Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

28 February 2019*

(Appeal — Arbitration clause — Article 272 TFEU — Concept of a 'declaratory action' — Article 263 TFEU — Concept of an 'administrative decision' — Grant agreement concluded under the Competitiveness and Innovation Framework Programme (CIP) (2007-2013) — Audit reports finding certain declared costs to be ineligible)

In Case C-14/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 January 2018,

Alfamicro — Sistemas de computadores, Sociedade Unipessoal, Lda, established in Cascais (Portugal), represented by G. Gentil Anastácio and D. Pirra Xarepe, advogados,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Sixth Chamber),

composed of C. Toader (Rapporteur), President of the Chamber, L. Bay Larsen and M. Safjan, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Alfamicro — Sistemas de computadores, Sociedade Unipessoal, Lda ('Alfamicro') requests that the Court of Justice set aside the judgment of the General Court of the European Union of 14 November 2017, *Alfamicro* v *Commission* (T-831/14, not published, EU:T:2017:804) ('the judgment

* Language of the case: Portuguese.

under appeal'), by which the General Court dismissed Alfamicro's action under Article 272 TFEU seeking, in essence, a declaration that the appellant does not owe a debt to the European Commission under Grant Agreement No 238882 on the EU financing of the 'Save Energy' project, concluded under the Competitiveness and Innovation Framework Programme (2007-2013) established by Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 (OJ 2006 L 310, p. 15) ('the grant agreement at issue').

Legal context

2 In accordance with Article 1(2) of Decision No 1639/2006, read in the light of recital 2 thereof, that decision was adopted in order to contribute to the competitiveness and innovative capacity of the European Community as an advanced knowledge society, with sustainable development based on robust economic growth and a highly competitive social market economy with a high level of protection and improvement of the quality of the environment. That decision was repealed from 31 December 2013 by Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014 — 2020) and repealing Decision No 1639/2006 (OJ 2013 L 347, p. 33).

3 According to recital 19 of Decision No 1639/2006, the purpose of that decision was to take appropriate measures to prevent irregularities and fraud, as well as the necessary steps to recover funds lost, wrongly paid or incorrectly used, in accordance with Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), 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 (OJ 1996 L 292, p. 2) and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

4 The decision's objectives, as set out in Article 2 thereof, include, in Article 2(2)(b), the Information and Communications Technologies (ICT) Policy Support Programme.

5 Article 9 of that decision, headed 'Protection of the Communities' financial interests', provides, in paragraph 3 thereof:

'All implementing measures resulting from this Decision shall provide, in particular, for supervision and financial control by the Commission or any representative authorised by it, and by audits by the European Court of Auditors, if necessary on-the-spot audits.'

Background to the dispute

6 Alfamicro is a single-shareholder company governed by Portuguese law providing computer and information technology services. On 9 June 2009, it signed the grant agreement at issue with the Commission.

7 The aim of the 'Save Energy' project, which was financed by that agreement, was to raise awareness among citizens and policy-makers of the issues surrounding energy efficiency. It ran from 1 March 2009 to 31 October 2011.

8 That project involved a consortium of 17 partners from 5 Member States, including Alfamicro, which acted as a coordinator. It coordinated the implementation of pilot technological and social innovation projects. Further, it participated in other European projects in which it took the role of technical consultant or project coordinator.

9 Article 5(1) of the grant agreement at issue set the maximum Community financial contribution at EUR 2 230 000 and specified that that financial contribution was to be limited to 50% of the eligible costs.

10 Article 10 of that agreement, headed 'Applicable law and competent court', provided, in the first paragraph thereof, that the agreement was to be governed by its terms, the relevant Community acts related to the Competitiveness and Innovation Framework Programme, the Financial Regulation applicable to the general budget of the European Communities and its implementing rules, other relevant Community law and, on a subsidiary basis, the law of Belgium.

11 According to the second paragraph of Article 10 of that agreement, 'the beneficiary is aware and agrees that the Commission may take decisions to impose pecuniary obligations, which shall be enforceable in accordance with Article 256 of the Treaty establishing the European Community'.

