financial audits were also provided for in Article 4.5 of Annex II to that agreement and in Article 25.1 of Annex I to the service contract.

30 Moreover, in accordance with Article 4.15 of the programme estimate, expenditure incurred under the programme estimate was also subject to a financial audit, during which the auditors could carry out all the accounting, technical, administrative and legal checks which they deemed useful or necessary.

***Recovery of debts***

31 Any debts established by the Commission or the national authorising officer were initially subject to Articles 41 to 47 of the Financial Regulation applicable to the 9th EDF, and then, after the entry into force of the Financial Regulation applicable to the 10th EDF on 20 March 2008, to Article 63 to 65 of the latter regulation.

32 Article 65(2) of the Financial Regulation applicable to the 10th EDF replicated the content of Article 46(3) of the Financial Regulation applicable to the 9th EDF. Those provisions, like the second subparagraph of Article 80(1) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), conferred on the Commission's accounting officer the power to recover debts by offsetting them against equivalent claims that the EDF or the European Union had on any debtor who in turn had a claim on the EDF or the European Union which was certain, of a fixed amount and due.

***Ineligible expenditure***

33 Section 3.3.2 of the Guide distinguished between the types of expenditure covered by programme estimates and the types covered by service contracts in the following terms:

'In the case of private indirect decentralised operations (EDF only), the staff costs of the body concerned as well as its own running costs necessary for the financial implementation of the imprest component of the budget of the successive programme estimates cannot be covered by the imprest component of the budget of programme estimates. Indeed, these costs are covered by the budget of the service contract concluded with the body.'

34 As regards, first, the recovery of the amounts allocated under the service contract which is the subject of the present action, Article 31.1 of Annex I to that contract stipulated as follows:

'The contractor undertakes to repay any amounts paid [under the service contract] in excess of the final amount due to the contracting authority before the deadline indicated in the debit note which is 45 days from the issuing of that note.'

35 In that regard, Article 31.3 of Annex I to the service contract provided that the contracting authority could offset amounts due to be repaid to it against amounts of any kind due to the contractor, and, if necessary, that the Commission could as a donor subrogate itself to the contracting authority.

36 As regards, secondly, the recovery of the amounts allocated under the programme estimate, Article 4.14 of the programme estimate stated that the amounts corresponding to ineligible expenditure were to be repaid without delay by the imprest administrator and the accounting officer or, where applicable, by the entity referred to in section 4.2 of the programme estimate, namely the applicant.

37 In accordance with the introductory paragraph of section 4 of the programme estimate, the technical arrangements for implementation of the programme estimate should follow the rules and procedures set out in the Guide. Section 3.4.1 of the latter provided, inter alia, as follows:

'The Head of Delegation's endorsement of the programme estimate signals his or her agreement to the financing … as long as the rules and procedures set out in this practical guide are followed. If the rules and procedures are not followed, expenditure on the operations in question will not become eligible for European Union financing.'

38 Section 4.1.2 of the Guide provided, furthermore, that 'to be deemed eligible, expenditure ha[d] to be incurred in carrying out activities provided for in the duly approved and signed programme estimate'.

## Procedure and form of order sought

39 By application lodged at the Registry of the General Court on 3 November 2015, the applicant brought the present action.

40 By a separate document lodged at the Registry of the General Court on 22 January 2016, the Commission raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court. The applicant submitted its observations on that plea of inadmissibility on 21 March 2016.

41 By order of 30 May 2016, the Eighth Chamber of the General Court (former composition) decided to reserve its decision on that plea of inadmissibility for the final judgment.

42 The applicant claims that the Court should:

– declare the action to be admissible;

– annul the 'set-off decisions of the … Commission contained in its letters of 25 August, 27 August, 7 September, 16 September and 23 September 2015 by which it recovered the sum of EUR 624 388.73';

– order the Commission to pay EUR 624 388.73 plus late payment interest on that sum, to be determined on the basis of the European Central Bank (ECB) reference rate plus two percentage points;

– order the Commission to pay compensation for non-material damage, set at the symbolic amount of EUR 1;

– order the Commission to pay the costs.

43 The Commission contends that the Court should:

– primarily, dismiss the action as inadmissible;

– in the alternative, declare that it lacks jurisdiction to hear and determine the action;

– in the further alternative, dismiss the action;

– order the applicant to pay the costs.

## Law

### *Subject matter of the action*

44 In its plea of inadmissibility, the Commission contends, as a preliminary point, that the present action must be limited to an application for annulment of five of the six set-off decisions referred to in paragraph 17 above, inasmuch as the applicant did not challenge the decision of 25 September 2015 in the application. According to the Commission, it follows that the amount to be taken into consideration in the context of the action must be limited to EUR 560 096.51.

45 In its observations on the plea of inadmissibility, the applicant does not dispute the omission of the decision of 25 September 2015 in the form of order set out in the application. It states, however, that the amount claimed necessarily implies that that decision should be regarded as forming part of the subject matter of the action. Moreover, the application makes express reference to that decision as being one of the decisions against which the action has been brought.

46 Under Article 76(d) of the Rules of Procedure, an application initiating proceedings must contain the subject matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself (see, to that effect, judgment of 16 April 2015, *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 17 and the case-law cited).

47 In the present case, in the application, the applicant clearly and unequivocally states the amount for which it seeks reimbursement, which includes the amount referred to in the decision of 25 September 2015. Moreover, that decision is referred to in the application at least once as one of the 'decisions challenged in the present action'.

48 Therefore, the omission of the decision of 25 September 2015 in the parts of the application relating to the form of order sought by the applicant has no bearing on the subject matter of the action.

49 [As rectified by order of 3 October 2018] Indeed, it is clear from a reading of the application that the applicant's arguments seek, in particular, to obtain the annulment of all the set-off decisions referred to in paragraph 17 above, all of which seek the recovery of the disputed debt, and this not only allows the General Court to rule on the application, but also allows the applicant to prepare its defence. Moreover, in its written submissions, the applicant responded to that argument by referring to the debt in its entirety.

