Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

27 April 2022*

(Arbitration clause – Grant agreement concluded in the context of the Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Eligible costs – Request for reimbursement – Financial audit – OLAF investigation – Conflict of interest on account of family or emotional ties – Principle of good faith – Principle of non-discrimination on grounds of marital status – Legitimate expectations – Action for annulment – Debit notes – Acts inseparable from the contract – Act not open to challenge – Right to effective judicial review – Inadmissibility)

In Case T-4/20,

Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii, established in Wrocław (Poland), represented by Ł. Stępkowski, lawyer,

applicant,

v

European Commission, represented by B. Araujo Arce and J. Estrada de Solà, acting as Agents,

defendant,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, M. Jaeger (Rapporteur) and M. Stancu, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure, in particular:

– the application for omission of certain information vis-à-vis the public made by the applicant by separate document on 3 January 2020 under Article 66 of the Rules of Procedure of the General Court;

– the defence lodged at the Court Registry on 20 May 2020, in which the Commission states that it does not oppose the application made by the applicant under Article 66 of the Rules of Procedure;

further to the hearing on 5 October 2021,

* Language of the case: English.

gives the following

Judgment

1 By its action, the applicant, Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii, seeks, primarily, on the basis of Article 272 TFEU, a declaration that the contractual claim of the European Commission set out in six debit notes issued on 13 November 2019 for an aggregate amount of EUR 180 893.90, comprising a principal amount of EUR 164 449 and damages of EUR 16 444.90, is non-existent, and an order that the Commission repay the amounts contained in those debit notes, and, in the alternative, on the basis of Article 263 TFEU, annulment of the Commission's letter of 12 November 2019, which was addressed to the applicant.

I. Background to the dispute

2 The applicant is a research institute which acceded to three grant agreements under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) ('FP7'), as a beneficiary.

3 Between December 2007 and July 2010, the Commission concluded a number of grant agreements, inter alia those bearing the numbers 215669-EUWB, 248577-C2POWER and 257626-ACROPOLIS ('the EUWB grant agreement', 'the C2POWER grant agreement' and 'the ACROPOLIS grant agreement', respectively, or, taken together, 'the grant agreements at issue') with three consortia consisting of research bodies from different Member States, each consortium being led by a coordinator. While the coordinators of the consortia were the main contractual counterparts of the Commission, each beneficiary had the status of a party to the grant agreements at issue.

4 The applicant, then called Wrocławskie Centrum Badań EIT+, acceded to the grant agreements at issue as a beneficiary.

5 Between 12 and 14 August 2013, the C2POWER grant agreement – together with other grant agreements concluded under the FP7 (the SAPHYRE and FIVER projects) – was the subject of an audit carried out by an external auditing firm acting as an authorised representative of the Commission.

6 On 11 October 2013, the applicant provided the additional information requested by the auditors at a closing meeting held on 14 August 2013.

7 On 17 February 2014, the auditors sent the applicant the initial draft audit report. By letter of 7 March 2014, the applicant submitted its observations on that report.

8 By letter of 22 April 2014, the Commission sent the applicant the final audit report of 21 March 2014 (No 13-BA 222-030) concerning the C2POWER grant agreement and the SAPHYRE and FIVER projects ('the final audit report') and informed the applicant that it regarded the audit as closed.

9 On 15 September 2014, in the context of investigation OF/2013/0325/A 3, the European Anti-Fraud Office (OLAF) sent the applicant, as a person concerned, a request for the production of documents relating to the hours reported by one of its employees ('the employee in question') in connection with its EU-funded projects. On 8 October 2014, the applicant sent the requested documents to OLAF.

10 By letter of 10 October 2014, OLAF requested that the applicant produce other supporting documents concerning two other of its employees. By letter of 6 November 2014, the applicant provided the documents requested.

11 On 15 January 2015, OLAF informed the applicant, as a person concerned by the investigation, of the conduct alleged against it, namely its complicity in the false declarations made on the timesheets of the employee in question and of two other of its employees.

12 On 27 January 2015, the applicant sent its observations to OLAF, in which it disputed OLAF's allegations.

13 On 1 June 2015, OLAF informed the applicant of the closure of the investigation and of the recommendations sent to the Polish judicial authorities and to the competent services of the Commission.

14 On 25 June 2015, the applicant sent OLAF a letter which contained a certain number of requests for information and supporting documents and in which it requested that OLAF provide it with, inter alia, a copy of its investigation report.

15 On 10 August 2015, OLAF provided the applicant with the information requested, except for the information which was subject to strict confidentiality and personal data protection rules and which included its investigation report. OLAF thus specified the facts at issue, the period and the projects to which those facts related (namely the grant agreements at issue, the SAPHYRE project and the ONEFIT project), as well as the recommendations addressed to the competent directorate-general concerning the recovery of the amount concerned.

16 By letter of 1 September 2015, the applicant requested that OLAF provide it with detailed information and the relevant legal provisions relating to its investigation. OLAF replied on 9 November 2015.

17 On 7 August 2018, the Commission informed the applicant of its intention to issue two debit notes, for a principal amount of EUR 374 188 and for an amount of EUR 30 200 by way of damages, on the basis of OLAF's conclusions concerning the grant agreements at issue, the SAPHYRE project and the ONEFIT project.

18 On 26 October 2018, the applicant sent the Commission a letter in which it disputed OLAF's conclusions and requested that the Commission take account of a number of factual and legal circumstances before adopting recovery measures.

19 By letter of 22 July 2019, the Commission informed the applicant that some of its comments had led it to alter its initial position. More specifically, the personnel costs of the two other of its employees had ultimately been accepted and only the personnel costs of the employee in question, relating to the period between August 2010 and October 2012, had been rejected, resulting in a total amount claimed of EUR 180 895.90.

20 On 29 August 2019, the applicant sent the Commission a second letter of objection in which it requested that the Commission take account of its additional observations in respect of the measures which it intended to adopt.

21 The Commission replied to the applicant by letter of 12 November 2019, maintaining its position and informing it of the issue of debit notes ('the contested decision'). That letter was attached to an email of 13 November 2019, as were debit notes No 3241913641 (ACROPOLIS grant agreement, principal, amount of EUR 72 592), No 3241913642 (EUWB grant agreement, damages, amount of EUR 7 259.20), No 3241913643 (EUWB grant agreement, principal, amount of EUR 64 818), No 3241913644 (C2POWER grant agreement, damages, amount of EUR 6 481.80), No 3241913645 (C2POWER grant agreement, principal, amount of EUR 27 039) and No 3241913647 (ACROPOLIS grant agreement, damages, amount of EUR 2 703.90), payable on 30 December 2019.