12 The third paragraph of Article 10 of that agreement states that, notwithstanding the Commission's right directly to adopt the decisions referred to in the second paragraph of Article 10, the General Court or, on appeal, the Court of Justice of the European Communities was to have sole jurisdiction to hear any dispute between the Community and any beneficiary concerning the interpretation, application or validity of the grant agreement at issue and the legality of the decisions as referred to above.

13 Annex II to the grant agreement at issue — the terms of which were incorporated into that agreement — set out the general conditions to which that agreement was subject ('the General Conditions'). Article II.28 of the General Conditions, headed 'Financial audit', provided, in the first subparagraph of paragraph 1 thereof, that the Commission was entitled to initiate an audit in respect of the beneficiary at any time during the implementation of the project concerned and up to five years after the date of the final payment. Under the second subparagraph of that paragraph, that procedure was to be carried out by external auditors or by the Commission services themselves, including the European Anti-Fraud Office (OLAF). According to the wording of paragraph 6 of Article II.28 of the General Conditions, the European Court of Auditors was to have the same rights as the Commission, notably the right of access, for the purpose of checks and audits.

14 The duration of the 'Save Energy' project, initially envisaged to be 30 months, was subsequently extended to 32 months, meaning that it ended on 3 October 2011. After the project, the Commission made a payment of EUR 680 300, which represented 50% of the costs declared by Alfamicro.

15 By letter of 25 October 2012, the Court of Auditors informed Alfamicro that, pursuant to Article 287 TFEU and as provided for under paragraph 6 of Article II.28 of the General Conditions, it would be the subject of an audit to be carried out in its offices in Cascais (Portugal) from 17 to 19 December 2012. The Court of Auditors completed its audit on 11 April 2013.

16 The preliminary audit report, sent to Alfamicro by letter of 29 April 2013, was subsequently revised by the Court of Auditors, taking into account the provisional observations submitted by the appellant. By letter of 25 August 2014, the Commission sent Alfamicro the final audit report and informed it that the audit was now closed. As a result of the audit, the Court of Auditors rejected the costs declared by Alfamicro in respect of personnel and services provided by two of its subcontractors, as well as 'other direct costs', principally relating to travel costs and costs for the purchase of consumables, totalling EUR 934 262, on the basis that they fell outside of the scope of the contract and were not covered by the relevant regulations.

17 By letter of 8 September 2014 ('the pre-information letter'), the Commission informed Alfamicro that, on the basis of the audit conclusions, it intended to recover a sum of EUR 467 131 and that a debit note for that amount would be drawn up if Alfamicro failed to submit observations within 30 days from the date of receipt of the pre-information letter. The Commission also noted in the pre-information letter that, if that amount was not paid during the period set out in the debit note, default interest would be calculated at the rate set out therein. Lastly, the Commission noted that it was entitled to recover that amount either by offsetting it or by taking measures to enforce payment. By letter of 8 October 2014, Alfamicro contested the content of the pre-information letter.

18 By letter of 28 October 2014, the Commission confirmed its position as set out in the pre-information letter and attached to its letter a debit note with the number 3241413112 for an amount of EUR 467 131 with a payment deadline of 12 December 2014.

19 Subsequently, by letters of 15 and 24 April 2015, sent to Alfamicro during the written part of the procedure before the General Court, the Commission informed Alfamicro that it would offset that debt against other amounts payable to the appellant as a beneficiary of three other projects subsidised by the European Union. As a result of that set-off, the amount claimed by the Commission from Alfamicro is currently EUR 270 436.

The procedure before the General Court and the judgment under appeal

20 By application lodged at the Registry of the General Court on 29 December 2015, Alfamicro brought an action under Article 272 TFEU, in accordance with which the Court of Justice is to have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

21 Alfamicro asked the General Court to make a declaration that the Commission's decision allegedly contained in its letter of 28 October 2014 was invalid, nullifying all of its legal effects and, in particular, annulling the debit note for EUR 467 131 attached to that letter and issuing a credit note for the same amount in its favour.