50 It follows that the present action has been brought against all the set-off decisions referred to in paragraph 17 above ('the contested decisions').

51 It is therefore necessary to reject the preliminary argument, put forward by the Commission in its plea of admissibility, according to which the subject matter of the action must be limited to an application for annulment of five of the six contested decisions.

### *Jurisdiction and admissibility*

52 The Commission puts forward three arguments in support of its plea of inadmissibility.

53 First, the Commission disputes the admissibility of the action on the ground that the application does not contain any specific pleas in relation to the contested decisions. It argues, in that regard, that the pleas raised by the applicant seek only to challenge the validity of the disputed debt, and not the legal and financial validity of the set-off measures which are the subject matter of those decisions.

54 Secondly, the Commission asks the General Court to declare that it lacks jurisdiction to hear and determine the action, in the light of the fact that the contested decisions are not attributable to the Commission. It maintains, on the one hand, that it intervened only for the purposes of guaranteeing the financing of the programme and, on the other, that its accounting officer was subrogated to the national authorising officer, to whom those decisions are attributable.

55 Thirdly, the Commission considers that the applicant committed an 'abuse of procedure'. According to the Commission, the contested decisions concern, in essence, the contractual relations between the applicant and the competent authorities of the Republic of Guinea-Bissau, so, in the absence of an arbitration clause, the applicant cannot bring the action before the General Court.

56 In its observations on the plea of inadmissibility, the applicant submits that it is the addressee of the contested decisions. Those decisions were not adopted in a contractual context, but were adopted by the Commission acting under its own powers, in the exercise of its prerogatives as a public authority.

57 As regards the Commission's argument that the applicant committed an 'abuse of procedure', it should be noted that the present action is based partly on Article 263 TFEU and, inter alia, seeks annulment of the contested decisions. In support of the action, the applicant has, in essence, raised five pleas in law, namely a plea alleging 'lack of legal basis'; a plea alleging infringement of the principle of unjust enrichment; a plea alleging misuse of discretion under Articles 42, 44, 45 and 47 of the Financial Regulation of 27 March 2003 applicable to the 9th EDF, and infringement of the principle of proportionality; a plea alleging infringement of the principle of good administration; and a plea alleging that the Commission committed manifest errors of assessment concerning a number of findings in the audit report on the programme estimate.

58 The explicit references to Article 263 TFEU in the application and the headings of the pleas relied on therein are thus inviting the General Court to exercise its power to review the legality of the contested decisions. In that regard, it must be borne in mind that, according to the case-law, an act such as the contested decision, whereby the Commission effects an out-of-court set-off between debts and claims arising from different legal relationships with the same person, is a challengeable act for the purposes of Article 263 TFEU. It is in the context of such an action for annulment that it is for the General Court to examine the legality of one or more set-off decisions in the light of the effects of the failure actually to pay the contested sums to the applicant (see judgment of 6 October 2015, *Technion and Technion Research & Development Foundation* v *Commission*, T-216/12, EU:T:2015:746, paragraph 53 and the case-law cited).

59 Nevertheless, in raising the plea alleging the 'lack of legal basis' and a plea alleging the Commission's manifest error of assessment concerning a number of findings in the audit report on the programme estimate, the applicant is, in essence, seeking a declaration from the Court that the disputed debt could not form the basis of the contested decisions. Indeed, in the context of the plea alleging the 'lack of legal basis', the applicant complains, in particular, that the Commission has deemed the applicant, who disputes that that debt is due, to be the debtor of the amount.

60 The present action, therefore, in reality seeks not only annulment of the contested decisions, an order for the Commission to pay EUR 624 388.73 and compensation for non-material damage suffered by the applicant, but also a declaration by the Court that the applicant does not owe the disputed debt to the European Union (see, by analogy, judgment of 6 October 2015, *Technion and Technion Research & Development Foundation* v *Commission*, T-216/12, EU:T:2015:746, paragraphs 54 and 55).

61 As regards the nature of the disputed debt, on the one hand, it should be noted that there is no contractual relationship between the European Union, represented by the Commission, and the applicant. The other party to the service contract pursuant to which the applicant prepared the programme estimate is the Minister for the Economy and Finance of the Republic of Guinea-Bissau, and not the European Union represented by the Commission. As regards the programme estimate, the applicant stated, in its observations on the plea of inadmissibility, that it was not a contract, but a programming document for the implementation of the funds transferred by the Commission in accordance with the budget it set, and did not create reciprocal commitments with the Commission. At the hearing, the Commission stated that it agreed with the applicant on this point. It described the programme estimate as a unilateral act tantamount to a declaration of intent by the applicant, whereby the applicant assumed responsibility for the correct implementation of the project.

62 In that regard, it should be pointed out that it is clear from Article 54(4) of the Financial Regulation applicable to the 9th EDF that programme estimates are 'individual legal commitments' and that they are to be concluded by the ACP State or the beneficiary overseas country or territory (OCT), or by the Commission acting in their name and on their behalf. Therefore, the fact that the Head of Delegation merely 'approved' the programme estimate cannot lead to the conclusion that it is a contract between the applicant and the European Union, represented by the Commission, as that would run counter to the very wording of the abovementioned provision.

63 Moreover, the payment by the Commission of the financial allocation for the programme estimate constituted the implementation of the Commission's payment obligation under Article 54(3)(a) of the Financial Regulation applicable to the 9th EDF, without such an obligation having been laid down in the programme estimate. In those circumstances, the Commission's rights in relation to the debts originating from that financial allocation cannot derive from the programme estimate, and arose solely from the Commission's exercise of EU law prerogatives in accordance with the various financial regulations governing resources allocated to EDFs.