22 On 23 December 2019, the applicant paid in full the amounts demanded by the Commission.

23 By letter of 24 December 2019, the applicant called into question the content of the contested decision, of the Commission's email of 13 November 2019 and of the debit notes attached to that email, and disputed those debit notes.

II. Forms of order sought

24 The applicant claims, in essence, that the Court should:

– uphold its action brought on the basis of Article 272 TFEU by declaring, first, that the contractual claim of the Commission is non-existent and, secondly, that the personnel costs claimed in debit notes No 3241913641 (EUR 72 592), No 241913643 (EUR 64 818) and No 3241913645 (EUR 27 039) of 13 November 2019 are eligible costs;

– order the Commission to repay the sums set out by it in debit notes No 3241913641, No 3241913642, No 3241913643, No 3241913644, No 3241913645 and No 3241913647 of 13 November 2019, with interest, those sums previously having been provisionally paid to it subject to the outcome of the present proceedings;

– in the alternative, uphold its action brought on the basis of Article 263 TFEU by annulling the contested decision;

– in any event, order the Commission to pay the costs.

25 The Commission contends, in essence, that the Court should:

– dismiss the action brought under Article 272 TFEU as unfounded;

– declare that the amount of EUR 180 893.90, consisting of the principal amount of EUR 164 449 and the amount of EUR 16 444.90 by way of damages, mentioned in debit notes No 3241913641, No 3241913642, No 3241913643, No 3241913644, No 3241913645 and No 3241913647 of 13 November 2019, corresponds to non-eligible costs;

– dismiss the action brought in the alternative under Article 263 TFEU as manifestly inadmissible;

– order the applicant to pay the costs.

III. Law

A. The application for omission of information

26 By separate document lodged at the Court Registry on 3 January 2020, the applicant submitted an application for omission of certain information vis-à-vis the public, in accordance with Article 66 of the Rules of Procedure of the General Court, in order to ensure, first, the protection of personal data and, secondly, the protection of business secrets.

27 By that application, the applicant seeks, in essence, omission of the following types of information:

– the names of persons formerly and currently employed by it;

– the names of third parties;

– the content of the employment contracts of its employees;

– other information contained in the application or the annexes which may allow a person to be identified by the public;

– its organisational structure;

– the OLAF report, should it be produced.

28 In addition, the applicant requests that, in the event that this judgment is published, only extracts are published from which the persons concerned by these proceedings cannot be identified or from which details relating to the applicant's organisational structure, its management practices or its conduct as an employer cannot be revealed.

29 In the first place, it should be borne in mind that, in reconciling the need to make judicial decisions public, on the one hand, and the right to protection of personal data and of business secrets, on the other, the court must seek, in the circumstances of each case, to find a fair balance, having regard also to the public's right of access, in accordance with the principles set out in Article 15 TFEU, to judicial decisions (see, to that effect, judgment of 5 October 2020, *Broughton* v *Eurojust*, T-87/19, not published, EU:T:2020:464, paragraph 49).

30 In the present case, first of all, this judgment does not contain the names of persons formerly and currently employed by the applicant, the names of third parties or other information contained in the application or the annexes which may allow a person to be identified by the public.

31 Next, the request relating to the OLAF report is devoid of purpose since that report has not been produced.

32 Lastly, as regards the information relating to the content of the employment contracts, the applicant's organisational structure, its management practices and its conduct as employer, this judgment only contains information the omission of which would be liable to have a detrimental effect on the public's access to and understanding of judgments.

33 In the second place, it should be noted that the information contained in this judgment was presented and discussed at the hearing conducted in open court on 5 October 2021 or is information the omission of which has not been sufficiently justified, so that there is no legitimate reason to grant the applicant's application (see, to that effect, orders of 21 July 2017, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, T-130/17 R, EU:T:2017:541, paragraph 62, and of 21 July 2017, *PGNiG Supply & Trading* v *Commission*, T-849/16 R, EU:T:2017:544, paragraph 57).

B. The action brought under Article 272 TFEU

1. The application for a declaration that the contractual claim is non-existent and that the personnel costs are eligible costs, and the claim for repayment of the sums paid

34 In support of its primary heads of claim set out in its action brought under Article 272 TFEU, the applicant puts forward four pleas in law, alleging infringement of the provisions of the grant agreements at issue, of Belgian law and of Polish employment and labour law, and breach of the principle of the protection of legitimate expectations.

(a) The first plea, alleging infringement of the provisions of the grant agreements at issue

35 The applicant puts forward three complaints in support of its first plea.

(1) The first complaint, alleging infringement of Article II.22(1) and (6) of Annex II to the grant agreements at issue on account of the unilateral recovery of funds and liquidated damages

36 By its first complaint, the applicant disputes the legality both of the recovery effected by the Commission and of the imposition by the Commission of liquidated damages in the light of the contractual provisions governing that competence.

37 It takes the view that, although Article II.22(6) of Annex II to the grant agreements at issue allows the Commission to adopt measures such as the issuing of recovery orders or the application of sanctions, that power must be exercised on the basis of the conclusions of an audit within the meaning of Article II.22(1) of Annex II to those agreements.

38 However, first, the Commission required payment from the applicant without relying on the conclusions of an audit as regards the EUWB and ACROPOLIS grant agreements and, as regards the C2POWER grant agreement, contrary to the conclusions of the audit, conclusions which it had, however, accepted.

39 Secondly, the Commission relied on OLAF's investigation report, which is not a financial audit within the meaning of Article II.22(1) of Annex II to the grant agreements at issue. In that regard, the applicant maintains that, although Article II.22(8) of Annex II to the grant

agreements at issue allows the Commission to have recourse to OLAF to conduct on-the-spot checks and inspections, that provision does not empower it to derogate from the provisions of Article II.22(6) of Annex II to those agreements.

40 Consequently, the applicant concludes that the applicable contractual provisions did not allow the Commission to take the action it did, which was to recover funds and liquidated damages unilaterally instead of bringing a claim for payment before the court with jurisdiction, and to confine itself to challenging facts without adducing any evidence in support of that challenge.

41 The applicant adds that, contrary to the Commission's claims, neither Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; 'the Financial Regulation') nor Article 317 TFEU on its own grants a contractual self-standing power to the Commission to demand recovery in the absence of any final audit report or contrary to the conclusions of such a report in accordance with the grant agreements at issue.

42 The Commission disputes the applicant's arguments.

43 First, Section 3, entitled 'Controls and sanctions', of Annex II to the grant agreements at issue includes Article II.22, entitled 'Financial audits and controls', which provides for audit procedures, on the one hand, and control procedures, on the other.

