Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

29 October 2015*

(Appeal — Arbitration clause — Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) — Contracts relating to EU financial support granted to the Perform and Oasis projects) — Irregularities identified during audits of other projects — Decision of the Commission to suspend reimbursement of the amounts advanced by the recipient — Eligible costs — Distortions of the documents on the file)

In Case C-78/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 February 2014,

European Commission, represented by D. Triantafyllou, B. Conte and R. Lyal, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

ANKO AE Antiprosopeion, Emporiou kai Viomichanias, established in Athens (Greece), represented by V. Christianos and S. Paliou, dikigoroi,

applicant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, A. Borg Barthet, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 December 2014,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2015,

gives the following

* Language of the case: Greek.

Judgment

1 By its appeal, the European Commission requests the Court to set aside the judgment of the General Court of the European Union of 12 December 2013 in *ANKO* v *Commission* (T-117/12, EU:T:2013:643) ('the judgment under appeal'), by which the General Court ordered the Commission to pay to ANKO AE Antiprosopeion, Emporiou kai Viomichanias ('ANKO') certain sums, plus interest, the payment of which had been suspended on the basis of Section II.5(3)(d) of the general terms and conditions included in Annex II to the subsidy contracts relating to the Perform and Oasis projects ('the general terms and conditions').

Legal context

2 In accordance with 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), within the framework laid down by Decision No 1982/2006/EC 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), and in particular the specific 'Cooperation' programme, the Commission of the European Communities, acting on behalf of the Community, on 19 December 2007 and 21 January 2008 entered into subsidy contracts No 215754 and No 215952 with Siemens SA and FIMI Srl respectively, in their capacity as coordinators of the two separate consortia of which ANKO formed part.

3 Those contracts were intended to finance, respectively, the project entitled 'Open architecture for accessible services, integration and standardisation' ('the Oasis project') and the project entitled 'A complex multi-parametric system for the continuous-effective assessment and monitoring of motor status in Parkinson's disease and other neurodegenerative diseases' ('the Perform Project').

4 Under Section II.5(3)(d) of the general terms and conditions, the Commission may, following receipt of the reports mentioned in Section II.4 thereof, 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 general 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 general 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; and

— 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 European 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 In accordance with Section II.14(1), first paragraph, (a) and (d), of the general terms and conditions relating to the eligible costs of the project, the latter must be, first, actual and, secondly, calculated in accordance with the management principles and the usual accounting practices of the beneficiary. The accounting practices used in the recording of costs and receipts must respect the accounting rules of the State in which the contractor is established and must also permit reconciliation of the costs and receipts declared in respect of the project with the corresponding financial statements and supporting documentation.

6 Under Section II.14(1), second paragraph, of the general terms and conditions, notwithstanding the provisions of Section II.14(1), first paragraph, (a), beneficiaries may opt to declare average personnel costs if the following cumulative criteria are satisfied:

— the cost methodology for average personnel costs is that declared by the beneficiary as being its usual cost accounting practice; as a result, it applies uniformly to all the beneficiary's participations under the Framework Programmes;

— the cost methodology is based on the actual personnel costs of the beneficiary as registered in its statutory accounts, excluding budgeted or estimated amounts;

— the cost methodology excludes from the average personnel rates any ineligible cost item as defined in paragraph 3 of that section and all costs attributed to other cost categories, in order to avoid double funding of the same costs; and

— the number of productive hours used to calculate the average hourly rates corresponds to the normal management practice of the beneficiary, on condition that it reflects the beneficiary's actual labour standards, in accordance with the applicable national legislation, collective labour agreements and other contracts and that it is based on verifiable data.

7 Section II.15(1) of the general terms and conditions defines direct costs as being all costs which may be directly attributed to the project and which are defined as such by the beneficiary, in accordance with its accounting principles and usual internal rules. As regards personnel costs, only the costs of the actual hours worked by the persons directly carrying out the work under the project may be charged, and those persons must be directly engaged by the beneficiary, work under its sole technical supervision and responsibility and be paid in accordance with its usual practices.