64 On the other hand, it should be noted that the disputed debt was based solely on the findings of the audit report relating to the programme estimate, which was established in accordance with Article 4.15 of the programme estimate and Article 4.5 of the financing agreement, with no reference to the provisions of the service contract. Moreover, it is clear from section 2.5 of that audit report that it concerned only the ineligible expenditure identified in the management of the EU financial contributions budget in the form of imprest accounts. That report did not therefore include the expenditure covered by that contract, namely the applicant's staff costs and its own operating costs necessary for the financial implementation of the imprest component of the budget of the programme estimate.

65 It follows that the question of whether the disputed debt exists does not concern the contractual context relating to the conclusion of the service contract between the applicant and the national authorising officer, or the interpretation of the terms of a contract, or any grant agreement, concluded between the applicant and the European Union represented by the Commission.

66 In those circumstances, contrary to what the Commission contends, the applicant has not committed an 'abuse of procedure' by lodging the application for annulment of the contested decisions with the General Court. Indeed, according to the case-law, an action may be brought before the European Union Courts on the basis of Article 263 TFEU where the contested act aims to produce binding legal effects which fall outside of the contractual relationship between the parties and which involve the exercise of the prerogatives of a public authority conferred on the institution acting in its capacity as an administrative authority (order of 29 September 2016, *Investigación y Desarrollo en Soluciones y Servicios IT* v *Commission*, C-102/14 P, not published, EU:C:2016:737, paragraph 55; see also, to that effect, judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 20).

67 Moreover, as regards the Commission's argument that the contested decisions are not attributable to it in so far as it was subrogated to the national authorising officer when it adopted them, it should be noted that the financial provisions applicable to EDF resources, namely Article 46(3) of the Financial Regulation applicable to the 9th EDF and Article 80(1) of the Financial Regulation applicable to the 10th EDF concerning the recovery of debts by offsetting, did not provide for subrogation. That was provided for only under Article 31.1 of the service contract. However, it is clear from paragraph 64 above that the provisions of that contract were not applicable for the purposes of the recovery of the disputed debt. In any event, since subrogation permits the transfer of a claim to a transferee, who acquires the right to recover the debt, it is clear that the contested decisions remain, even in the case of subrogation, attributable to the Commission.

68 Finally, the Commission's argument concerning the inadmissibility of the applicant's claim for annulment cannot be accepted. In accordance with Article 63(2) and (3) of the Financial Regulation applicable to the 10th EDF, verification by the authorising officer and accounting officer responsible that any amount receivable is certain, of a fixed amount and due is a prerequisite for the adoption of a recovery decision, and applies a fortiori in the case of a decision to offset debts under Article 65 of the Financial Regulation applicable to the 10th EDF. Therefore, the applicant cannot be denied the power to challenge the existence of its debt to the Commission, since that debt constitutes the legal basis of the contested decisions.

69 In the light of all the foregoing, the Court has jurisdiction to hear and determine the present dispute. The Commission's plea of inadmissibility must be rejected and the action declared admissible in its entirety.

***Substance***

*The claim for annulment*

70 Before addressing the fourth plea, alleging infringement of procedural rights, it is appropriate to address the first, third and fifth pleas, in so far as they concern the 'absence of a legal basis' specific to the Commission's claims and the extent of the Commission's discretion under the financial provisions applicable in the context of the implementation of EDF resources, and they seek to establish that the Commission committed manifest errors of assessment in endorsing certain findings of the audit report on the programme estimate.

71 The fourth plea should be examined in the context of assessing the head of claim seeking recovery of sums allegedly linked to unjust enrichment of the Commission plus late payment interest on those sums, to be determined on the basis of the ECB reference rate plus two percentage points. That head of claim will be examined after the claim for annulment.

*– The first plea in law, alleging the 'lack of a legal basis'*

72 In the first place, the applicant submits that, in the contested decisions, the Commission did not identify any 'legal basis' specific to its claims and, therefore, infringed the principle of legal certainty. In that regard, it relies on the letters of 29 October 2014, 12 December 2014 and 2 October 2015, in which, in order to establish the existence of the applicant's debt to the European Union, the Commission referred only to Articles 28 to 31 of the General Conditions for Service Contracts and to the 'financial rules applicable to the [9th] EDF', without providing further clarification.

73 In the second place, the applicant submits that it cannot be regarded as the debtor of the disputed debt, in so far as it acted as intermediary between the Commission and the State of the Republic of Guinea-Bissau, from which it is legally distinct. It claims that Article 46 of the Financial Regulation applicable to the 9th EDF did not permit the recovery of a debt from a private body, involved in an indirect, decentralised operation, which was not the beneficiary of the sums in question. According to the applicant, it is clear from Annex I to the financing agreement that the beneficiary State was accountable to the Commission for the implementation of the programme. In that regard, it states that the sums classified as ineligible under the programme estimate were not used to cover its costs or earmarked for profit.

74 The Commission disputes the applicant's arguments. It states that Article 13(3) and Articles 42 to 47 of the Financial Regulation applicable to the 9th EDF conferred on its accounting officer the power to recover the disputed debt and constituted, therefore, the legal basis for the contested decisions. Moreover, it contends that the applicant cannot be regarded merely as a financial intermediary, and

was fully responsible for the management of the funds allocated under the programme estimate, in accordance with Article 80 of that regulation, paragraph 3 of which provided that 'the [private] body concerned … assume[d] responsibility for the management and implementation of the programme or project in place of the National Authorising Officer'.

75 As a preliminary point, it should be recalled that the principle of legal certainty forms part of the general principles of EU law, the observance of which it is the General Court's task to ensure. It requires that the binding nature of any act intended to produce legal effects must be derived from a provision of EU law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis (see judgment of 12 December 2007, *Italy* v *Commission*, T-308/05, EU:T:2007:382, paragraph 123 and the case-law cited). That requirement applies a fortiori to decisions addressed to natural or legal persons referred to in the fourth paragraph of Article 288 TFEU.