44 As regards audit procedures, Article II.22(1) of Annex II to the grant agreements at issue provides that 'the Commission may, at any time during the implementation of the project and up to five years after the end of the project, arrange for financial audits to be carried out, by external auditors, or by the Commission services themselves including OLAF'. That article also provides that 'the audit procedure shall be deemed to be initiated on the date of receipt of the relevant letter sent by the Commission', that 'such audits may cover financial, systemic and other aspects (such as accounting and management principles) relating to the proper execution of the grant agreement', and that 'they shall be carried out on a confidential basis'.

45 Article 11.22(6) of Annex II to the grant agreements at issue adds that, 'on the basis of the conclusions of the audit, the Commission shall take all appropriate measures which it considers necessary, including the issuing of recovery orders regarding all or part of the payments made by it and the application of any applicable sanction'.

46 As regards control procedures, Article II.22(8) of Annex II to the grant agreements at issue provides, in relation to the possibility of adopting investigative measures, that, 'in addition', the Commission 'may carry out on-the-spot checks and inspections in accordance with Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by [OLAF] [and] Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by [OLAF]'.

47 It follows from the foregoing that the control procedures, as provided for in the grant agreements at issue, are measures falling within the contractual framework linking the parties which are juxtaposed with the audit procedures as independent procedures.

48 Secondly, in order to enable the procedures referred to in Article II.22 of Annex II to the grant agreements at issue to be carried out, Article II.3(g) of that annex provides that 'each beneficiary shall … provide the Commission including [OLAF] and [the] Court of Auditors directly with all information requested in the framework of controls and audits'.

49 The letter from OLAF of 15 September 2014 requesting that the applicant produce certain documents (see paragraph 9 above) specifically pursues that objective, justifying the investigative measure on the basis of Article II.3(g) of Annex II to the grant agreements at issue.

50 The procedure conducted by OLAF is thus part of the contractual framework established by the parties.

51 Thirdly, it is significant that the request for production of documents of 15 September 2014 is not based on Article II.22(3) of Annex II to the grant agreements at issue, which provides:

'The beneficiaries shall keep the originals or, in exceptional cases, duly authenticated copies – including electronic copies – of all documents relating to the grant agreement for up to five years from the end of the project. These shall be made available to the Commission where requested during any audit under the grant agreement.'

52 Although a request based on that provision allows the same result to be achieved as a request made under Article II.3(g) of Annex II to the grant agreements at issue, Article II.22(3) of that annex applies only to audit procedures and not to control procedures. Moreover, the same reasoning is applicable for the purpose of defining the respective scopes of Article II.22(3) of Annex II to the grant agreements at issue and Article II.22(8) of that annex.

53 Therefore, the procedure conducted by OLAF in the present case comes under the control procedures provided for in the provisions of the grant agreements at issue.

54 Fourthly, in the context of the control procedure carried out in the present case, the Commission identified irregularities committed by the applicant leading to the ineligibility of certain costs.

55 In that regard, it should be noted that the second subparagraph of Article II.21(1) of Annex II to the grant agreements at issue provides that, 'where an amount due to the [European Union] by a beneficiary is to be recovered after termination or completion of any grant agreement under the FP7, the Commission shall request, by means of a recovery order issued against the beneficiary concerned, the reimbursement of the amount due'.

56 In accordance with that provision, on which the contested decision is expressly based, the Commission was entitled to draw conclusions from the outcome of the control procedure by seeking from the applicant recovery of the sums due.

57 Thus, contrary to the applicant's claims that, first, Article II.22(8) of Annex II to the grant agreements at issue does not empower the Commission to derogate from Article II.22(6) of that annex and that, secondly, there is no power for the Commission to ignore a final audit report under the grant agreements at issue, the procedure followed in the present case is independent of the audit procedure referred to by the applicant.

58 In that regard, it must be noted that the first paragraph of Article 9 of the grant agreements at issue expressly states that those agreements are to be 'governed by … the Financial Regulation applicable to the general budget and its implementing rules …'.

59 Article 119 of the Financial Regulation provides as follows:

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

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

60 In that regard, it should be noted, first of all, that Article 119 of the Financial Regulation, in the version applicable at the material time, does not impose any particular and specific procedural requirement as to how irregularities are to be identified in the context of control procedures initiated after the acceptance of the final reports and accounts.

61 Next, the detailed rules for the implementation of that provision, in force at the material time, also do not contain any requirement in that regard. Article 183(1)(a) and (2) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of [the Financial Regulation] (OJ 2002 L 357, p. 1) entitles the authorising officer responsible, inter alia, to demand reimbursement pro rata by the beneficiary where the agreed work programme is not carried out properly.

62 Lastly, in response to a question raised at the hearing, the applicant acknowledged that Article 119 of the Financial Regulation is applicable to the contractual framework, subject to the identification of an irregularity.

63 Consequently, it follows from the foregoing that the Commission cannot be criticised for not having complied with the applicable procedural requirements in the context of the control procedure carried out in the present case.

64 Fifthly, it is common ground that, following the observations provided by the applicant in its letter of 26 October 2018, the Commission reduced the amount of the sums which it was claiming from the applicant. In disputing the conclusions of the OLAF report on which the Commission's claims were based, the applicant relied, inter alia, on the final audit report. Therefore, for the purpose of drawing up the recovery orders, the Commission took into account the assessments resulting both from the audit procedure and from the control procedure. On that basis, the Commission acted within the framework of the powers conferred on it by Article II.22(6) and the second subparagraph of Article II.21(1) of Annex II to the grant agreements at issue, which the contested decision reflects.

65 Consequently, the procedure followed by the Commission in order to request reimbursement of sums which it considered to be due does not infringe the contractual provisions. Accordingly, the first complaint must be rejected.

(2) The second complaint, alleging infringement of Article II.14(1)(a) and (b) of Annex II to the grant agreements at issue on account of the demand for payment in regard to actual costs

66 By its second complaint, the applicant submits that the Commission was required to accept that the personnel costs of the employee in question were actual costs, since the final audit report had specifically confirmed that they were genuine, a conclusion which the Commission had endorsed in its letter of 22 April 2014.

67 The applicant concludes from this that, by departing from the auditors' conclusions without, however, putting forward anything to support the possibility of doing so or providing explanations as to the relevance of OLAF's conclusions when it had partially rejected them, the Commission infringed Article II.14(1)(a) and (b) of Annex II to the grant agreements at issue and thus made an error of fact.