Background to the dispute

8 ANKO is a company incorporated under Greek law for the purposes of marketing and manufacturing metallic products as well as electronic and telecommunications products, devices and appliances. Since 2006, it has been involved in several projects subsidised by the European Union.

9 By letter of 1 August 2011, the Commission informed ANKO that it intended to carry out a financial audit relating, in particular, to the Perform and Oasis projects.

10 Taking the view, essentially, that there were valid reasons for suspecting that an infringement of the subsidy contracts relating to those projects might have occurred, and in particular an infringement of Section II.5(3)(d) of the general terms and conditions, as a result of irregularities committed by ANKO, the Commission, by two letters of 9 August 2011, suspended, as a preventive measure, payment to that company of amounts provided for by those contracts.

The proceedings before the General Court and the judgment under appeal

11 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:

— declare the suspension of payments by the Commission under the Oasis and Perform projects to be in breach of its contractual obligations;

— 'order' the Commission to pay to 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 and conditions, as from the date of service of its application;

— 'order' the Commission to declare 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

— order the Commission to pay the costs.

12 In support of its action, ANKO claimed in particular that that suspension had occurred in breach of the subsidy contracts relating to the Perform and Oasis projects, that it was contrary to the principle of good faith and that it lacked a legal basis.

13 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 the payments corresponding to the Oasis and Perform projects without any legal basis and in breach of the subsidy contracts relating to those projects.

14 In paragraph 93 of the judgment under appeal, the General Court also upheld the second head of claim, in that it sought an order requiring the Commission to pay the amounts suspended under the Perform project, that payment being without prejudice to the eligibility of the expenditure declared by ANKO.

15 By contrast, in paragraph 98 of the judgment under appeal, the General Court rejected the third head of claim.

Procedure before the Court and forms of order sought

16 By its appeal, the Commission requests the Court to set aside the judgment under appeal and to order ANKO to pay the costs. ANKO contends that the appeal should be dismissed and that the Commission should be ordered to pay the costs.

17 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 the 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.

18 By its orders in *Commission* v *ANKO* (C-78/14 P-R, EU:C:2014:93) and *Commission* v *ANKO* (C-78/14 P-R, EU:C:2014:239), the Vice-President of the Court decided, respectively, 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 that judgment pending delivery of the final judgment in the appeal proceedings in this case.

The appeal

19 The Commission puts forward one single ground of appeal, alleging that the General Court erred in its interpretation of the general terms and conditions. That ground of appeal consists of five parts.

20 First, the Commission submits that the General Court erred in its assessment of the serious and systematic nature of the irregularities as grounds for suspension. Secondly, it invokes an erroneous assessment of the possibility or risk of repetition of the irregularities, Third, the Commission submits that the General Court drew an erroneous inference from the ad hoc adjustments made by ANKO. Fourth, the Commission contends that the General Court misinterpreted the option of using average costs and erroneously extended that option to notional expenditure, which resulted in a distortion of evidence. Finally, fifth, it invokes the confusion of the criteria for suspension, which require suspicion, with the criteria for eligibility, which require certainty.

Preliminary observations

21 According to Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, there is a right of appeal on points of law only and that appeal must be based on grounds alleging lack of jurisdiction of the General Court, a breach of procedure before it which adversely affects the interests of the appellant and the infringement of EU law by the General Court (judgment in *Commune de Millau and SEMEA* v *Commission*, C-531/12 P, EU:C:2014:2008, paragraph 55).

22 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 evidence accepted. The establishment of those facts and the assessment of that evidence therefore 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 (judgment in *Commune de Millau and SEMEA* v *Commission*, C-531/12 P, EU:C:2014:2008, paragraph 56 and the case-law cited).