76 However, failure to specify the precise legal basis for a legislative act need not necessarily constitute a material defect where it is possible to determine the legal basis for that act on the basis of other elements thereof. Nonetheless, explicit reference is indispensable where, in its absence, the parties concerned and the competent European Union Court would remain uncertain as to the precise legal basis (judgments of 26 March 1987, *Commission* v *Council*, 45/86, EU:C:1987:163, paragraph 9, and of 12 December 2007, *Italy* v *Commission*, T-308/05, EU:T:2007:382, paragraph 124).

77 In the present case, it should be noted that, in their respective footnotes, the contested decisions contain an explicit reference to Article 65 of the Financial Regulation applicable to the 10th EDF and to Article 80 of Regulation No 966/2012.

78 It is clear from the wording of Article 65 of the Financial Regulation applicable to the 10th EDF that, under the second paragraph of that provision, the Commission may recover amounts due to the EDF by offsetting.

79 It should be pointed out that the second subparagraph of Article 80(1) of Regulation No 966/2012 replaced Article 83 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1), which applied *mutatis mutandis* to the implementation of Article 65(2) of the Financial Regulation applicable to the 10th EDF, in accordance with Article 65(7) of the latter regulation.

80 It follows that, in so far as the contested decisions were based on Article 65 of the Financial Regulation applicable to the 10th EDF and Article 80 of Regulation No 966/2012, it cannot be claimed that the Commission failed to fulfil its obligation to provide a specific legal basis for adopting the set-off measures in the contested decisions.

81 As regards the question whether the Commission could rightly use the disputed debt as a basis for adopting the set-off measures which are the subject of the contested decisions, given that, according to the applicant, it did not identify any 'legal basis' specific to its claims, it should be recalled, as is clear from the contested decisions and the debit note, that the disputed debt is based on the audit report relating to the programme estimate. Section 2.2 of that report explicitly identifies all the provisions used to establish the existence of the disputed debt.

82 Moreover, by its arguments relating to its capacity as intermediary between the Commission and the Republic of Guinea-Bissau, the applicant complains, in essence, that the Commission adopted the contested decisions without having any legal basis for identifying the applicant as the debtor of the disputed debt and, consequently, as the addressee of those decisions.

83 In that regard, first, it should be pointed out that it is clear from Article 64(2) of the Regulation applicable to the 10th EDF that, without prejudice to the responsibilities of the ACP States, the Commission may 'formally establish an amount as being receivable from persons other than States by means of a decision which shall be enforceable under the same conditions as laid down in Article [299] of the Treaty'.

84 It follows that, contrary to what is claimed by the applicant, under Article 64(2) of the Regulation applicable to the 10th EDF, the Commission had a legal basis for establishing an amount as being receivable from the applicant as a private body, distinct from the beneficiary State, in this case, the Republic of Guinea-Bissau.

85 Secondly, it should be verified whether, in this case, the disputed debt was due, within the meaning of Article 63(2) and (3) of the Financial Regulation applicable to the 10th EDF, from the applicant.

86 In that regard, it should be noted that Article 4.14 of the programme estimate provided, explicitly, that it fell to the imprest administrator or the imprest accounting officer appointed by the applicant, or to the applicant itself, to repay the ineligible sums, and that only in the event of their failure to do so and if no financial guarantee had been lodged before payment of the initial allocation could the representative of the beneficiary country, namely the national authorising officer, be required to repay those sums.

87 In accordance with Article 4.14 of the programme estimate, it follows that, in establishing the programme estimate, the applicant committed unilaterally to repaying any ineligible expenditure identified by the Commission. The Commission was, therefore, fully entitled to regard the applicant as debtor of the disputed debt.

88 That conclusion cannot be called into question by sections 2.5 and 4.1.5 of the Guide, which provided, respectively, that 'whatever may be the extent of the powers and responsibilities delegated, financial responsibility in respect of the … Commission for implementation of the programme estimates [were to] remain always with the relevant representative of the beneficiary country(ies)' and that 'on issuing a recovery order, the relevant representative of the beneficiary country(ies) [were to] make sure that the sum due [was] indeed reimbursed'.

89 It is apparent from the introductory paragraph of section 4 of the programme estimate that the information in that section sought to specify and complement the provisions of the Guide applicable to programme estimates, so that those provisions could not be relied on for the purpose of calling into question the financial responsibility of entities which is established by the specific provisions of the programme estimate.

90 Similarly, in so far as the financing agreement applied to a range of programmes or projects which were not necessarily under private indirect decentralised management, it cannot be relied on for the purposes of contradicting the essence of the specific commitments made by the applicant under the programme estimate.

91 Finally, the applicant's argument that the sums classified as ineligible under the programme estimate were not used to cover its costs or earmarked for profit cannot succeed. As is apparent from Article 65(2) of the Regulation applicable to the 10th EDF, recovery by offsetting is permissible for 'claims against any debtor'. It can therefore be used for any financial allocation from the Commission in the context of the management of EDF resources, whether or not the sums were paid to cover the debtor's costs or remuneration or to generate a profit margin.

92 In the light of all the foregoing, the first plea must be rejected.

*– The third and fifth pleas in law, alleging misuse of the Commission's discretion under the financial provisions applicable in the contest of the implementation of EDF resources, infringement of the principle of proportionality and manifest errors or assessment concerning certain findings in the audit report on the programme estimate*

93 By the third plea, on the one hand, the applicant submits that the Commission failed to exercise the discretion conferred on it by the provisions of the Financial Regulation applicable to the 9th EDF concerning the establishment and the recovery of amounts receivable, read in conjunction with the Guide, inasmuch as it merely endorsed the auditor's findings and did not take an independent decision following the submission of the audit report on the programme estimate.