68 The applicant adds that the Commission's position as regards the allocation of the burden of proof as to the eligibility of the costs incurred by the beneficiary of a grant and its ability to recover funding is irrelevant. In that regard, it submits that, in the present case, since the final audit report confirming that the costs at issue were actual costs was delivered, the burden of proving that that report was incorrect and that certain personnel costs were ineligible lies with the Commission.

69 The Commission disputes the applicant's arguments.

70 As a preliminary point, it should be noted that the applicant's line of argument, in the context of the second complaint of its first plea, consists in alleging that the Commission infringed the contractual provisions on account of the failure to observe the allegedly binding nature of the final audit report.

71 However, first, it is not apparent from the provisions of the grant agreements at issue that such a value is to be attributed to audits. On the contrary, the provisional nature of their evidential value is affirmed in Article II.22(1) of Annex II to the grant agreements at issue, which recognises the possibility of carrying out new audits during the five years after completion of the project concerned. Similarly, Article II.22(8) of Annex II to the grant agreements at issue allows the Commission to initiate investigations in accordance with 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), which was repealed by Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by [OLAF] and repealing Regulation [No 1073/1999] and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1).

72 Secondly, as is apparent from the considerations set out in paragraphs 58 to 62 above, the contested decision falls within the framework of Article 119 of the Financial Regulation, paragraph 1 of which expressly states that acceptance by the institution of final reports and accounts is 'without prejudice to subsequent checks by the institution'.

73 Thus, the final audit report, even after validation by the Commission, cannot be regarded as being binding and immutable in relation to the Commission. It is therefore appropriate to reject the applicant's argument that, so as not to make an error of fact amounting to an infringement of Article II.14(1)(a) and (b) of Annex II to the grant agreements at issue, the Commission was

required to accept that the personnel costs of the employee in question were genuine since an audit – the conclusions of which it had endorsed – had previously acknowledged that these were actual costs.

74 For the same reasons, the applicant's argument that the Commission did not adduce any evidence that the final audit report was incorrect is irrelevant. It is apparent from the considerations set out in paragraph 72 above that, in the light of the contractual provisions of the present case, the Commission is not bound by the findings of a financial audit where a subsequent check calls into question the results of that audit.

75 In the light of the foregoing, the second complaint must be rejected.

(3) The third complaint, alleging infringement, first, of Article II.3(n) of Annex II to the grant agreements at issue as a result of the identification by the Commission of a risk of a conflict of interest on account of the existence of family ties and, secondly, of Articles 7 and 9 of the Charter of Fundamental Rights of the European Union as a result of discrimination on grounds of marital status

76 First of all, the applicant takes the view that the Commission was not entitled to conclude that there was a risk of a conflict of interest within the meaning of Article II.3(n) of Annex II to the grant agreements at issue, resulting in the reliability of the records of the number of hours worked by the employee in question being called into question on account of the access that his wife had to those records.

77 In that regard, the applicant submits that, despite having been made aware of it, the Commission failed to take into account, first, the review to which both the employee in question and his wife were subject by their respective hierarchical superiors, who checked that the work of the employee in question was genuine, and, secondly, the absence of any functional, hierarchical or organisational links between the spouses. In that regard, the applicant states that the Commission makes an error of fact by assuming that the involvement of the wife of the employee in question was substantial when, in reality, the nature of the wife's access to the timesheets of that employee was purely administrative and his wife had no power to amend those documents. Furthermore, the applicant notes that the auditors verified and validated the system for recording working time. Moreover, the applicant maintains that there was no risk of a conflict of interest, as demonstrated by the fact that no incident of potential fraud with regard to the timesheets was identified by the respective hierarchical superiors of the spouses.

78 Next, the applicant observes that there is no legal rule requiring spouses to be strictly kept apart in a work environment. In that regard, it notes that the measures put in place in the present case (double independent review, assignment to different departments) constitute a less intrusive method of ensuring the genuine character of the timesheets to which the wife of the employee in question had access in her administrative capacity.

79 Lastly, the applicant takes the view that the Commission's position constitutes discrimination on grounds of marital status, contrary to Articles 7 and 9 of the Charter of Fundamental Rights of the European Union ('the Charter'), since requiring spouses to be kept apart at work solely because they are spouses, in the absence of a genuine reason to doubt their probity, would amount to unequal treatment at work and/or discrimination. In that regard, the applicant disputes the

Commission's position which envisages a change in the tasks of the wife of the employee in question in order to avoid a conflict of interest, since such a measure would constitute discrimination on grounds of marital status.

80 The Commission disputes the applicant's arguments.

81 Article II.3(n) of Annex II to the grant agreements at issue provides that each beneficiary must take every necessary precaution to avoid any risk of a conflict of interest relating to economic interests, political or national affinities, family or emotional ties or any other interests liable to influence the impartial and objective performance of the project.

82 Thus, as a preliminary point, it should be noted that, contrary to the Commission's contention, it is not apparent from Article II.3(n) of Annex II to the grant agreements at issue that the existence of economic, emotional or family ties gives rise to a presumption that there is a risk of a conflict of interest liable to influence the impartial and objective performance of the project.

83 The presumption which may arise from the presence of economic, emotional or family ties is limited to the existence of a risk of a conflict of interest. Thus, the wording of Article II.3(n) of Annex II to the grant agreements at issue gives rise to a rebuttable presumption as to the existence of such a risk where, in particular, persons with family or emotional ties are involved in one way or another in the same project. In the present case, the marital relationship between the employee in question and his wife leads to the application of that presumption.

84 Therefore, although the Commission may benefit from that presumption, it is nevertheless required to adduce all the evidence demonstrating that the impartial and objective performance of the project concerned may be jeopardised.

85 Thus, as a first step, it is appropriate to examine the evidence adduced by the applicant in order to rebut the presumption as to the existence of a risk of a conflict of interest, as the fulfilment of the condition that there be emotional and family ties is not disputed.

86 In that regard, the applicant's arguments based on the absence of a hierarchical relationship and on the absence of an organisational link are not such as to rule out a risk of a conflict of interest, since, in the context of the present case, in which the wife of the employee in question approved his timesheets, the influence of the family situation cannot be ruled out merely because there was no relationship of administrative subordination in the work environment.

87 Consequently, the situation in the present case does constitute a risk of a conflict of interest within the meaning of Article II.3(n) of Annex II to the grant agreements at issue.

88 Accordingly, and as a second step, it is appropriate to examine the evidence adduced by the Commission demonstrating that an impartial and objective performance of the project concerned may be jeopardised.