22 Before the General Court, Alfamicro put forward pleas in law alleging infringement of the grant agreement at issue, insofar as the declared costs were found to be ineligible, and breaches of the principles of proportionality, legitimate expectations, legal certainty, sound administration and the obligation to state reasons.

23 In its reply, lodged after the set-off measures referred to in paragraph 19 above were taken by the Commission, Alfamicro extended the subject matter of its action by asking the General Court to declare those set-off measures invalid and order the Commission to annul them and repay to Alfamicro the corresponding sums, plus default interest.

24 In turn, the Commission lodged a counterclaim seeking, in essence, an order requiring Alfamicro to repay the sum wrongly paid under the grant agreement at issue.

25 The General Court classified the application lodged by Alfamicro under Article 272 TFEU as a 'declaratory action', requesting a declaration that it does not owe a debt to the Commission under the grant agreement at issue.

26 With regard to the first plea in law, alleging an infringement of the grant agreement at issue, the General Court carried out an in-depth analysis of the Court of Auditors' conclusions relating to the costs for services provided by internal consultants and subcontractors (in this instance, the companies identified as O. and D.). It upheld the assessment of the Court of Auditors and the Commission in that regard, according to which a sum corresponding to 93% of the grant paid by the Commission could

not be verified and was not reliable and, consequently, could not be considered to represent costs actually incurred by Alfamicro. Consequently, the General Court held that the costs were not eligible under the grant agreement at issue and dismissed the first plea in law.

27 By its second plea in law, Alfamicro claimed that the principle of proportionality had been breached. Since the 'Save Energy' project has ended and the Commission benefited from it in full, Alfamicro claimed that it would be disproportionate to reduce the grant to only 7% of its original amount. The General Court held that, in agreements of that type, the grant is not remuneration for work carried out by the beneficiary, but a grant in respect of projects, the payment of which is subject to specific conditions. For that reason, the Commission was entitled to reimburse only eligible costs pursuant to the agreement signed with that beneficiary. Thus, the General Court found that the principle of proportionality had not been breached and rejected that plea in law.

28 By its third plea in law, Alfamicro claimed that the principles of legitimate expectations, legal certainly and sound administration had been breached. The General Court rejected that plea in law as being ineffective, as it considered that those principles did not apply in a contractual context. In any event, it found that there had been no breach of those principles in the present case.

29 Alfamicro's fourth and final plea in law was based on a breach by the Commission of the obligation to state reasons. It claimed that the reasons for the decision allegedly contained in the letter of 28 October 2014 were 'extremely brief', and that, consequently, the decision was vitiated by an error in law. The General Court rejected that plea in law and held that, as the letter was not an administrative measure, the obligation to state reasons did not apply in the present case. Further, it found that, even if that plea were to be interpreted as being based on the obligation to perform a contract in good faith, that plea could not succeed, as that letter formed part of a framework which was known to Alfamicro, that party having been sufficiently informed by the pre-information letter.

30 Accordingly, the General Court dismissed the declaratory action in its entirety.

31 With regard to the claim by Alfamicro in its reply, in which it requested that the General Court declare that the set-off measures, taken by the Commission after the application commencing proceedings had been lodged, were invalid and order the Commission to repay Alfamicro an amount equal to that set-off, plus default interest, the General Court rejected them as inadmissible on the ground that those set-off measures were administrative measures and any order that they be annulled should be requested pursuant to Article 263 TFEU. The Rules of Procedure of the General Court do not allow the nature of an ongoing action to be amended.

32 With regard to the Commission's counterclaim, the General Court found that the Court of Auditors' assessment that certain costs were ineligible was well founded and, consequently, confirmed that Alfamicro owed an amount equal to those costs to the Commission. On that basis, it ordered that Alfamicro pay to the Commission the amount still due after the set-off measures have been taken, namely EUR 277 849.93, plus EUR 26.88 in default interest per day from 20 June 2015 until the entirety of the debt arising from the grant agreement at issue has been repaid.