94 On the other hand, the applicant argues that the Commission infringed the principle of proportionality by failing to balance the impact of the debt against the value of the service contract, and not taking into account the fact that the service contract provided for penalties to be applied if the applicant did not fulfil its obligations under that contract. It submits that the Commission also failed to take into consideration the fact that the expenditure classified as ineligible was committed and paid by the applicant to the various final beneficiaries, and that the amount of the disputed debt is equivalent to 97% of the amount the applicant paid to those beneficiaries.

95 The Commission disputes the applicant's arguments. It considers that the audit report on the programme-estimate was correct and well argued, so it could accept the report without making unnecessary remarks on it. As regards the taking into account of factors relating to the value of the service contract and the penalties provided for in that contract, the Commission notes that that contract and the programme estimate must be regarded as separate documents.

96 By the fifth plea, the applicant states that the Commission committed manifest errors of assessment in so far as it endorsed, in particular, financial findings Nos 1, 2 and 8 of the audit report on the programme estimate.

97 In that regard, it should be pointed out that, in the context of financial finding No 1 of the audit report, entitled 'Over-implementation of budget lines', the auditor identified ineligible expenditure of EUR 200 779.27 due to internal overruns on several budget headings of the programme estimate, following the reallocation of the expenditure which the applicant had initially classified incorrectly.

98 In the context of financial finding No 2, entitled 'Expenditure relating to grant contracts after amendment period No 1', the auditor considered that the expenditure incurred during amendment implementation period No 2 of the various grant contracts, totalling EUR 312 265.42, was ineligible, on the ground that there had t been any continuity between the end of amendment period No 1 (between 24 January and 16 April 2012) and the start of amendment period No 2 (23 May 2012).

99 In the context of financial finding No 8, entitled 'Expenditure outside the contractual period', the auditor concluded that some expenditure, totalling EUR 32 585, had been incurred after the end of the programme estimate and was therefore ineligible.

100 As regards financial finding No 1, the applicant submits that section 3.5.2 of the Guide, Article 2.1 of Annex I to the financing agreement and Article 4.12 of the programme estimate permitted only reallocation between the main headings of the budget or within the same main budget heading, so the reallocation between subheadings of the budget was not permissible. The auditor did not provide adequate reasoning for some of the amounts reallocated. Moreover, the applicant states that, following the reclassification of the amount shown in budget line 390000 in budget line 177000 by the auditor, it was compelled to cover the costs associated with the need, on the one hand, to extend the first two financial guarantees beyond the prescribed term and, on the other, to obtain a third financial guarantee.

101 The Commission argues that the budget of the programme estimate must be considered as the sum of its components, and that the reclassifications and accounting adjustments made by the auditor were made on the basis of a rigorous assessment of the original supporting documents for the expenditure in question.

102 As regards financial finding No 2, the applicant acknowledges the lack of continuity between the end of amendment period No 1 and the start of amendment period No 2 of the grant contracts. However, it complains, in essence, that the Commission refused to allow the retroactive application of the grant contract amendments, which it had authorised in respect of amendment No 2 to the service contract in order to remedy its own delay in signing the amendment to that contract, and this compelled the applicant to continue to fulfil its remit, without a contract, between 1 January and 10 February 2012.

103 The Commission contends that, in accordance with Articles 11 and 14.1 of the General Conditions applicable to European Union-financed grant contracts for external actions, as set out in the programme estimate and annexed to each grant contract, the implementation period for the actions concerned could not lawfully be extended.

104 As regards financial finding No 8, the applicant argues that the expenditure incurred is associated with services provided during the period of the programme estimate, namely the monitoring and review of works carried out under grant contracts, before the end of the operational phase, on 30 June 2012.

105 The Commission states that the applicant cannot claim to have provided all the services in question given that the final reports on those services were not provided by the date required and that it did not submit any evidence to support its claim.

106 It should be noted that the principle of sound financial management of EU resources is laid down in Article 4 of the Financial Regulation applicable to the 9th EDF and in Article 6(d) of the Financial Regulation applicable to the 10th EDF. As is apparent from Article 11 of the latter regulation, that principle includes the principles of economy, efficiency and effectiveness.

107 The Commission's obligation to ensure the sound financial management of EU resources, in accordance with Article 317 TFEU, and the need to combat fraud in connection with EU financing endow the commitments relating to financial conditions with fundamental importance (judgment of 17 June 2010, *CEVA* v *Commission*, T-428/07 and T-455/07, EU:T:2010:240, paragraph 126).

108 It follows that, in the present case, the applicant's obligation to present expenditure incurred during the project implementation period and in accordance with the requirements laid down in the programme estimate, the Guide and the financing agreement, constitutes a commitment which was essential in order to provide the Commission with the information necessary for it to ascertain whether the contributions paid were eligible for EDF financing and to recover, where appropriate, any amounts established as being receivable.

109 In the light of the principle of sound financial management and, in particular, the principle of effectiveness, the Commission cannot, moreover, be criticised for relying on the conclusions of the audit report on the programme estimate to claim the payment of a debt owed to it, in its capacity as donor, in so far as the conclusions appeared to be accurate and substantiated.

110 Notwithstanding that consideration, it is apparent from Article 63(1) and Article 65(2) of the Financial Regulation applicable to the 10th EDF that the competent authorising officer appointed by the Commission was required to verify the reality and the amount of the debt, as well as the conditions in which the debt was due, and could cancel or adjust the amount of the debt.

111 Therefore, in the exercise of its discretion in the recovery of debts, the Commission cannot escape judicial review. If that was the case, the discretion enjoyed by the competent authorising officer appointed by the Commission would, in fact, become a quasi-arbitrary power, removing the control of the EU Courts (see, to that effect, judgment of 13 July 2011, *Greece* v *Commission*, T-81/09, not published, EU:T:2011:366, paragraph 142).

112 It is in the light of those considerations that it is necessary to examine whether an independent and sufficient assessment was carried out pursuant to the provisions of the Financial Regulation applicable to the 10th EDF and, if appropriate, whether the Commission was correct to consider that the financial irregularities on the part of the applicant were sufficiently serious to make it necessary, in the light of the principle of proportionality, to recover all the ineligible expenditure identified in the audit report on the programme estimate.