89 In that regard, so far as concerns the nature of the activities which the wife of the employee in question carried out for the applicant, it is apparent from the documents before the Court that she was, at the material time, employed by the applicant in its financial department and that she held the post of 'head employee for FP7 projects', also referred to as 'head administrative employee

tasked with FP7 grants'. By virtue of that post, as the applicant acknowledges, '[she] had administrative access to her husband's timesheets reported to the FP7 grants and was signing them up to November 2012'.

90 In the first place, as regards the responsibilities exercised by the wife of the employee in question with regard to his timesheets, it must be noted that, although the applicant claims that the wife of the employee in question carried out clerical work and was responsible, inter alia, for the collection and maintenance of documentation related to the FP7 grants, it is clear from the timesheets of the employee in question, produced by the applicant in Annex A.16 to the application, that his wife approved their content, the word 'approved' appearing on those documents next to the signature of the wife of the employee in question.

91 In the second place, as regards the applicant's claim that it was impossible for the wife of the employee in question to alter the official documentation, such a claim makes the possibility of jeopardising the proper performance of the project concerned even more plausible, since although – as is shown in paragraph 90 above – she approved her husband's timesheets, she would not even have been able to alter them should they have been inaccurate.

92 Consequently, it must be concluded that the Commission has proved to the requisite legal standard that the proper performance of the project concerned may have been jeopardised.

93 That conclusion is not called into question by the applicant's claim that the activities of the wife of the employee in question were subject to double review by her hierarchical superiors. The evidence intended to demonstrate that there is a possibility that the proper performance of the project concerned may be jeopardised must be assessed in the light of the fact that the applicant has not succeeded in refuting the existence of a situation giving rise to a risk of a conflict of interest (see paragraph 87 above). In that context, it should be noted that, contrary to the applicant's claims, there is indeed a functional link between the employee in question and his wife. The fact that she was responsible for approving her husband's timesheets without being able to alter them, while unambiguously appearing as 'supervisor' on those records, is sufficient for the review system put in place by the applicant to be regarded as failing to satisfy the requirement that it take every necessary precaution to avoid any risk of a conflict of interest relating to family or emotional ties liable to influence the impartial and objective performance of the project concerned, in accordance with Article II.3(n) of Annex II to the grant agreements at issue.

94 Accordingly, the Commission did not infringe Article II.3(n) of Annex II to the grant agreements at issue by taking the view that the applicant had not taken every necessary precaution to avoid any risk of a conflict of interest relating to family or emotional ties liable to influence the impartial and objective performance of the project concerned.

95 Moreover, first of all, as regards the applicant's considerations relating to the fact that the system for recording working time had been validated by the auditors in the presence of the employee in question and his wife, reference is made to the conclusions, set out in paragraphs 73 and 74 above, concerning the value of the assessments contained in the final audit report.

96 Next, as regards the applicant's objections concerning the absence of concrete evidence of the risk of a conflict of interest, it is sufficient to note that the actual wording of Article II.3(n) of Annex II to the grant agreements at issue does not require it to be proved that that conflict had an influence on the performance of the contract or on its costs.

97 Lastly, as regards the claim that the Commission's position constitutes discrimination on grounds of marital status, contrary to Articles 7 and 9 of the Charter, it should be noted that the alleged infringement does not relate to improper implementation of the contractual provisions.

98 Nevertheless, it must be borne in mind that the General Court has already had occasion to rule that the Charter, which forms part of primary law, provides, in Article 51(1), without exception, that its provisions 'are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity' and that, therefore, fundamental rights are designed to preside over the exercise of the powers conferred on the EU institutions, including in contractual matters (judgments of 3 May 2018, *Sigma Orionis* v *Commission*, T-48/16, EU:T:2018:245, paragraphs 101 and 102, and of 3 May 2018, *Sigma Orionis* v *REA*, T-47/16, not published, EU:T:2018:247, paragraphs 79 and 80; see, also, by analogy, judgment of 13 May 2020, *Talanton* v *Commission*, T-195/18, not published, EU:T:2020:194, paragraph 73).

99 Similarly, when institutions, bodies, offices or agencies of the European Union perform a contract, they remain subject to their obligations under the Charter and the general principles of EU law (see, to that effect, judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraph 86). The Court has also stated that, if the parties decide, in their contract, to confer on the EU judicature, by means of an arbitration clause, jurisdiction over disputes relating to that contract, that judicature will have jurisdiction, independently of the applicable law stipulated in that contract, to examine any infringement of the Charter or of the general principles of EU law (judgment of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraph 81).

100 In the present case, the requirement to avoid any conflict of interest on account of family or emotional ties is intended to prevent a serious and manifest breach of the requirement of impartiality and objectivity (see, to that effect, judgment of 6 April 2006, *Camós Grau* v *Commission*, T-309/03, EU:T:2006:110, paragraph 141), to which, in particular, the person responsible for certifying the timesheets of researchers working on an EU-funded project is subject. Therefore, even if a rule intended to ensure that there is no conflict of interest, such as that at issue here, might affect the rights protected by Articles 7 and 9 of the Charter, those rights would not be affected in terms of their content; rather, at most, they would be subject to a limitation on their exercise. However, under Article 52(1) of the Charter, subject to the principle of proportionality, limitations on the exercise of the rights and freedoms recognised by the Charter may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedom of others.

101 That would be the case here. In that situation, as regards, first of all, the existence of an objective of general interest recognised by the European Union, such a limitation would seek to ensure observance of the principle of sound financial management, as enshrined in Article 317 TFEU. Next, that limitation would be necessary, since the Commission, which does not directly witness the performance of tasks by a grant beneficiary, has no other means of checking the accuracy of the personnel costs declared by that grant beneficiary than those which should be engendered by, inter alia, the production of reliable timesheets (see, to that effect, judgment of 8 September 2015, *Amitié* v *Commission*, T-234/12, not published, EU:T:2015:601, paragraph 210 and the case-law cited). Lastly, that limitation would not be disproportionate, since, first, the rights protected by Articles 7 and 9 of the Charter would not be affected in terms of their actual content, as is stated in paragraph 100 above, and, secondly, as the Commission notes, the requirement to avoid any conflict of interest on account of family or emotional ties could be satisfied by means of minimal organisational adjustments. Accordingly, the applicant's claims relating to the existence of

discrimination must be rejected in so far as, first, they are based on the existence of an infringement of Articles 7 and 9 of the Charter and, secondly, such an infringement, assuming it to be possible in the light of the disputed application of the rule on conflicts of interest, has not been demonstrated.

102 In the light of the foregoing, the third complaint should be rejected, as must, therefore, the first plea in its entirety.