Forms of order sought

33 By its appeal, Alfamicro claims that the Court should:

– set aside the judgment under appeal;

– refer the case back to the General Court so that it can be heard again in the context of Article 263 TFEU; and

– order the Commission to pay all of the costs.

34 The Commission contends that the Court should:

– principally, find that the appeal brought by the appellant is inadmissible;

– in the alternative, dismiss the appeal as unfounded and, consequently, uphold the judgment under appeal; and

– order the appellant to bear all the costs.

The appeal

35 In support of its appeal, Alfamicro relies on four grounds of appeal, the first alleging that the General Court misrepresented the heads of claim in the initial application as seeking a finding of fact that Alfamicro did not owe a debt to the Commission under the grant agreement at issue, the second alleging infringement of the grant agreement at issue, the third alleging a breach of the principle of proportionality and the fourth alleging a breach of the principle of legal certainty.

The first ground of appeal, alleging infringement of Article 263 TFEU

Admissibility of the first ground of appeal

– Arguments of the parties

36 The Commission objects to the admissibility of the first plea in law. It relies on the fact that Alfamicro had lodged its appeal before the General Court on the basis of Article 272 TFEU and the arbitration clause in the grant agreement at issue. By bringing an appeal requesting that the Court of Justice set aside the judgment under appeal and refer the case back to the General Court so that it can give judgment on the basis of Article 263 TFEU on the validity of an alleged administrative decision adopted by the Commission in its letter of 28 October 2014, the appellant is changing the subject matter of the proceedings, contrary to Article 170 of the Rules of Procedure of the Court of Justice. The ground of appeal should therefore be rejected as inadmissible.

37 Alfamicro argues that its application initiating proceedings made it clear that it claimed that the General Court should, first, declare that the Commission's decision, which it understood to be contained in the letter of 28 October 2014, was invalid and, second, annul the debit note attached thereto. Further, it claims that the General Court acknowledged, in paragraphs 35 and 36 of the judgment under appeal, that Alfamicro was seeking an annulment of the Commission's decision by arguing that the decision contained in that letter was an administrative measure. Accordingly, the Commission's plea of inadmissibility should be rejected.

– Findings of the Court

38 According to the case-law of the Court of Justice, to allow a party to put forward for the first time before the Court of Justice a plea in law which it did not raise before the General Court would in effect allow that party to bring before the Court of Justice a wider case than that heard by the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it. However, an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an

amplification of an argument already developed in the context of a plea set out in the application before the General Court (judgment of 16 November 2017, *Ludwig-Bölkow-Systemtechnik* v *Commission*, C-250/16 P, EU:C:2017:871, paragraph 29 and the case-law cited).

39 Alfamicro did indeed request that the General Court give judgment on the basis of Article 272 TFEU and the arbitration clause in the grant agreement at issue, rather than on the basis of Article 263 TFEU.

40 However, it is apparent from paragraph 36 of the judgment under appeal that, from the outset, the appellant requested a declaration that the Commission's decision allegedly contained in the letter of 28 October 2014 was invalid. It follows that Alfamicro was indeed intending to bring an action for annulment. Additionally, the General Court noted that contradiction and found, in paragraph 41 of the judgment under appeal, that any action for annulment would be inadmissible on the ground that neither that letter nor the debit note was an administrative measure that could be challenged in the context of such an action.

41 It is clear therefrom that Alfamicro had claimed, in its action before the General Court, that the Commission's letter of 28 October 2014 had to be considered to be an administrative measure issued by that institution, even if the legal basis for its action was incorrect. As the General Court incorrectly assessed the argument in the first ground of appeal, in so far as it misconstrued the legal nature of the Commission's letter of 28 October 2014, such a ground of appeal is merely a continuation of an argument already developed in a plea in law in the application before the General Court.

