Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

30 May 2024*

(Appeal – Instrument for Pre-Accession Assistance – Subsidies – Investigations by the European Anti-Fraud Office (OLAF) – Administrative penalties – Exclusion from public procurement procedures and from procedures for the award of grants financed from the general budget of the European Union – Publication of the exclusion on the website of the European Commission – Proportionality of the penalties – Failure to indicate the absence of a final judgment or a final administrative decision)

In Case C-130/23 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 2 March 2023,

Vialto Consulting Kft., established in Budapest (Hungary), represented by S. Paliou and A. Skoulikis, dikigoroi,

appellant,

the other party to the proceedings being:

European Commission, represented by T. Adamopoulos, F. Behre and R. Pethke, acting as Agents,

defendant at first instance,

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the Chamber, J. Passer (Rapporteur) and M.L. Arastey Sahún, Judges,

Advocate General: A.M. Collins,

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

* Language of the case: Greek.

Judgment

1 By its appeal, Vialto Consulting Kft. ('Vialto') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 21 December 2022, *Vialto Consulting* v *Commission* (T-537/18, 'the judgment under appeal', EU:T:2022:852), by which the General Court dismissed Vialto's action seeking, first, annulment of the final decision of the European Commission of 29 June 2018 by which the latter excluded Vialto for a period of two years from public procurement procedures, from procedures for the award of grants, from procedures for financial instruments (for dedicated investment vehicles and financial intermediaries), from procedures for prizes governed by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), and from award procedures governed by Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund (OJ 2015 L 58, p. 17), and ordered the publication of that exclusion on its website ('the decision at issue'), and, second, compensation for the damage which Vialto claims to have suffered as a result of that decision.

Legal context

2 Article 105a of Regulation No 966/2012, as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1) ('Regulation No 966/2012'), entitled 'Protection of the Union's financial interests by means of detection of risks and imposition of administrative sanctions', provided, in paragraph 1 thereof:

'In order to protect the Union's financial interests, the Commission shall set up and operate an early detection and exclusion system.

The purpose of such a system shall be to facilitate:

…

(b) the exclusion of an economic operator which is in one of the exclusion situations listed in Article 106(1);

…'

3 Under Article 106 of Regulation No 966/2012:

'1. The contracting authority shall exclude an economic operator from participating in procurement procedures governed by this Regulation where:

…

(e) the economic operator has shown significant deficiencies in complying with main obligations in the performance of a contract financed by the budget, which has led to its early termination or to the application of liquidated damages or other contractual penalties, or which has been discovered following checks, audits or investigations by an authorising officer, [the European Anti-Fraud Office (OLAF)] or the Court of Auditors;

…

2. In the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in points (c), (d) and (f) of paragraph 1, or in the case referred to in point (e) of paragraph 1, the contracting authority shall exclude an economic operator on the basis of a preliminary classification in law of a conduct referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 108.

…

The facts and findings referred to in the first subparagraph shall include, in particular:

(a) facts established in the context of audits or investigations carried out by the Court of Auditors, OLAF or internal audit, or any other check, audit or control performed under the responsibility of the authorising officer;

…

3. Any decision of the contracting authority taken under Articles 106 to 108 or, where applicable, any recommendation of the panel referred to in Article 108, shall be made in compliance with the principle of proportionality and in particular taking into account the seriousness of the situation, including the impact on the Union's financial interests and image, the time which has elapsed since the relevant conduct, its duration and its recurrence, the intention or degree of negligence, the limited amount at stake for point (b) of paragraph 1 of this Article or any other mitigating circumstances, such as the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation as recognised by the contracting authority, or the disclosure of the exclusion situation by means of the declaration referred to in paragraph 10 of this Article.

…

16. In order to, where necessary, reinforce the deterrent effect of the exclusion and/or financial penalty, the Commission shall, subject to a decision of the contracting authority, publish on its internet site the following information related to the exclusion and, where applicable, the financial penalty in the cases referred to in points (c), (d), (e) and (f) of paragraph 1 of this Article:

(a) the name of the economic operator concerned;

(b) the exclusion situation by reference to paragraph 1 of this Article;

(c) the duration of the exclusion and/or the amount of the financial penalty.

