Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 5 March 2015 [1]

Case C-78/14 P

European Commission
v

ANKO AE Antiprosopeion, Emporiou kai Viomichanias

(Appeals — Arbitration clause — Jurisdiction of the Court — Interpretation of a contractual term)

1. The present appeal against the decision of the General Court of the European Union in *ANKO* v *Commission* [2] concerns the distinction between questions of fact and of law in the context of an appeal relating to a case of a contractual nature regarding an arbitration clause. The Court having until now had to hear and determine only a limited number of appeals of this type, this case will allow the Court to make it clear that the mere interpretation of a contractual term is a question of fact from which there can be no appeal.

The facts of the case

2. ANKO AE Antiprosopeion, Emporiou kai Viomichanias ('ANKO') is a company incorporated under Greek law for the purpose of commercialising and manufacturing metallic products as well as electronic and telecommunication products, devices and appliances. Since 2006, it has contributed to several projects subsidised by the European Union.

3. In accordance with Regulation (EC) No 1906/2006 [3] and with the framework established by Decision No 1982/2006/EC, [4] on behalf of the European Communities, the Commission of the European Communities concluded two contracts, No 215754 and No 215952, on 19 December 2007 and 21 January 2008 with Siemens SA and FIMI Srl, in their capacity as coordinators of two distinct consortiums, of which Anko was a member. The purpose of those subsidy contracts was to finance a project entitled 'Open architecture for accessible services, integration and standardisation' ('the Oasis project') and another entitled 'A complex multi-parameter system for the effective and ongoing evaluation and monitoring of motor capacity in sufferers of Parkinson's disease and other neurodegenerative illnesses' ('the Perform Project'), respectively.

1 — Original language: French.

2 — T-117/12, EU:T:2013:643 ('the judgment under appeal').

3 — Regulation (EC) No 1906/2006 of the European Parliament and of the Council of 18 December 2006 laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007-2013) (OJ 2006 L 391, p. 1).

4 — Decision of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) (OJ 2006 L 412, p. 1).

4. The general terms and conditions applicable to both subsidy contracts appear in Annex II ('the terms and conditions'). Under Section II.5(3)(d) of Annex II, following receipt of the reports mentioned in Section II.4 of Annex II, the Commission may suspend payments at any time in respect of all or part of the amount earmarked for the recipient in question:

— if the work carried out is not in conformity with the terms and conditions of the subsidy contract;

— if the recipient has to reimburse to the State of which he is a national a sum mistakenly paid by way of State aid;

— in the event of breach of the provisions of the subsidy contract, or of suspicion or presumption that they have been breached, in particular following the inspection and audits provided for in Sections II.22 and II.23 of the terms and conditions;

— in the event of a suspicion of irregularity committed by one or more beneficiaries in the performance of the subsidy contract at issue;

— in the event of suspicion or a finding of irregularity committed by one or more beneficiaries in the performance of another subsidy contract financed by the general budget of the Union or by budgets managed by it. In such a case, payments are to be suspended where the irregularity appears to be of a serious and systematic nature liable to affect the implementation of the subsidy contract at issue.

5. Taking the view, essentially, that there were, as a result of irregularities committed by ANKO, valid reasons for suspecting that the subsidy contracts, in particular Section II.5(3)(d) of the general terms of the contract, had possibly been breached, the Commission, by two letters of 9 August 2011, suspended payment to that company of the amounts provided for in those contracts, by way of a preventive measure.

The proceedings before the General Court and the judgment under appeal

6. By application lodged under Article 272 TFEU and the arbitration clauses contained in the subsidy contracts at issue, ANKO claimed that the General Court should (1) declare that the suspension of payments by the Commission under the Oasis and Perform projects amounted to breach of its contractual obligations; (2) order the Commission to pay it the amount of EUR 637117.17 under the Perform project, together with interest as provided for in Section II.5(5) of the general terms of the contract, as from the date of service of that application; (3) order the Commission to find that ANKO was not bound to repay to the Commission the sum of EUR 56 390 which had been paid to it under the Oasis project; and (4) order the Commission to pay the costs.