42 That ground of appeal must therefore be declared admissible.

Substance

– Arguments of the parties

43 By its first ground of appeal, Alfamicro claims that the General Court incorrectly held, first, that the measure that it asked to be annulled did not have the characteristics of a challengeable act, as referred to in Article 263 TFEU, and, second, in paragraph 50 of the judgment under appeal, that, by its application, Alfamicro was in fact asking the General Court to declare that Alfamicro did not owe a debt under the grant agreement at issue, as was claimed by the Commission.

44 Alfamicro argues that a number of factors show that the Commission's letter of 28 October 2014 is an administrative measure. That letter unilaterally establishes the debt and its deadline and grants the Commission the power to take enforcement measures. Thus, the nature of the audit carried out by the Court of Auditors and the fact that the results of that audit had consequences on other agreements between Alfamicro and the Commission shows that that audit sits outside of the contractual framework.

45 Further, Alfamicro claims that the set-off measures taken by the Commission following that letter are also administrative measures. It is contradictory to argue, first, that the Commission's debt is based on a contractual obligation and that consequently the beneficiary must bring its action under Article 272 TFEU and, second, to acknowledge that the Commission can act unilaterally to enforce that debt by means of set-off, which is to say by means of an administrative measure that can only be challenged on the basis of Article 263 TFEU.

46 The Commission contests the arguments raised by Alfamicro in support of the first ground of appeal.

– *Findings of the Court*

47 As a preliminary point, it should be noted, as the General Court did in paragraph 42 of the judgment under appeal, that, according to the settled case-law of the Court, an action for annulment for the purposes of Article 263 TFEU must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (judgments of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 16 and the case-law cited, and of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 31 and the case-law cited).

48 On a number of occasions, the Court has found that, in the context of an action for annulment, the power of interpretation and application of the provisions of the FEU Treaty by the EU judicature does not apply where the applicant's legal position falls within the contractual relationships whose legal status is governed by the national law agreed to by the contracting parties (see, 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 18, and order of 21 April 2016, *Borde and Carbonium* v *Commission*, C-279/15 P, not published, EU:C:2016:297, paragraph 39).

49 Were the EU judicature to hold that it had jurisdiction to adjudicate on the annulment of acts falling within purely contractual relationships, not only would it risk rendering Article 272 TFEU — which grants the Courts of the European Union jurisdiction pursuant to an arbitration clause — meaningless, but would also risk, where the contract does not contain such a clause, extending its jurisdiction beyond the limits laid down by Article 274 TFEU, which specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party (judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 19).

50 It follows from that case-law that, where there is a contract between the applicant and one of the European Union institutions, an action may be brought before the European Union judicature on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside of 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 (judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 20).

51 In the present case, the measure contested by Alfamicro is the Commission's letter of 28 October 2014 by which the Commission sent a debit note to Alfamicro and notified it to repay sums wrongly paid under the grant agreement at issue, the amount of which is set out in the debit note.

52 Consequently, that debit note falls within the scope of the grant agreement at issue, since the note's purpose is the recovery of a debt which is grounded on the provisions of that agreement. Such a debit note and the formal demand for payment accompanying it set out only the maturity date and also the payment terms of the debt that they establish and cannot be equated to an enforcement order as such, even though it refers to enforcement pursuant to Article 299 TFEU as a possible option among others open to the Commission where a party fails to perform an obligation by the delivery date laid down (see, by analogy, judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 23).

53 In any event, in the present case, the Commission did not resort to enforcement measures, but decided to lodge a counterclaim before the General Court seeking an order requiring Alfamicro to settle that debt.

54 Further, no document relied on by Alfamicro supports the conclusion that the Commission acted in its capacity as an administrative authority or that its letter of 28 October 2014 produced legal effects outside of the contractual framework that were capable of changing Alfamicro's legal situation.

55 Provision was made for the audit carried out by the Court of Auditors in the grant agreement at issue, as is usual for that type of agreement. Audits pursue the objective of ensuring that the beneficiary of a grant receives a payment only in respect of costs that are eligible under the agreement allocating them, so as to ensure responsible management and use of European funding.