23 In this context, as was stated by the Advocate General in points 24 and 26 of his Opinion, it should be noted that the General Court's examination of a contractual term cannot be considered to be an interpretation of law and cannot therefore be reviewed in the context of an appeal without encroaching upon the jurisdiction of the General Court to establish the facts. By contrast, the alleged infringement of EU law applicable to contracts is subject to a review by the Court such as that carried out in the context of an appeal.

24 In the present case, the two subsidy contracts at issue are, under Section 9 thereof, governed, according to their own terms, by EU-law provisions relating to the Seventh Framework Programme of the European Community for research, technological development and demonstration activities, by 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) and, alternatively, by Belgian law.

25 However, the Commission does not invoke an infringement of those provisions of EU law.

26 It is in the light of those considerations that it is necessary to examine the five parts of the single ground of appeal.

The first, second, third and fifth parts

Arguments of the parties

– The first part

27 In essence, the Commission criticises the General Court on the ground that it erred in its interpretation of Section II.5(3)(d) of the general terms and conditions and in the application thereof for the purposes of evaluating the 'serious and systematic' nature of the irregularities at issue as a ground for suspending the payments provided for in the subsidy contracts relating to the Perform and Oasis projects.

28 The Commission claims in this 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 serious and systematic irregularities identified as a result of financial inspections conducted in 2006 and 2008 with regard to other projects in which ANKO had participated and on the latter's refusal to comply with recommendations made during the last of those investigations.

29 Those irregularities, the Commission submits, principally concerned the calculation of inflated direct personnel costs for services performed by persons lacking the necessary scientific qualifications and the methodology used for calculating 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.

30 In response, ANKO contends, first of all, that an appeal which merely repeats the pleas in law and arguments previously set out before the General Court is inadmissible, since such an appeal amounts in reality to no more than a request for re-examination of the application brought before the General Court. Moreover, by its arguments, the Commission invokes facts, whereas the appeal must be limited to questions of law.

31 As regards the merits, ANKO contends, in essence, that the General Court did not refuse to classify the alleged 'irregularities' as 'serious' and 'systematic', as the Commission wrongly claims. On the contrary, the General Court held that the Commission had not adduced evidence that the 'irregularities' committed by ANKO were serious and systematic, even though that institution was obliged to adduce that evidence.

– The second part

32 The Commission maintains that the 'methodology' applied by ANKO to calculate its personnel costs is a source of irregularities in the sense that it inflates both the number of hours and the remuneration of ANKO's personnel. This improper practice, it argues, had already been found to have occurred in other projects and is therefore equally capable of affecting the realisation of the projects here at issue. According to the Commission, the General Court's refusal to recognise such a possibility, or suspicion, amounts to a misinterpretation of the contractual term at issue.

33 In response, ANKO submits that the Commission, in the context of the second part, merely repeats the arguments already presented at first instance and considers that part to be inadmissible. With regard to the merits, ANKO contends that the General Court examined and assessed the facts and evidence adduced by the parties, holding that, although the Commission bore the burden of doing so, it had failed to adduce evidence that the irregularities committed by ANKO in the context of the previous projects were capable of affecting the performance of the Perform and Oasis projects. The Commission is therefore wrong to allege that the General Court 'refused' to acknowledge that the

irregularities alleged to have been committed by ANKO in the context of the projects under the Sixth Framework Programme were capable of affecting the performance of the projects at issue in the present case.

– The third part

34 The Commission acknowledges that ANKO made some rectifications and repayments. However, it contends that this does not mean that ANKO definitively modified its general 'methodology'. ANKO, it argues, simply made several ad hoc adjustments where irregularities had been identified and merely reimbursed some of the sums that it had allegedly received in error, but took no measures of a general nature with regard to checks of its personnel or their qualifications in relation to the programme at issue or the exact recording of the number of hours worked by its personnel such as to prevent the previous 'practice' from being used in the future.