113 In that regard, according to settled case-law, the principle of proportionality requires that acts of the EU institutions do not exceed the limits of what is appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 26 February 2016, *Bodson and Others* v *BEI*, T-240/14 P, EU:T:2016:104, paragraph 116 and the case-law cited).

114 In the present case, it must be determined whether the set-off decisions, in so far as they were based on the disputed debt consisting, in particular, of expenditure identified as ineligible in findings Nos 1, 2 and 8 of audit report on the programme estimate, exceeded what was necessary to achieve the objectives of ensuring sound financial management and combating fraud in connection with EU financing, as mentioned in paragraphs 105 and 106 above.

115 As regards, first, financial finding No 1 of the audit report, it must be held that the applicant's argument by which it submits that it had to pay all bank guarantee charges and other costs relating to budgeted subsidies and guarantees is based on incorrect assertions. Indeed, the auditor's reallocation in respect of budget line 177000, entitled 'Other costs with subsidies and guarantees', consisted of deducting EUR 53 279.17, so that the total amount implemented, after correction, was EUR 2 672.17. Following the auditor's corrections, the applicant therefore had no ineligible expenditure under budget line 177000.

116 [As rectified by order of 3 October 2018] Ultimately, the auditor's corrections to the various budget lines led to the identification of ineligible expenditure in the amount of EUR 80 988.96, in that they increased or caused overruns on certain budget subheadings (for budget lines 250000, 320000, 340000, 350000, 370000, 112000 and 172000). However, as regards other budget subheadings, the auditor's reallocation had the effect of reducing the budget overrun (for budget lines 154000, 174000 and 360000) or even eliminating it (for budget lines 152000, 156000, 177000 and 390000).

117 Following the auditor's corrections, EUR 50 554.74 was therefore deducted from the total amount of the budget overruns attributable to the applicant in the implementation of the final budget of the programme estimate. Therefore, the auditor's reallocation amounts only to EUR 30 343.22 (namely the difference between EUR 80 988.96 and EUR 50 554.74) out of a total of EUR 200 779.27, corresponding to all the ineligible expenditure identified in the context of financial finding No 1.

118 It follows that the Commission cannot be criticised for having endorsed the auditor's corrections, in so far as those corrections represented only a limited proportion of the total amount of budget overruns attributable to the applicant, the existence and scale of which have not been disputed by the applicant. Moreover, since the auditor made those corrections on the basis of the documents and invoices which the applicant presented to the auditor on the spot, the Commission was not, in any event, capable of carrying out a proper assessment as to the details of the amounts to be allocated to each budget line.

119 Therefore, in approving financial finding No 1 of the audit report, the Commission did not infringe the principle of proportionality. Moreover, it cannot be accused of having failed to carry out an independent assessment of the auditor's findings, in so far as it was not in possession of all the documents taken into account by the auditor.

120 Similarly, as regards financial finding No 8 of the audit report, it must be considered that, since the applicant was not able to send the Commission the final reports relating to the services provided before the end of the contractual period, and had only invoices which post-dated the end of the programme estimate, it did not adduce any evidence to support the conclusion that the Commission had committed a manifest error of assessment or infringed the principle of proportionality.

121 However, as regards financial finding No 2 of the audit report, it should be noted that, as the applicant rightly argued in its written submissions and at the hearing, the Commission did not take into account the fact that the signature of amendment No 2 to the service contract had also been subject to a delay, between 1 January and 10 February 2012.

122 In that regard, it should be pointed out that it is clear from an email dated 23 January 2012 sent to the applicant by a Commission representative, and provided in annex to the application, that the extension of the service contract had not yet been approved at that time. In that email, the Commission representative, the political affairs and media relations attaché in the Delegation of the European Union to the Republic of Guinea-Bissau, apologised for the delay and gave reassurances that the retroactive extension of the contract '[would] not [be] an issue'.

123 It follows that, in ordering the recovery of the expenditure identified in financial finding No 2 of the audit report, the Commission, in essence, refused to allow the same retroactive application of the grant contract amendments as it had allowed to the service contract amendment, in full knowledge that the extension thereof was delayed.

124 That refusal could be legally based on the general conditions applicable to grant contracts for EU external actions, in so far as, on the one hand, in accordance with Article 11.1 of those general conditions, any extension of the implementation period of grant contracts had to be requested by the grant beneficiary, in accordance with Article 9, which provided that a '[grant] contract [could] be modified only during its execution period', and, on the other, in accordance with Article 14.1 of those general conditions, only the actual costs incurred during the 'implementation of the Action' could be classified as eligible.

125 However, that refusal is capable of constituting an infringement of the principle of proportionality, since, in the email of 23 January 2012, the Commission representative had expressly encouraged the applicant to continue the effective collaboration until the end of the programme, and praised its perseverance 'despite all the obstacles and problems … encountered'.

126 In those circumstances, and since the implementation of the project was ultimately based on the award of grants by the applicant to the final beneficiaries, in accordance with the provisions of the programme estimate and, in particular, paragraph 1.5.4.3 thereof, project implementation could not continue, according to the Commission's assurances concerning the retroactive application of the amendment to the service contract, without the applicant in turn giving its assurances on the continuity of the implementation of the grant contracts.

127 In that regard, it should also be noted that the ineligible expenditure identified under financial finding No 2 is EUR 312 265.42, which is half of the disputed debt and was paid to the final beneficiaries with which the applicant concluded the grant agreements.

128 In view of the above, it should be concluded in the present case that, on the one hand, there was no fraud in connection with EU financing and, on the other, EU interests relating to the need to ensure compliance with the principle of sound financial management have not been significantly affected in that regard.