56 It is true that, after sending its letter of 28 October 2014, the Commission extrapolated, in respect of some other agreements with Alfamicro, on the basis of the results of the audit relating to the grant agreement at issue, and the Commission's decisions taken on that basis could, in some cases, constitute administrative measures taken by that institution if they fall outside of the contractual framework of those agreements. However, first, rather than being established on that basis, the debt established by the Commission in its letter of 28 October 2014 is based directly on the results of the audit carried out by the Court of Auditors with regard to expenses declared by Alfamicro under the grant agreement at issue and, second, the General Court was not adjudicating on an application relating to the other agreements.

57 Further, the set-off measures taken subsequently by the Commission are separate measures, and whether or not they are administrative in nature has no effect on the contractual nature of the declaration of debt in the debit note attached to the Commission's letter of 28 October 2014. Indeed, while Alfamicro criticises generally the approach in accordance with which contractual measures are differentiated from the administrative set-off measures, as set out in the case-law of the General Court, it does not contest, in the context of the present appeal, the General Court's decision, in paragraph 196 of the judgment under appeal, to find the heads of claim seeking annulment of the Commission's set-off measures to be inadmissible, but merely argues that the General Court should have found that the letter of 28 October 2014 and the debit note attached to that letter were challengeable acts, as referred to in Article 263 TFEU.

58 Consequently, the General Court did not err in law when it held that, even if the action at first instance, despite being explicitly based on Article 272 TFEU, had to be classified as an 'action for annulment' with its legal basis in Article 263 TFEU, such an action would be inadmissible, because neither the letter of 28 October 2014 nor the debit note attached to that letter are challengeable acts as referred to in Article 263 TFEU, which means that it was appropriate to find that Alfamicro's action was based on Article 272 TFEU, in the light of the arbitration clause in the grant agreement at issue.

59 It follows from the foregoing that the first ground of appeal must be rejected as unfounded.

The second and third grounds of appeal, alleging infringement of the grant agreement at issue and breach of the principle of proportionality

Arguments of the parties

60 By its second and third grounds of appeal, which it is appropriate to examine together, Alfamicro criticises the General Court for having decided, in paragraph 142 of the judgment under appeal, that the Commission was obliged to request repayment of funding paid in respect of costs considered to be ineligible, and that it did not breach the proportionality principle or its obligation to perform its contractual obligations in good faith.

61 Alfamicro claims that, as Article II.28 of the General Conditions provides that the Commission is to take 'all appropriate measures which it considers necessary', that institution should have taken the proportionality principle into account when implementing the result of the Court of Auditors' audit. The grant agreement at issue is a contract involving reciprocal obligations and Alfamicro fulfilled the obligations to which it was subject under that agreement. By reducing the grant by 93%, despite the fact that the 'Save Energy' project had been completed, the Commission infringed that agreement and breached the proportionality principle.

62 The Commission contests the arguments put forward in support of the second and third grounds of appeal.

Findings of the Court

63 As a preliminary point, it should be noted that the General Court found, in paragraphs 90 and 128 of the judgment under appeal, that the Court of Auditors had correctly assessed that the costs declared by Alfamicro were ineligible. That finding, which follows in any event from a finding of fact falling within the sovereign power of the General Court, is not contested in the present appeal.

64 Consequently, the point in issue is only whether the General Court was fully entitled to find that, when it deducted the entirety of the costs deemed ineligible from the amount of the grant and requested, consequently, that a large part of the grant be repaid, the Commission did not breach the proportionality principle.

65 In that context, it should be noted that, under Article 317 TFEU, the Commission is obliged to observe the principle of sound financial management. It also ensures the protection of the financial interests of the European Union in the implementation of its budget. This is also a contractual matter, as the grants made by the Commission come from the EU budget. In accordance with a fundamental principle governing EU aid, the European Union can subsidise only expenditure actually incurred (judgment of 28 February 2013, *Portugal* v *Commission*, C-246/11 P, not published, EU:C:2013:118, paragraph 102 and the case-law cited).