7. In paragraph 79 of the judgment under appeal, the General Court upheld ANKO's plea in support of its first head of claim, according to which the Commission had suspended payments under the Oasis and Perform projects without any legal basis and in breach of the subsidy contracts relating to those projects. Likewise, in paragraph 93 of the judgment under appeal, the General Court upheld the second head of claim, 'in that it seeks an order that the Commission should pay the amounts suspended under the Perform project, that payment being without prejudice to the eligibility of the expenditure declared by [ANKO]'. However, in paragraph 98 of the judgment under appeal, it rejected the third head of claim.

The proceedings before the Court of Justice and the arguments of the parties

8. The Commission brought the present appeal by application lodged at the Court Registry on 13 February 2014. The Commission claims that the Court of Justice should set aside the judgment under appeal and order the respondent to pay the costs.

9. By application lodged at the Court Registry on 17 February 2014, the Commission requested the Court to suspend enforcement of the judgment under appeal pending delivery of the judgment on appeal. By letter lodged at the Court Registry on 18 February 2014, the Commission also requested that that application be granted provisionally pending the order bringing the interim proceedings to an end, even before the other party to the proceedings had submitted its observations.

10. By orders of 21 February and 8 April 2014, respectively, the Vice-President of the Court decided to suspend enforcement of the judgment under appeal pending the order bringing the interim proceedings to an end, even before the other party to the proceedings had submitted its observations, and to suspend operation of the judgment under appeal pending delivery of the final judgment in the appeal proceedings in this case.

11. The parties presented oral argument at the hearing which took place on 11 December 2014.

Legal assessment

12. The Commission puts forward a single ground of appeal, divided into five parts, alleging 'misinterpretation of the general terms' of the subsidy contracts, that is to say, (1) erroneous assessment of the 'serious and systematic' nature of the irregularities as grounds for suspension; (2) erroneous assessment of the possibility or risk of repetition of the irregularities; (3) an erroneous inference from the ad hoc adjustments; (4) misinterpretation of the option of using average costs and erroneous extension of that option to notional expenditure — distortion of the evidence; and finally (5) confusion of the criteria for suspension (suspicion) with the criteria for eligibility (certainty).

Distinction of questions of law from questions of fact in proceedings brought under Article 272 TFEU

13. It should at the outset be noted that, in accordance with Articles 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal is limited to points of law and is to lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant or the infringement of Union law by the General Court. The General Court therefore has exclusive jurisdiction to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess the implications of the facts as found.[5] The establishment of those facts and the assessment of that evidence do not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject as such to review by the Court of Justice.[6]

14. The distinction between questions of fact and questions of law is not always straightforward. In the circumstances, the essential issue is whether the interpretation of a term in a subsidy contract is, in principle, a question of fact or of law.

15. The Court's case-law offers only limited guidance in that connection.

5 — See, for an illustration of this settled case-law, judgment in *Commune de Millau and SEMEA* v *Commission* (C-531/12 P, EU:C:2014:2008, paragraph 56 and the case-law cited).

6 — Idem.

16. In the judgment in *Commission* v *Alexiadou*, the Court of Justice set aside a judgment of, and referred the case back to, the General Court on the grounds that the latter ought to have taken into consideration a term of a contract which it had ignored.[7]

17. In its judgment delivered in *Evropaïki Dynamiki* v *Commission*,[8] the Court of Justice also set aside a judgment of, and referred the case back to, the General Court. In that case, the Court of Justice considered that the General Court had failed to rule on one of the appellant's heads of claim,[9] that it had not sufficiently examined whether certain costs were eligible within the meaning of certain terms of the general terms and conditions at issue,[10] that there had been no coherent and reasoned application of a term of the contract's terms and conditions[11] and, finally, that the General Court had not responded adequately and sufficiently to the arguments advanced by the appellant.[12]

18. Nevertheless, in neither of those cases was a mere interpretation of the contract at issue.[13]

19. In the facts of the case giving rise to the recent judgment in *Commune de Millau and SEMEA* v *Commission*,[14] the General Court had considered at first instance that the right of a third party to benefit from a contract could be inferred from the purpose of the contract itself. The General Court therefore held that it had jurisdiction to hear the appeal brought by the Commission against the Commune de Millau. The Court of Justice concluded that this was a finding of fact by the General Court,[15] rather than a point of law subject to review by the Court of Justice. In that case, pursuant to the term for the benefit of a third party between SEMEA[16] and the Commune de Millau, the latter was subject to the arbitration clause provided for in the terms and conditions of the contract concluded between SEMEA and the Commune de Millau.