35 ANKO considers the third part to be inadmissible, given that the arguments invoked in support of that part had already been put forward at first instance, and, in any event, are unfounded. As regards the merits, it contends that the General Court did not merely assess the rectifications carried out by it. On the contrary, the General Court did not base its arguments solely on those rectifications, but also assessed other evidence and, in particular, a letter of 3 March 2009 produced by the Commission itself. On the basis of that letter, it can be held, first, that ANKO did not refuse to use a cost methodology compatible with the Commission's recommendations, and, secondly, that it did not insist on using an erroneous cost methodology.

– The fifth part

36 The Commission contends that the General Court confused the criteria for suspension, based on mere suspicion, and the criteria for eligibility of the expenditure declared.

37 The Commission maintains in this regard that suspension of payments is a provisional measure which allows it to rely on a potential effect and therefore on the mere probability of that effect. It follows that certainty is not required with regard to the existence of a breach and loss.

38 ANKO replies that the Commission's arguments are inadmissible in so far as the Commission seeks, in reality, to call into question the assessment of the facts carried out by the General Court.

39 With regard to the merits, ANKO notes that the General Court declared, in several paragraphs of the judgment under appeal, that the Commission was not required to demonstrate with certainty that the irregularities had had an impact on the subsidy contracts relating to the Perform and Oasis projects. The General Court held, by contrast, that the Commission had failed to show even the possibility or probability of such an impact. ANKO also contends that a suspension of payments must not be at the absolute discretion of the Commission, which could thereby suspend payments by invoking merely a suspicion of irregularity. Under Section II.5(3)(d) of the general terms and conditions, the Commission is required to show, in the first place, that the irregularities were serious and systematic and, in the second place, that they were capable of affecting the implementation of those contracts in the future.

Findings of the Court

40 It should be noted that, in paragraphs 46 to 79 of the judgment under appeal, the General Court analysed Section II.5(3)(d) of the general terms and conditions by examining, in particular, whether the fifth condition set out therein had been satisfied.

41 It was in this context that the General Court, in paragraph 65 of the judgment under appeal, concluded that 'the Commission [had] 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'.

42 As was stated by the Advocate General in point 43 of his Opinion, by the first, second, third and fifth parts of the single ground of appeal, the Commission merely contests the conclusion reached by the General Court and it seeks no more than that the Court of Justice should substitute its own interpretation of Section II.5(3)(d) of the general terms and conditions for that adopted by the General Court.

43 Moreover, as noted in paragraph 25 of the present judgment, the Commission does not claim an infringement of EU law.

44 In the light of the case-law cited in paragraphs 21 and 22 of the present judgment, the first, second, third and fifth parts of the single ground of appeal must therefore be rejected as inadmissible.

The fourth part

Arguments of the parties

45 The Commission notes, first of all, that the criteria must be satisfied cumulatively in order for average personnel costs to be declared. First, the cost methodology for average personnel costs is that declared by the beneficiary as being 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, on condition that this reflects the beneficiary's actual labour standards. With regard to this last criterion, the Commission emphasises that the General Court held that only the costs of the hours actually worked on the project at issue by those persons directly performing the work could be charged.

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

47 In this regard, the Commission states that it is contesting, not the possibility of using average rates for personnel costs, but rather the inclusion of costs that were not real, either because the remuneration did not correspond to the specialisation of the personnel employed or because the productive hours were not real but notional.

48 Consequently, the Commission argues that the General Court's interpretation of the clause at issue is mistaken and the reasoning behind it irrelevant, inasmuch as it had already been found, in relation to the five projects at issue, that the costs claimed by ANKO were not, at least in part, real, contrary to what is required by the general terms and conditions.

49 According to the Commission, in this context the General Court may also be criticised for having distorted the evidence in so far as ANKO relied, not on average costs, but on exact numbers of productive hours and exact remuneration, which, as appears from the audit reports, as regards the oldest subsidy contracts, had been corrected on an ad hoc basis for each employee. Consequently, the judgment under appeal is vitiated by, first, an error of law concerning the interpretation of the contractual clauses at issue and, secondly, a distortion by the General Court of the evidence adduced by ANKO.