129 It follows that, in the light of the particular circumstances of the case and, in particular, the Commission's delay in signing the amendment to the service contract and the consequences of the recovery decision for the applicant, the Commission should have found that the recovery decision concerning the auditor's conclusions in financial finding No 2 of the audit report was disproportionate.

130 In the alternative, the Court points out that, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (see order of 8 February 2010, *Alisei* v *Commission*, T-481/08, EU:T:2010:32, paragraph 48 and the case-law cited).

131 As the applicant rightly argued at the hearing, the audit report is not a challengeable act. An audit report merely takes note of the existence of possible pre-existing irregularities and the debts which arise from them, and thus does not modify the legal position of the debtor (see, to that effect, order of 8 February 2010, *Alisei* v *Commission*, T-481/08, EU:T:2010:32, paragraph 67).

132 It is for that reason in particular that, as is clear from paragraph 107 above and from the case-law (see, to that effect, order of 8 February 2010, *Alisei* v *Commission*, T-481/08, EU:T:2010:32, paragraph 53), when adopting a set-off decision definitively laying down its position, the Commission may rely on the conclusions drawn in an audit report only if it regards the conclusions drawn in the report as correct and justified. In that context, it cannot avoid, as it has in the present case, assessing the conclusions drawn in the audit report in the light of the principle of proportionality.

133 The action must therefore be upheld on the basis of the third and fifth pleas, only in so far as it concerns financial finding No 2 of the audit report on the programme estimate.

– *The fourth plea in law, alleging infringement of the principle of good administration*

134 The applicant argues, in essence, that the Commission did not comply with the procedural rights referred to in Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter').

135 First, the applicant submits that the Commission did not state its reasons for deciding to maintain the position it took in the letter of 29 October 2014, after the applicant sent detailed observations in its letter of 7 November 2014 and its email of 14 December 2014.

136 Secondly, the applicant complains that the Commission merely provided a two-page response to its letter of 6 May 2015, whereas that letter contained seven pages of detailed arguments. It adds that that response was only sent, by letter, on 2 October 2015, which was five months later, thereby leaving it with uncertainties. In the response, the Commission stated, moreover, that 'additional studies' were underway, which meant that it would be pursuing the matter.

137 Thirdly, the applicant claims that adequate reasons were not given for the audit report and, in particular, for financial finding No 1 thereof. It considers that it was not in a position to understand the scope of that finding and of the contested decisions and to exercise its right to be heard.

138 The Commission argues that the applicant's observations concerning the procedure leading up to the establishment of the disputed debt and the offsetting of that debt against the applicant's claims are wrong. In that regard, the Commission notes that the applicant's letter of 7 November 2014 and its email of 14 December 2014 were sent to the Commission in response to its letter of 29 October 2014, in which it expressed its intention to recover that debt and invited the applicant to submit observations.

139 According to the Commission, the applicant has not adduced any evidence to show that the letter of 2 October 2015 failed to provide a satisfactory response to the applicant's observations of 6 May 2015. Moreover, the reference to the 'additional studies' underway was intended only to provide for the possibility that new reasons might justify the reopening of the case.

140 It should be noted that, in accordance with Article 41(1) of the Charter, 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'. The first indent of Article 41(2) of the Charter states that that right includes in particular 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'.

141 In accordance with settled case-law of the Court of Justice, respect for the rights of defence requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (see judgments of 21 September 2000, *Mediocurso* v *Commission*, C-462/98 P, EU:C:2000:480, paragraph 36 and the case-law cited, and of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 83 and the case-law cited).

142 In the present case, by letter of 29 October 2014, the Commission asked the applicant to submit its observations, within two weeks of receipt of that letter, on the Commission's intention to recover the disputed debt. On 7 November and 14 December 2014, and on 6 May and 22 June 2015, the applicant was able to send four letters to the Commission before the adoption of the contested decisions. Moreover, the Commission allowed a reasonable amount of time to elapse between the applicant's letter of 5 May 2015 and the adoption of the contested decisions, from 25 August 2015.

143 It follows that the applicant was able to effectively make known its point of view and, therefore, to exercise its right to be heard before the adoption of the contested decisions.

144 That finding cannot be called into question by the fact that the applicant did not receive a response to its letter of 6 May 2015 until after the adoption of the contested decisions.

145 Indeed, the right to be heard does not include the right to an *inter partes* hearing involving the institution which has adopted the contested acts and the addressee of those acts, but guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely (see, to that effect, judgments of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 36, and of 9 February 2017, *M*, C-560/14, EU:C:2017:101, paragraphs 25 and 31).

146 In the light of all the foregoing, it should be concluded that the Commission did not infringe the applicant's right to be heard referred to in Article 41(2) of the Charter.

147 Moreover, as regards the applicant's arguments stating that the Commission merely provided a two-page response to its letter of 6 May 2015 and that it gave a cursory response to the applicant's detailed explanations of 7 November and 14 December 2014, they are concerned rather with the examination of the Commission's obligation to state reasons, laid down in Article 41(2) of the Charter and Article 296 TFEU.

148 In that regard, it is clear from the case-law that the statement of reasons required by the second paragraph of Article 296 TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the act in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review (see, to that effect, judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63 and the case-law cited).

149 In the context of individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 148 and the case-law cited).

150 In the present case, the applicant cannot rely solely on the length of the Commission's response to its letter of 6 May 2015, as that cannot, in itself, constitute a relevant factor for the purpose of establishing an infringement of the obligation to state reasons under the second paragraph of Article 296 TFEU. Moreover, the applicant cannot ignore the fact that, as is clear from the contested decisions, the Commission's reasoning was based on the audit report relating to the programme estimate, which was sent to the applicant, and on the explanations given by the financial auditor therein.