20. It is apparent from this case-law that the Court of Justice has not yet upheld an appeal based upon misinterpretation of a contract. The grounds upon which the Court has set aside judgments of the General Court have always been of a different order. The Court has, in my opinion, adopted a prudent approach as to appeals where the interpretation of a contract is at issue.

21. Nevertheless, the same line of authority has not considered in explicit terms whether the interpretation of a contractual term is a question of fact or of law.

22. In light of these considerations, is the mere interpretation of a term of a contract a finding of fact?

23. I suggest that it is.

24. A contractual term does not amount to a source of law in the sense of a rule of law. In this context, a contract does not fall within the notion of 'law' as laid down in Articles 256 TFEU and 58 of the Statute of the Court of Justice of the European Union. It therefore follows that the interpretation of a contractual term cannot be considered to be an interpretation of law.

7 — C-436/07 P, EU:C:2008:623 (paragraph 19).

8 — C-200/10 P, EU:C:2011:281.

9 — Ibidem, paragraph 33.

10 — Ibidem, paragraph 41.

11 — Ibidem, paragraph 54.

12 — Idem.

13 — Judgments in *Commission* v *Alexiadou* (EU:C:2008:623) and *Evropaïki Dynamiki* v *Commission* (EU:C:2011:281).

14 — EU:C:2014:2008.

15 — Judgment in *Commune de Millau and SEMEA* v *Commission* (EU:C:2014:2008, paragraph 57). This finding led the General Court to conclude that the Commune de Millau was already under an obligation to pay.

16 — Société d'économie mixte d'équipement de l'Aveyron.

25. Certainly, the situation would be different if the appeal was grounded upon an infringement of the law governing the contract, whether that of a Member State or of the EU.[17] That is an interpretation of the law governing the contract.

26. However, the Court could not interpret a contractual term which was unrelated to a provision of EU law without encroaching upon the jurisdiction of the General Court to find the facts.

27. A brief analysis of the applicable procedural law of several Member States supports this conclusion.

28. In Polish law, it is apparent from the decisions of the courts, and the dominant opinion of legal scholars, that the determination of the intentions of the parties to a contract is a finding of fact from which there is no appeal in cassation. On the other hand, any misapplication of the rules of contractual interpretation provided for in Article 65 of the civil code can constitute grounds of appeal in cassation.[18]

29. In Spanish law, the correct interpretation of a contract is not subject to appeal in cassation. That question exceeds the jurisdiction of the court of cassation and, as opposed to an evaluation of the legality of the decision, implies an intrusion into the jurisdiction of the judges of fact.[19]

30. In the same line of reasoning, the interpretation of a contract is, in principle, reserved in Italian law to the judges of fact and, as an assessment of the facts, is not subject to an appeal in cassation.[20]

31. Similarly, in German law the terms of a contract are not considered to be rules of law subject to appeals restricted to points of law ('Revision').[21] The elucidation of the intentions of the parties to a contract is an assessment of the facts.[22] The same goes for the interpretation of an arbitration clause.[23] In an appeal brought before a court on point of law ('Revision'), the court is bound by the interpretation adopted by the court adjudicating on the facts. The former can only determine whether the latter had erred in law by infringing provisions of law like the rules of interpretation or whether it had made an interpretation devoid of any reasoning, whether logical or empirical.[24]

32. In Lithuanian law, the interpretation of a contract is regarded as a question of fact. An appeal in cassation therefore relates only to any contravention of the rules of interpretation of contracts.[25]

17 — The Court does not seem to see any reason not to hear an appeal on provisions of intrinsically national substantive law applicable to the contract. See, for example, judgment in *Commission* v *CCRE* (C-87/01 P, EU:C:2003:400, paragraphs 56 to 64). On the basis of the wording of Article 58 of the Statute of the Court of Justice of the European Union, Advocate General Kokott is critical of such a line of authority in her Opinion in the case of *Commune de Millau and SEMEA* v *Commission* (C-531/12 P, EU:C:2014:1946, paragraphs 76 and 77).