50 ANKO replies that the Commission's arguments are manifestly unfounded as regards the alleged distortion of the evidence, and inadmissible as to the remainder, in so far as the Commission seeks, in reality, to call into question the General Court's factual assessments.

51 As regards the merits of the case, ANKO contends, inter alia, that the General Court examined, in paragraphs 72 to 75 of the judgment under appeal, whether, in the present case, the Commission had demonstrated that the cost methodology used by ANKO was compatible with the requirements of Section II.14(1), first paragraph, (d), and II.14(1), second paragraph, of the general terms and conditions. ANKO contends that, after examining the relevant evidence, the General Court held that 'the Commission [had] in no way demonstrated that the methodology used by [ANKO] was not compatible with Section II.14(1), first paragraph, (d), and II.14(1), second paragraph, [of the general terms and conditions].'

52 Moreover, the question as to the eligibility of the costs, that is to say, the issue of determining whether they are actual or notional and to what extent, is, ANCO submits, outside the scope of the present dispute in view of the fact that the General Court ruled exclusively on the question whether the suspension of payments imposed by the Commission on ANKO was legitimate and compatible with that section. As regards the distortion of evidence, ANKO contends, inter alia, that the Commission fails to specify which evidence was distorted by the General Court and fails to indicate the errors of appraisal which, in its view, led to that distortion. Moreover, ANKO disputes the contention that there was a distortion of the evidence submitted.

Findings of the Court

53 In so far as the Commission calls into question the General Court's interpretation of the general terms and conditions, the fourth part of the ground of appeal must, in the light of the case-law cited in paragraph 22 of the present judgment, be rejected as inadmissible.

54 With regard to the alleged distortion of the evidence by the General Court, although it is true that the Commission, in accordance with settled case-law, has expressly pleaded such distortion (see, inter alia, order in *Walcher Meßtechnik* v *OHIM*, C-374/14 P, EU:C:2015:101, paragraph 27), it should, however, be noted that, according to equally settled case-law, that distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and evidence (see judgment in *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 27 and the case-law cited).

55 Moreover, as the Court has already held, a distortion of the evidence requires that the General Court must have manifestly exceeded the limits of a reasonable assessment of the evidence. It therefore does not suffice, in order to show such a distortion, to suggest a reading of that evidence different from that adopted by the General Court (see judgments in *Activision Blizzard Germany* v *Commission*, C-260/09 P, EU:C:2011:62, paragraph 57, and in *Commission* v *Aalberts Industries and Others*, C-287/11 P, EU:C:2013:445, paragraph 52).

56 In the light of those principles, it must be held that the General Court's interpretation in paragraphs 71 to 79 of the judgment under appeal does not amount to a distortion of the evidence.

57 In paragraph 75 of the judgment under appeal, the General Court merely held that 'the Commission has in no way demonstrated that the methodology used by [ANKO] was not compatible with Section II.14(1), first paragraph, (d), and II.14(1), second paragraph, [of the general terms and conditions]'.

58 As stated by the Advocate General in point 55 of his Opinion, even though, in essence, a different reading of the cost-allocation method applied by ANKO in the context of previous projects is possible, the Commission has nevertheless failed to demonstrate the manifestly erroneous character of the General Court's assessment of the facts — that is to say, the content of the general terms and conditions, the intentions of the parties and the circumstances in which the subsidy contract was concluded and performed — and it has therefore failed sufficiently to demonstrate that the evidence was distorted.

59 The fourth part is consequently unfounded.

60 It follows from all of the foregoing that the appeal must be dismissed as being, in part, manifestly inadmissible and, in part, unfounded.

Costs

61 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those Rules, applicable to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ANKO has applied for costs to be awarded against the Commission, and as the latter has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]