(b) The second plea, alleging an infringement of Belgian law

103 As a preliminary point, the applicant notes that the grant agreements at issue contain a reference to Belgian law.

104 Accordingly, relying on Belgian civil law, the applicant raises three complaints in support of its second plea.

105 First of all, the applicant takes the view that the Commission's position in the present case amounts to an assumption that the applicant is acting in bad faith, an assumption which led the Commission unilaterally to declare that there had been a breach of contract although there was no such finding in the final audit report and, as regards the C2POWER grant agreement, to act contrary to the conclusions of the audit. Accordingly, the Commission infringed the principle of performance of contracts in good faith enshrined in Articles 1134 and 1135 of the code civil belge (Belgian Civil Code).

106 Next, the applicant alleges that the Commission based its claim for repayment of the personnel costs of the employee in question on an investigation report which was drawn up by OLAF outside the contractual framework and the evidential value of which is dubious. The Commission itself decided not to follow all the conclusions of that report and did not explain the reasons that led it not only to depart from the findings of the final audit report, without, however, having demonstrated any wrongdoing on the part of the applicant, but also ultimately no longer to take into account the costs considered to be 'significantly in excess', namely those going beyond a threshold the setting of which has no basis in the provisions of the grant agreements at issue. Consequently, the Commission infringed the rule on the burden of proof that was laid down in Article 1315 of the Belgian Civil Code, pursuant to which the party seeking performance of an obligation must prove that the obligation exists.

107 Lastly, the applicant takes the view that it made the payments claimed by the Commission when the Commission was not entitled to raise a claim. Consequently, the Commission infringed Articles 1235, 1376 and 1377 of the Belgian Civil Code by not repaying the amounts that had been paid to it and that it had wrongfully received because there had been no debt.

108 The Commission disputes the applicant's arguments.

109 It is necessary to deal with the first two complaints of the second plea together.

110 In the first place, it should be noted that, contrary to the applicant's claims, the Commission's request for reimbursement, as has been concluded in paragraph 65 above, is not based on an investigation report drawn up outside the contractual framework. Moreover, it must be recalled that it has also been concluded that the Commission was not bound by the findings of the final audit report (see paragraphs 73 and 74 above).

111 In the second place, it is appropriate to examine the question of the basis for the Commission's request for reimbursement in order to determine whether the Commission infringed both the principle of performance of contracts in good faith, by assuming bad faith on the part of the applicant, and the rule on the burden of proof, by not adducing evidence to support that request.

112 In that regard, first, it should be noted that, in accordance with a generally accepted legal principle, any court should apply its own rules of procedure, including rules of jurisdiction (see, to that effect, judgment of 8 April 1992, *Commission* v *Feilhauer*, C-209/90, EU:C:1992:172, paragraph 13). Rules intended to govern the burden of proof, the admissibility of evidence, the strength and probative value of evidence are nonetheless not covered by that principle since they are not inherently procedural but substantive, in the sense that those rules determine under which conditions individual rights exist and in what field they exist, and the grounds for their extinction. The choice of applicable law made in the audited agreements therefore also concerns the rules of evidence (judgment of 8 September 2015, *Amitié* v *Commission*, T-234/12, not published, EU:T:2015:601, paragraph 115).

113 Thus, in the present case, the allocation of the burden of proof as to the eligibility of the costs incurred by the beneficiary of a grant is governed by Article 1315 of the Belgian Civil Code, which provided that the party that seeks the performance of an obligation must prove the obligation and, conversely, a party that claims to have been released from an obligation must prove that it has made the payment or performed the act which has brought about the extinction of its obligation.

114 Secondly, it is settled case-law that, in the context of an agreement containing an arbitration clause within the meaning of Article 272 TFEU, it is for the party which has declared costs to the Commission for the award of a financial contribution by the European Union to produce evidence that the costs in question meet the financial conditions of the grant agreements (see, to that effect, judgment of 25 January 2017, *ANKO* v *Commission*, T-771/14, not published, EU:T:2017:27, paragraph 63 and the case-law cited).

115 Thirdly, as has been noted in paragraph 101 above, the Commission, which does not directly witness the performance of tasks by a grant beneficiary, has no other means of checking the accuracy of the personnel costs declared by that grant beneficiary than those which should be engendered by, inter alia, the production of reliable timesheets (see, to that effect, judgment of 8 September 2015, *Amitié* v *Commission*, T-234/12, not published, EU:T:2015:601, paragraph 210 and the case-law cited).

116 Fourthly, it is clear from case-law that failure to comply with the obligation to submit reliable timesheets to justify the personnel costs declared constitutes sufficient grounds for rejecting all those costs (see, to that effect, judgment of 6 October 2015, *Technion and Technion Research & Development Foundation* v *Commission*, T-216/12, EU:T:2015:746, paragraph 82 and the case-law cited). In addition, if the costs declared by the beneficiary of the grant are not eligible under the relevant grant agreement because they have been judged to be unverifiable and/or unreliable, the Commission has no choice but to recover an amount of the grant equal to the unsubstantiated amounts, since, pursuant to the legal basis provided by that grant agreement, the Commission can pay out of the EU budget only duly substantiated sums (see judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraph 102 and the case-law cited).

117 In the present case, it has been concluded, in paragraph 92 above, that the requisite reliability of the timesheets at issue was not ensured because there was a risk of a conflict of interest liable to influence the impartial and objective performance of the project concerned.

118 In that regard, first, it may be noted that a risk of a conflict of interest constitutes an abnormal situation in which the costs incurred are likely neither to be actual costs nor to have been incurred by the beneficiary itself, nor even, as the case may be, to have been used for the sole purpose of achieving the objectives of the project concerned within the meaning of Article II.14(1)(a), (b) and (e) of Annex II to the grant agreements at issue. Consequently, the non-performance by the other party of the contractual obligation imposed by Article II.3(n) of Annex II to the grant agreements at issue to take every necessary precaution to avoid any risk of a conflict of interest constitutes an improper performance of its contractual obligations. It thus justifies the recovery of costs pursuant to Article 183 of Regulation No 2342/2002 (see, to that effect, judgment of 22 January 2019, *EKETA* v *Commission*, T-198/17, not published, EU:T:2019:27, paragraph 91). Secondly, where the Commission presents concrete evidence of the existence of a risk that the working time declared does not meet the eligibility criteria, which is the case where a risk of a conflict of interest is identified, ineligibility is presumed and it is for the beneficiary to show – with probative evidence – that those eligibility criteria have, on the contrary, indeed been met (see, to that effect, judgments of 22 October 2020, *EKETA* v *Commission*, C-273/19 P, EU:C:2020:852, paragraphs 74 to 77, and of 22 January 2019, *EKETA* v *Commission*, T-166/17, not published, EU:T:2019:26, paragraph 61).