18 — See Ereciński, T. (ed.), 'Komentarz do art. 398(3)', in Ereciński, T. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2012, paragraph 11; Wójcik, M., 'Komentarz do art. 398(3)', in Jakubecki, A. (ed.), *Komentarz do Kodeksu pospowania cywilnego*, Warsaw 2012, paragraph 7; and the judgments of the Sąd Najwyższy (Supreme Court of Poland) from 20 March 2002, no V CKN 945/00, and of 15 October 2002, no II CKN 1167/00.

19 — See, judgments of the Tribunal supremo (Supreme Court, Spain) of 7 June 2011 (No 364/2011 (FD 10°)); 12 November 2012 (No 650/2012 (FD 3°)); and 15 November 2012 (No 782/2012 (FD 3°)).

20 — See, judgments of the Corte di Cassazione (Court of Cassation), Italy, Cass., 29.7.2003, n. 11679, Cass., 14.7.2004, n. 13075 and Cass., 4.5.2009, n. 10232.

21 — In the law of civil procedure, see Reichold, K., in Thomas, H., and Putzo, H., (ed.), *Zivilprozeßordnung*, 29th ed., Munich 2008, § 545, paragraph 3. In the law of administrative procedure, see Kopp, O. and Schenke, W.-R., *Verwaltungsgerichtsordnung*, 15th ed., Munich 2007, § 137, paragraph 3 et seq.

22 — See, Heßler, H.-J., in Zöller, R.,, *Zivilprozeßordnung*, 28th ed, Munich 2010, § 546, paragraph 9.

23 — Bundesgerichtshof (Federal Court of Justice, Germany), judgment of 28.2.1957 — VII ZR 204/56 (BGHZ 24, 15).

24 — As for the law of civil procedure, see Heßler, H.-J., op. cit., § 546, paragraph 9. In terms of procedure in administrative law, see Kopp, O.,Schenke, W.-R., op. cit., § 137, paragraph 19.

25 — See judgments of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) of 15 April 1998, No 3K-21/98, 2 November 2010, No 3K-7-409/2010, and of 25 March 2011, No 3K-3-132/2011.

33. In the main proceedings, the two subsidy contracts are, in accordance with Section 9 which figures in both contracts, governed by the wording of their own terms, the provisions of EU law relating to the Seventh Framework Programme for research, technological development and demonstration activities, the Financial Regulation of the EU and, subsidiarily, Belgian law.

34. However, the Commission does not rely upon an infringement of EU law. Moreover, during the hearing, in answering a question which I posed in that regard, the Commission underlined that it does not rely upon an infringement of Belgian law.

35. It is in light of those considerations that I shall examine the five parts of the ground of appeal. On that basis, I fail to see how a single ground of appeal based upon a 'misinterpretation of the general terms' of the subsidy contracts could give rise to a question of law. Nevertheless, in the interests of an exhaustive evaluation, I shall briefly summarise the arguments advanced by the Commission with respect to each of the five parts of the single ground of appeal.

The first to third and the fifth parts of the ground of appeal

Arguments of the Commission

– The first part: erroneous assessment of the serious and systematic nature of the irregularities

36. In essence, the Commission reproaches the General Court for erring in its interpretation of Section II.5(3)(d) of the terms and conditions and in the application thereof for the purposes of evaluating the 'serious and systematic' nature of the irregularities at issue as grounds for suspending the payments provided for in the subsidy contracts. The Commission contends in that regard that the suspension of the payments was based, not on the conclusions of the financial auditor's report on the projects at issue, but rather on the serious and systematic irregularities found as a result of financial inspections conducted in 2006 and 2008 with regard to other projects in which the respondent had participated and on its refusal to comply with recommendations made during the last investigation with the reference 08-BA52-042. Those irregularities principally concerned the inflated calculation of direct personnel costs for services performed by persons without the necessary scientific qualifications and the methodology used for calculated expenses leading to an over-estimation of eligible costs and the lack of reliability in the system for recording the number of hours of work performed.