66 Consequently, the Commission cannot approve expenditure from the EU budget without legal basis; otherwise it will breach the principles established by the FEU Treaty. In the context of a grant, it is the grant agreement that governs the conditions for the allocation and use of that grant and, more particularly, the clauses relating to the determination of the amount of that grant on the basis of the costs declared by the party contracting with the Commission.

67 Consequently, if the costs declared by the beneficiary 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. Accordingly, in the present case, requesting repayment of the part of the grant corresponding to the ineligible costs, as established in the Court of Auditor's audit report, is an appropriate measure.

68 With regard to the arguments relating to the fact that that agreement involves reciprocal obligations, it is sufficient to note that the grant is not consideration for the realisation of the project forming the subject of the grant agreement. The sums paid by the Commission under that agreement are paid solely in order to allow the beneficiary to meet costs generated by such realisation. As part of those costs were found to be ineligible, as the beneficiary failed to comply with the contractual obligation to substantiate the use of the sums allocated to him, an amount equal to that part of the costs must be recovered by the Commission, and the fact that the beneficiary has in the meantime completed the project that is the subject of the grant agreement does not affect that obligation.

69 With regard to Alfamicro's argument of unjust enrichment, it is sufficient to find that that argument was raised for the first time before the Court of Justice and is, therefore, inadmissible.

70 Consequently, the General Court did not err in law when it found that, when the Commission requested repayment of funding paid in respect of costs considered to be ineligible, it took an appropriate measure with regard to the appellant, that measure being the only one that it was entitled to adopt in accordance with its obligations flowing from both the grant agreement at issue and EU law, and that, in that context, it did not act contrary to the proportionality principle or its obligation to perform its contractual obligations in good faith.

71 In the light of the findings above, the second and third grounds of appeal must be rejected as unfounded.

The fourth ground of appeal, alleging breach of the principle of legal certainty

Arguments of the parties

72 By that ground of appeal, Alfamicro argues that the General Court erred in law when it failed to find that the Commission had breached the principle of legal certainty. The appellant claims that paragraph 5 of Article II.28 of the General Conditions provided that the Commission was entitled to take 'appropriate measures'. The appellant submits that, even if it had been able to anticipate that the fact that it was unable to substantiate its costs declared as having been incurred in accordance with the grant agreement at issue could have consequences on the amount of that grant, it would never have been able to predict that that grant would be reduced by 93%, despite the project having been completed. By doing so, the Commission adopted inappropriate measures, contrary to what is set out in the grant agreement at issue and, on the same basis, breached the principle of legal certainty.

73 The Commission contests those arguments.

Findings of the Court

74 It should be noted that, rather than hearing the case as a court having jurisdiction to adjudicate on the lawfulness of a measure that may be the subject of an action for annulment under Article 263 TFEU, the General Court heard the case as the court having jurisdiction over the contract, and was therefore entrusted to adjudicate on the contractual dispute.

75 The principle of legal certainty — which is one of the general principles of European Union law — requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law (judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 100 and the case-law cited).

76 In that context, it follows that the General Court was fully entitled to find, in paragraphs 156 and 157 of the judgment under appeal, that the principle of legal certainty did not apply in a contractual dispute in which the General Court is not called upon to check the legality of an administrative measure. Therefore, any breach of that principle would have no consequences on the Commission's obligations under the grant agreement at issue.

77 The fourth ground of appeal must therefore be dismissed as ineffective.

78 It follows from all the foregoing that none of the grounds put forward by Alfamicro in support of its appeal can succeed.

79 The appeal must therefore be dismissed in its entirety.

Costs

80 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to the costs. Under Article 138(1) of those rules, applicable to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Alfamicro has been unsuccessful and the Commission has applied for costs to be awarded against it, Alfamicro must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Alfamicro — Sistemas de computadores, Sociedade Unipessoal, Lda to pay the costs.

[Signatures]