119 Consequently, by not adducing evidence that there was no risk of a conflict of interest and, therefore, by failing to comply with the obligation to submit reliable timesheets to justify the personnel costs declared, the applicant failed to fulfil its obligation under the rules on the allocation of the burden of proof. Accordingly, the Commission was entitled to claim the amounts that it considered it had wrongly paid, namely all the personnel costs of the employee in question appearing on the timesheets approved by his wife, without infringing the principle of performance of contracts in good faith within the meaning of Articles 1134 and 1135 of the Belgian Civil Code, or the rules on the burden of proof that were laid down in Article 1315 of that code.

120 The fact that the principles laid down in the case-law were defined in the context of a failure to comply with the obligation to submit, during a financial audit, reliable timesheets to justify the personnel costs declared and that, in the present case, the financial audit that led to the drawing up of the final audit report did not dispute the reliability of the timesheets submitted by the applicant concerning the employee in question has no bearing on the relevance of the application of those principles in the context of the present action. As has been noted in paragraphs 73 and 74 above, the Commission is not bound by the findings contained in that report.

121 Furthermore, the fact that the Commission ultimately did not follow all the conclusions of OLAF's investigation report does not amount to calling into question the evidential value of that report. It is apparent from recital 31 of Regulation No 883/2013, repealing Regulations No 1073/1999 and No 1074/1999 referred to in Article II.22(8) of Annex II to the grant agreements at issue, that it is for the EU institutions to decide what action should be taken on completed investigations on the basis of the final investigation reports drawn up by OLAF. In addition, Article 11(1) of Regulation No 883/2013 clearly states that the investigation report is to be accompanied by recommendations on whether or not action should be taken. Thus, the Commission is entitled to take into account only part of the findings contained in OLAF's investigation report, without that calling into question the evidential value of those findings.

122 Lastly, in so far as the Commission was entitled to claim all the costs incurred by the employee in question, the fact that it decided to apply a threshold which led it to claim only part of those costs cannot be challenged by the applicant because of its lack of legal interest in bringing proceedings.

123 In the light of the foregoing, it must be concluded that the first and second complaints of the second plea are unfounded.

124 Consequently, the third complaint has become devoid of purpose and must therefore be rejected.

125 Accordingly, the second plea must be rejected in its entirety.

(c) The third plea, alleging an infringement of Polish law

126 In the first place, the applicant notes that Article II.15(1) of Annex II to the grant agreements at issue makes a specific reference to national law governing employment contracts entered into by the grant beneficiaries. Accordingly, it takes the view that Polish employment and labour law should be considered to have been applicable to its employment relationship with the employee in question, on the one hand, and with his wife, on the other.

127 First, it alleges infringement of Article 140 of the Kodeks pracy (Polish Labour Code), in conjunction with Article 18(2) thereof, which allows for a 'task-based system of employment' (system zadaniowego czasu pracy), in that the Commission claims that the employee in question must have worked an 'excessive number of hours' and 'occupied an unreasonable time' in three parallel employment relationships, including the employment relationship that he entered into with the applicant in the context of a task-based system of employment. In the applicant's view, that system, which is lawful in Poland, does not require constant physical presence at work and thus ensures flexibility and the possibility of multi-tasking, provided that the employee performs his or her duties.

128 Secondly, the applicant alleges infringement of Article 11^3 of the Polish Labour Code, applied in conjunction with Articles 7 and 9 of the Charter, prohibiting the applicant at the material time from separating the employee in question and his wife at their workplace solely because they were married, as such separation amounts to discrimination on grounds of marital status.

129 In the second place, the applicant notes that the Commission did not put forward any specific reasons as to why it disputed the personnel costs of the employee in question for the period from August 2010 to October 2012, while accepting the personnel costs of that employee for November 2012, even though his wife also had access to his timesheets for November 2012.

130 The Commission disputes the applicant's arguments.

131 In the first place, it should be noted that, even if the third plea were upheld, the fact remains that the timesheets would continue to be unreliable, since the fact that the employee in question was able to work a large number of hours because of his involvement in various projects does not alter the fact that those hours were the subject of a validation procedure put in place by the applicant in breach of Article II.3(n) of Annex II to the grant agreements at issue.

132 In that context, it is recalled that the costs considered ineligible cover the period from August 2010 to October 2012. All the timesheets for that period were validated by the wife of the employee in question. In that regard, in so far as the applicant reiterates its objections concerning the relevance of the case-law relating to the burden of proof as regards the reliability of the timesheets, reference is made to paragraph 92 above.

133 In the second place, as regards the allegation of infringement of Article 11^3 of the Polish Labour Code, reference is made to paragraph 101 above, in which it was concluded that no discrimination on grounds of marital status can be identified.

134 Furthermore, in its line of argument relating to the infringement of Article 140 of the Polish Labour Code, the applicant notes an inconsistency on the part of the Commission, which criticises the access that the wife of the employee in question had to her husband's timesheets throughout the entire period at issue, but accepts that circumstance for the period from November to December 2012, even though she only ceased to be a member of the applicant's staff from January 2013.

135 In that regard, in order to reject the applicant's argument, it is sufficient to refer to paragraph 122 above, in which it was concluded that it has no legal interest in bringing proceedings.

136 Accordingly, for the reasons set out above and in so far as the applicant's arguments have no bearing on the outcome of the dispute, the third plea must be rejected as ineffective.

(d) The fourth plea, alleging breach of the principle of the protection of legitimate expectations in the context of the performance of agreements in good faith and of the prohibition on the abusive application of contractual terms

137 By its fourth plea, the applicant takes the view, in essence, that the principle of the protection of legitimate expectations must be observed in the context of contractual relationships entered into by the Commission. In the present case, by approving in a first step all the conclusions of the final audit report concerning, inter alia, the eligibility of the personnel costs of the employee in question, and then by rejecting those costs in a second step, the Commission infringed that principle, since the applicant could legitimately entertain a legitimate expectation as to, in particular, the eligibility of the personnel costs of the employee in question.

138 The applicant adds that the arguments put forward by the Commission to rule out the possibility of entertaining a legitimate expectation on the basis of the existence of an audit which did not uncover any irregularity are unfounded in law.

139 The Commission disputes the applicant's arguments.

140 It should be recalled that it has been concluded in paragraphs 73 and 74 above that it is apparent from the contractual provisions that the final audit report did not bind the Commission. Accordingly, the applicant could not entertain any legitimate expectation, despite the assent given by the Commission in respect of the results of that audit.