Where the decision on the exclusion and/or financial penalty has been taken on the basis of a preliminary classification as referred to in paragraph 2 of this Article, the publication shall indicate that there is no final judgment or, where applicable, final administrative decision. In those cases, information about any appeals, their status and their outcome, as well as any revised decision of the contracting authority, shall be published without delay. Where a financial penalty has been imposed, the publication shall also indicate whether that penalty has been paid.

…

17. The information referred to in paragraph 16 of this Article shall not be published in any of the following circumstances:

…

(b) where publication would cause disproportionate damage to the economic operator concerned or would otherwise be disproportionate on the basis of the proportionality criteria set out in paragraph 3 of this Article and to the amount of the financial penalty;

…'

4 Recital 21 of Regulation 2015/1929 stated:

'It is important to be able to reinforce the deterrent effect achieved by the exclusion and the financial penalty. In that regard, the deterrent effect should be reinforced by the possibility to publish the information related to the exclusion and/or to the financial penalty, with full respect for the data protection requirements set out in Regulation (EC) No 45/2001 of the European Parliament and of the Council [of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1)] and in Directive 95/46/EC of the European Parliament and of the Council [of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31)]. This should contribute to ensuring that the conduct concerned is not repeated. For reasons of legal certainty and in accordance with the principle of proportionality it should be specified in which situations a publication should not take place. In its assessment, the contracting authority should have regard to any recommendation of the panel. As far as natural persons are concerned, personal data should only be published in exceptional cases justified by the seriousness of the conduct or its impact on the Union's financial interests.'

Background to the dispute

5 The background to the dispute was set out by the General Court in paragraphs 2 to 22 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

6 The appellant is a company incorporated under Hungarian law which provides advisory services to undertakings and entities belonging to the private and public sectors.

7 Under Article 1 of Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) (OJ 2006 L 210, p. 82), the European Union is to assist the countries listed in Annexes I and II to that regulation, including the Republic of Türkiye, in their progressive alignment with the standards and policies of the European Union, including where appropriate the EU *acquis*, with a view to membership. Article 10 of Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Regulation No 1085/2006 (OJ 2007 L 170, p. 1) provides, under the general principles for implementation of assistance, that the Commission is to confer the management of certain actions on the beneficiary country, while retaining overall final responsibility for general budget execution. Decentralised management is to cover at least tendering, contracting and payments.

8 The Commission has concluded with the Republic of Türkiye a Framework Agreement that generally defines the rules for cooperation concerning assistance under the IPA, as well as a financing agreement. The designated operating structure, for the purposes of Article 21 of Regulation No 718/2007, was the Central Finance and Contracts Unit (CFCU). One of the projects financed under that agreement was project TR2010/0311.01 'Digitization of Land Parcel Identification System'. Approximately EUR 37 million was provided in financing for that project, which comprised three parts. The third part was carried out under a service contract concluded on 19 September 2014 between the CFCU and a consortium made up of five participants, including the appellant, and coordinated by Agrotec SpA, under the contract for the provision of services bearing the reference TR2010/0311.01-02/001.

9 After an investigation was opened on account of suspected acts of corruption or fraud committed in connection with that project, on the basis of Article 3 of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1), OLAF decided to carry out checks at the appellant's premises.

10 During a check carried out from 12 to 14 April 2016, it was noted that the appellant had refused to provide OLAF with certain information.

11 After OLAF's investigation was closed, the CFCU informed Agrotec thereof, and of OLAF's conclusion that the appellant had infringed Article 25 of the general terms and conditions of the contract for the provision of services referred to in paragraph 8 of the present judgment. The CFCU also informed Agrotec of its decision to exclude the appellant from that contract, in all respects, and to continue to perform that contract. Consequently, the CFCU requested that Agrotec terminate the appellant's activities immediately, as from 11 November 2016, and to take the necessary steps to exclude it from the consortium, namely by drafting an addendum to that contract.