– Second part: erroneous assessment of the possibility or risk of repetition of the irregularities

37. The Commission maintains that the very 'methodology' applied by ANKO to calculate its personnel costs is a source of irregularity in the sense that it inflates both the number of hours and the remuneration of ANKO's personnel. This improper practice had already been found to have occurred in five projects and is therefore equally 'capable' of having an effect upon the realisation of the projects at issue. According to the Commission, the General Court's refusal to recognise such a 'possibility' amounts to a misinterpretation of Section II.5(3)(d) of the general terms.

– Third part: erroneous inference from the ad hoc adjustments

38. The Commission concedes that ANKO made some rectifications and repayments. However, it contends that that does not mean that ANKO definitively modified its general 'methodology'. ANKO simply made several ad hoc adjustments where irregularities had been found and merely reimbursed some of the sums it is alleged it received in error, but took no measures of a general nature, regarding, on the one hand, checks of its personnel or their qualifications in relation to the programme at issue or, on the other, the exact recording of the number of hours worked by its

personnel which would prevent the previous 'practice' from being used in the future. As a result, the General Court's conclusions on the general 'methodology' of the appellant drawn from actual ad hoc adjustments amounts to flawed inductive reasoning leading to a misinterpretation of Section II.5(3)(d) of the general terms as to the potential for irregularities of the same nature to occur in other projects.

– Fifth part: confusion of the criteria for suspension (suspicion) with the criteria for eligibility (certainty).

39. The Commission contends that the General Court confused the criteria for suspension, that is to say, mere suspicion, and the criteria for eligibility of the expenditure declared.

40. The Commission maintains in that regard that suspension of payments is only a provisional measure. It could therefore ground this measure on a potential consequence and thus on a mere probability. It follows that an actual breach loss are by no means necessary.

Legal assessment

41. In paragraphs 46 to 79 of the judgment under appeal, the General Court interpreted Section II.5(3)(d) of the general terms.

42. In paragraph 65 of the judgment under appeal, it concluded that 'the Commission has not sufficiently demonstrated in law the serious and systematic nature of the irregularities identified, nor the way in which such irregularities, if proved, could affect the performance of the Perform and Oasis Projects'.

43. In the context of the present appeal, the Commission seeks no more than that the Court of Justice substitute its own interpretation of Section II.5(3)(d) of the general terms for that adopted by the General Court.

44. Given that the Commission challenges only the interpretation of Section II.5(3)(d) of the terms and conditions, I propose that the Court reject the first to third and the fifth parts of the appeal as inadmissible.

The fourth part of the ground of appeal: misinterpretation of the option of using average costs and mistaken extension to use of notional costs and distortion of the evidence

The Commission's arguments

45. The Commission draws attention in the first place to the criteria which must be satisfied cumulatively in order for average personnel costs to be declared. First, the cost methodology for average personnel costs is to be that declared by the beneficiary as its usual cost accounting practice; second, the cost methodology is to be based on the actual personnel costs of the beneficiary as registered in its statutory accounts, excluding budgeted or estimated amounts; third, the cost methodology is to exclude from the average personnel rates any ineligible cost item and, fourth, the number of productive hours used to calculate the average hourly rates is to correspond to the usual management practice of the beneficiary provided that it reflects the beneficiary's actual labour standards. With regard to the last criterion, the Commission emphasises that the General Court held that only the costs of the hours actually worked on the project by those persons directly performing the work could be charged.

46. The Commission maintains that, in paragraphs 71 to 75 of the judgment under appeal, by admitting the validity of certain personnel costs claimed by ANKO, by reference to the general terms and, in particular, the second subparagraph of Section II.14(1), the General Court misinterpreted the effect of those contractual terms which allow for the use of a calculation based upon average costs, but only to the extent that the calculation of that average is based upon actual costs rather than notional personnel costs. The use of an 'average' in accordance with the terms at issue does not legitimise such notional costs, since such an average must be established on the basis of actual costs.