141 In addition, it is apparent from the final audit report that the auditors expressly stated that the objective of their work 'was not to provide any material assurance on the overall adequacy of the system [of] internal controls itself'. Although – in the course of their work – the auditors did not identify any particular weaknesses in the applicant's internal control system relating to the

preparation and presentation of financial statements concerning the C2POWER grant agreement, the mere reservation as regards the objective of that work in the light of the assurances which can be provided on the adequacy of that system is sufficient to introduce uncertainty precluding the creation of any legitimate expectation in that regard.

142 Consequently, the fourth plea must be rejected, as must, therefore, the heads of claim seeking a declaration that the contractual claim of the Commission is non-existent and that the personnel costs claimed in the debit notes concerning the principal amounts relating to the grant agreements at issue and seeking reimbursement of the sums paid are eligible costs.

2. The claim that the Commission should be ordered to pay default interest

143 Since it has been concluded that it is appropriate to reject the pleas in support of the heads of claim seeking a declaration that the contractual claim of the Commission is non-existent and that the personnel costs claimed in the debit notes concerning the principal amounts relating to the grant agreements at issue and seeking reimbursement of the sums paid are eligible costs, the claim that the Commission should be ordered to pay default interest must be rejected for lack of purpose.

144 In the light of the foregoing, since all the pleas and claims raised in support of the action brought under Article 272 TFEU have been rejected, that action must be dismissed.

C. The action brought under Article 263 TFEU

145 In the alternative, the applicant brings an action on the basis of Article 263 TFEU, since it takes the view that the contested decision is a challengeable act for the purpose of that provision.

146 The Commission contends that the action brought under Article 263 TFEU is manifestly inadmissible.

147 In that regard, it is apparent from settled case-law that, where there is a contract between the applicant and one of the institutions, an action may be brought before the EU judicature on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside the contractual relationship between the parties and which involve the exercise of the prerogatives of a public authority conferred on the contracting institution acting in its capacity as an administrative authority (see judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 20 and the case-law cited).

148 In those circumstances, it is therefore necessary to consider whether the contested decision, attached to the Commission's email of 13 November 2019 together with the debit notes at issue, is among the measures which may be annulled by the EU judicature under the fourth paragraph of Article 263 TFEU or whether, on the contrary, it is contractual in nature (see order of 14 June 2012, *Technion and Technion Research & Development Foundation* v *Commission*, T-546/11, not published, EU:T:2012:303, paragraph 35 and the case-law cited).

149 In the present case, it is apparent from the contested decision, first, that the Commission raised a claim and indicated the amount of that claim by issuing a number of debit notes and, secondly, that the Commission commented on the applicant's objections. Thus, there is nothing that falls outside the contractual framework or that indicates the exercise of the prerogatives of a public authority.

150 In that regard, it must be noted that the applicant takes the view that the contested decision brings about a distinct change in its legal position, since the Commission required it to pay a sum of money. However, as is apparent from paragraph 65 above, the request for reimbursement falls within the scope of the provisions of the grant agreements at issue.

151 Even if the applicant sought to dispute the debit notes, it must be stated that those documents do not constitute challengeable acts for the purposes of Article 263 TFEU.

152 A debit note issued by the Commission concerning sums due under a grant agreement cannot be classified as a definitive measure open to an action for annulment by reason of the fact that it contains information on the interest which will accrue on the debt established as receivable if it is not paid by the final date for payment, the possible recovery by offsetting or by calling in any previously provided guarantee, as well as the possibility of enforcement and inclusion in a database accessible to the authorising officers of the EU budget, even if that information is drafted in a way which could give the impression that the debit note containing it is a definitive act of the Commission. Such information could, in any event and by its very nature, only be information provided in preparation for an act of the Commission related to the enforcement of the debt established as receivable, since in the debit note the Commission does not adopt a position as to the means which it intends to employ in order to recover that debt, increased by default interest accruing from the final date for payment fixed in that debit note. The same also applies to information on possible methods of recovery (see, to that effect, order of 20 April 2016, *Mezhdunaroden tsentar za izsledvane na maltsinstvata i kulturnite vzaimodeystvia* v *Commission*, T-819/14, EU:T:2016:256, paragraphs 46, 47, 49 and 52 and the case-law cited).

153 It follows that an action against the debit notes at issue cannot be validly brought before the EU judicature on the basis of Article 263 TFEU, since those debit notes fall within a purely contractual framework from which they are inseparable and do not produce binding legal effects going beyond those flowing from the grant agreements at issue and which involve the exercise of the prerogatives of a public authority conferred on the Commission in its capacity as an administrative authority.

154 That would not be the case if the Commission had adopted a decision on the basis of Article 299 TFEU (see, to that effect, judgment of 20 July 2017, *ADR Center* v *Commission*, T-644/14, EU:T:2017:533, paragraphs 207 and 208). However, in the present case, the Commission has not adopted such an act.

155 In that regard, it should be noted that, since repayment was made, the Commission was not required to adopt such an act following the issuing of the debit notes. It would be contrary to the right to sound administration to encourage an applicant not to pay the amounts set out in a debit note so that a decision that may be challenged on the basis of the fourth paragraph of Article 263 TFEU is adopted after that note is issued (see, to that effect, judgment of 18 October 2018, *Terna* v *Commission*, T-387/16, EU:T:2018:699, paragraph 35).

156 However, in the present case, the applicant's right to effective review has not been infringed since the applicant has not been prevented from being able to contest the sums repaid.

157 In that context, it should be noted that the inadmissibility of an action for annulment cannot deprive the counterparty concerned of the right to effective judicial review, since it is entitled to defend its position, if it considers that position to be well founded, within the framework of an action brought on a contractual basis pursuant to Article 272 TFEU (see, to that effect, order of 20 April 2016, *Mezhdunaroden tsentar za izsledvane na maltsinstvata i kulturnite vzaimodeystvia* v *Commission*, T-819/14, EU:T:2016:256, paragraphs 46, 47, 49 and 52).

158 In the present case, the applicant has in fact brought an action under Article 272 TFEU and the pleas raised in support of that action have been examined by the court with jurisdiction (see, in that regard, paragraph 144 above).

159 Thus, declaring the action brought under Article 263 TFEU inadmissible is not such as to affect the applicant's right to effective judicial review.

160 Consequently, the action brought on the basis of Article 263 TFEU must be dismissed as inadmissible.

161 In the light of the foregoing, it is not necessary to rule on the applications made by the applicant under Article 88(1) and Article 89(3)(a) and (d) of the Rules of Procedure.

IV. Costs

162 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

163 As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii to pay the costs.**

Kanninen Jaeger Stancu

Delivered in open court in Luxembourg on 27 April 2022.

E. Coulon S. Papasavvas
Registrar President