151 In any event, the applicant cannot claim to have provided detailed explanations in its letter of 7 November 2014 and its email of 14 December 2014, since it is clear from the latter that the purpose of that email was, above all, to request that Article 40 of the service contract, which provided for the possibility of an amicable settlement, be applied with regard to the disputed debt. The applicant merely submitted that the conclusions in the audit reports were 'incorrect, legally inadmissible, biased and based on unilateral reasoning', without providing any evidence or further arguments.

152 The Commission was therefore fully entitled to consider that it could maintain its position without providing additional reasons to the applicant following the letters or emails in question.

153 Therefore, the fourth plea in law must be rejected.

*The claim seeking repayment of the sums allegedly linked to unjust enrichment of the European Union*

154 [As rectified by order of 3 October 2018] By the second plea, raised in support of the head of claim seeking repayment of the sums making up the disputed debt, the applicant submits that, in so far as the contested decisions have no legal basis and had the consequence of increasing the Commission's assets by a total of EUR 624 388.73 (namely the amount of the disputed debt, which was EUR 607 096.08, plus interest), it is entitled to request the repayment of the sums linked to that unjust enrichment.

155 The Commission states that it has shown that there was a sound legal basis for the disputed debt, and the debt was attributable to the applicant. It contends that no infringement of the principle prohibiting unjust enrichment can be relied on in the present case.

156 According to settled case-law, a claim for repayment based on unjust enrichment of the European Union requires, in order to succeed, proof of an enrichment on the part of the European Union for which there is no legal basis and of impoverishment on the part of the applicant which is linked to that enrichment (see judgment of 28 July 2011, *Agrana Zucker*, C-309/10, EU:C:2011:531, paragraph 53 and the case-law cited).

157 Indeed, according to the principles common to the laws of the Member States, the right to repayment from the person enriched is conditional upon there being no legal basis for that enrichment (see, to that effect, judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraphs 44 to 46 and 49).

158 In the present case, it cannot be held that the offsetting of the debts carried out by the Commission had no legal basis, since, as is apparent from the assessment of the first plea above, the contested decisions were adopted pursuant to the provisions of the Financial Regulation applicable to the 10th EDF and of Regulation No 966/2012. Moreover, in the programme estimate, the applicant committed itself unilaterally to repaying to the Commission the expenditure that was not eligible for EDF financing.

159 It follows that the Commission cannot be subject to the requirement to repay the disputed debt, consisting of the ineligible expenditure identified in the audit report on the programme estimate, on the ground of unjust enrichment of the European Union.

160 However, the Commission will have to give due effect to the partial annulment of the set-off decisions, based on an infringement of the principle of proportionality.

161 Therefore, it is appropriate to reject the second plea and the head of claim seeking repayment of the sums making up the disputed debt, plus late payment interest to be determined on the basis of the ECB reference rate plus two percentage points.

*The claim for damages*

162 The applicant considers that it has suffered non-material damage, by reason of the uncertainty created by the delay in the Commission's response to its letter of 6 May 2015, and harm to its image and reputation. It argues that the contested decisions called into question its legitimacy as operator and regular partner to the Commission.

163 The Commission argues that the applicant's claim for damages is purely symbolic and does not satisfy the three conditions laid down in Articles 268 and 340 TFEU, under which it is necessary to prove the unlawfulness of the conduct alleged against the Commission, the existence of actual damage and the existence of a causal link between that conduct and the damage complained of.

164 As regards symbolic compensation for non-material damage, in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU and for the right to compensation to be enforceable, a number of conditions must be satisfied: the conduct alleged against the institutions must be unlawful, actual damage must have been suffered and there must be a causal link between that conduct and the damage complained of. That liability cannot be regarded as having been incurred without satisfaction of all the conditions to which the duty to make good any damage, as defined in the second paragraph of Article 340 TFEU, is thus subject (see judgment of 11 December *Heli-Flight* v *AESA*, T-102/13, EU:T:2014:1064, paragraph 116 and the case-law cited).

165 Moreover, the annulment of an unlawful measure may constitute, in itself, adequate and, in principle, sufficient compensation for all non-material damage which that measure may have caused, unless the applicant can show that he has suffered non-material damage which is separable from the unlawfulness giving rise to the annulment and which is incapable of being entirely repaired by that annulment (see judgment of 14 September 2017, *Bodson and Others* v *BEI*, T-504/16 and T-505/16, EU:T:2017:603, paragraph 77 and the case-law cited).

166 [As rectified by order of 3 October 2018] In the present case, it should be noted, first, as regards the unlawfulness of the conduct alleged against the Commission, that the applicant does not rely on any evidence other than the pleas put forward in support of the application for annulment, secondly, that only the third and the fifth pleas have been partially upheld and, thirdly, that the annulment of the contested decisions constitutes, in itself, adequate compensation for the non-material damage complained of, in so far as the applicant has not submitted any evidence capable of establishing the existence of non-material damage which is separable from the unlawfulness giving rise to the partial annulment of the contested decisions, before rejecting the claim for damages.

167 In the light of all the foregoing, the applicant's claim for damages must be rejected.

## Costs

168 Under Article 134(3) of the Rules of Procedure, the parties are to bear their own costs where each party succeeds on some heads and fails on others.

169 In the present case, since the contested decisions must be annulled only in part, the General Court orders each party to bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber),

hereby:

1. **Annuls, in part, the set-off decisions contained in the Commission's letters of 27 August and 7, 16, 23 and 25 September 2015, seeking to recover the sum of EUR 624 388.73, corresponding to the amount of part of the advance paid to the applicant in the context of a support programme for cultural initiatives in Guinea-Bissau, financed by the ninth European Development Fund (EDF), plus late payment interest, to the extent that they seek to recover the amount of EUR 312 265.42, corresponding to the amount of ineligible expenses identified by financial finding No 2 of EDF's audit report 2007/20859 concerning the operational programme estimate and the closure programme estimate reference FED/2010/249-005;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission and Transtec each to bear their own costs.**

Pelikánová Valančius Öberg

Delivered in open court in Luxembourg on 3 July 2018

[Signatures]