47. In that regard, the Commission observes that it does not contest the possibility of using average rates for personnel costs, but rather the inclusion of costs that are not real, either because the remuneration does not correspond to the specialisation of the personnel employed, or because the productive hours are not real but notional. The Commission stresses that the accuracy of the information taken into account is a general principle of good management and, in any event, a condition for the reimbursement of expenses by the European Union Budget, which finds expression, at the level of the subsidy contract, in the requirement for the hours worked and costs incurred to be recorded. The subsequent use of an hourly rate, which ANKO did not in fact use, would be another question which would, however, not authorise the inclusion of notional, and therefore non-existent, hours or qualifications of its non-specialised personnel.

48. As a result, the Commission argues that the interpretation of Section II.5(3)(d) of the terms and conditions is mistaken and the reasoning behind it irrelevant, inasmuch as it had already been found, in relation to the relevant five projects, that the costs claimed by the respondent were not, at least in part, real, as required by the terms and conditions of the subsidy contracts.

49. According to the Commission, the reasoning of the General Court in this context could also be considered a distortion of evidence, to the extent that ANKO allegedly used, not average costs, but exact numbers of productive hours and exact remuneration, which, as appears from the audit reports, as regards the oldest subsidy contracts, had been corrected ad hoc for each employee.

Assessment

50. In so far as the Commission questions the interpretation of the General Court, I refer to my assessment in points 41 to 44 above.

51. Regarding the General Court's alleged distortion of evidence, it is first of all to be found that the Commission has expressly pleaded such distortion, as is required by the case-law of the Court of Justice. [26]

52. According to settled case-law, 'Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a *new assessment* [27] of the facts and the evidence.' [28] The Court of Justice has sometimes used the slightly more flexible formulation, to the effect that 'there is such distortion where, without recourse to *new evidence*, [29] the assessment of the existing evidence appears to be clearly incorrect'. [30]

26 — As to this condition, see, for example, Order in *Carrols* v *OHMI* (C-171/12 P, EU:C:2013:131, paragraph 36).

27 — Emphasis added.

28 — See judgment in *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 27 and case-law cited).

29 — My emphasis.

30 — See judgment in *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 37). In her Opinion in that case, Advocate General Kokott (C-229/05 P, EU:C:2006:606, paragraph 42) explains the difference between the two concepts in the following terms: 'establishing whether evidence has been distorted requires a minimum level of assessment. Rather, there will be a distortion of evidence where, without recourse to new evidence, the assessment of the evidence appears to be clearly incorrect'.

53. Distortion of evidence presupposes that the General Court has manifestly exceeded the limits of a reasonable assessment of the evidence. In order to establish the existence of a distortion, it is not sufficient merely to propose an interpretation different from that adopted by the General Court. [31]

54. I consider that the interpretation adopted by the General Court in paragraphs 71 to 79 of the judgment under appeal does not amount to distortion of the evidence.

55. In paragraph 75 of the judgment under appeal, the General Court refers to Section II.14(1)(1)(d) of the terms and conditions. Even though a different opinion of ANKO's cost-allocation method could be held, the General Court's interpretation does not appear to be clearly incorrect. When it interprets the terms and conditions of the contract, it is for the General Court freely to assess the facts, that is to say, the meaning of the terms and conditions, the intentions of the parties and the circumstances in which the contract was concluded and performed. Even if a solution different from that adopted by the General Court could be envisaged, the latter's assessment cannot be considered to be clearly incorrect and to give rise to distortion of the evidence.

56. I suggest that the Court reject the fourth part as unfounded.

Conclusion

57. In light of all the foregoing, I propose that the Court dismiss the appeal and order the Commission to pay the costs.

31 — See judgments in *Activision Blizzard Germany* v *Commission* (C-260/09 P, EU:C:2011:62, paragraph 57) and *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 52).