12 By the decision at issue, notified to the appellant on 4 July 2018, the Commission decided to exclude the appellant for a period of two years from procurement procedures, from procedures for the award of grants and from procedures for financial instruments financed from the general budget of the European Union and by the 11th European Development Fund, pursuant to Regulation 2015/323, and to register the appellant for a period of two years in the early detection and exclusion system (EDES) established by Article 108(1) of Regulation No 966/2012.

13 It is apparent from the file submitted to the Court that, according to recital 77 of the decision at issue, exclusion was justified in view of the seriousness of the situation, stemming from the fact that Vialto had prevented OLAF from carrying out its investigation and from verifying whether the allegations of fraud and/or corruption were substantiated, and the evidence of Vialto's failure, for the purposes of Article 106(3) of Regulation No 966/2012, to comply with one of its main obligations in the performance of the contract, since it had expressly acknowledged in its observations to the panel referred to in Article 108 of Regulation No 966/2012 that it refused to provide OLAF with access to the data requested.

14 In addition, the Commission decided to publish the penalty of exclusion on its website, pursuant to Article 106(16) of Regulation No 966/2012. It is apparent from the file submitted to the Court that, according to recital 80 of the decision at issue, the publication measure was justified by the

fact that Vialto had prevented OLAF from conducting its investigation and that that serious breach of its main contractual obligations had not allowed for an effective protection of the European Union's financial interests.

The procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 13 September 2018, Vialto brought an action seeking annulment of the decision at issue and compensation for the material and non-material damage it suffered. In support of that action, Vialto put forward five pleas in law.

16 The first plea alleged that the Commission failed to fulfil its obligation to state reasons. The second alleged infringement of Article 7(1) of 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). The third plea alleged infringement of the right to good administration. The fourth plea alleged infringement of the principle of the protection of legitimate expectations. Last, the fifth plea alleged infringement of the principle of proportionality.

17 The General Court rejected all of those pleas as unfounded. Consequently, it also dismissed Vialto's claim for damages, since that claim was based on the same unlawfulness as that relied on in support of the claim for annulment, which it dismissed.

18 By the judgment under appeal, the General Court dismissed the action in its entirety.

Forms of order sought

19 By its appeal, Vialto claims that the Court of Justice should:

– set aside the judgment under appeal; and

– order the Commission to pay the costs.

20 The Commission contends that the Court of Justice should:

– dismiss the appeal in its entirety as manifestly unfounded; and

– order Vialto to pay the costs.

The appeal

21 In support of its appeal, the appellant puts forward three grounds of appeal, the first two alleging errors of law and distortion of the facts in the General Court's analysis of the existence of an infringement of the principle of proportionality, and the third alleging an error of law concerning the dismissal of the claim for damages.

The first ground of appeal

Arguments of the parties

22 By its first ground of appeal, Vialto claims that, in paragraphs 160, 164, 175, 177 and 182 of the judgment under appeal, the General Court erred in law in finding that the measure of publication of the exclusion from EU funding on the Commission's website was appropriate for attaining the objective of protecting the European Union's financial interests.

23 In particular, first, Vialto submits that the General Court erred in deciding that that measure complied with the principle of proportionality despite there being no reasoning for it that was specific and distinct from the reasoning for the penalty of exclusion, namely the seriousness of the infringement committed. Although the General Court accepted that the publication measure had to be the subject of a proportionality analysis independent of that carried out in respect of the penalty of exclusion, it did not assess the fact that the Commission's statement of reasons accompanying the decision in relation to the measure of publication of the exclusion was not different from the statement of reasons relating to the penalty of exclusion and that it was not specific.

24 In addition, Vialto disputes the appropriateness of the publication measure to attain the objective of protecting the European Union's financial interests. According to Vialto, such publication on the Commission's website was of no benefit whatsoever to the European Union's financial interests, but had the sole function of deterring third parties who enter into contracts with the Commission from breaching the rules.

25 Last, Vialto challenges the ground of the judgment under appeal set out in paragraph 182 thereof, in which the General Court concluded, as regards the publication measure, that there was nothing to suggest that it infringed the principle of proportionality on the sole ground that it was intended to protect the same legitimate objective. No reasons are given for that assessment and the fact that both the penalty of exclusion and the publication measure may pursue the same general legitimate objective does not automatically render the publication measure compliant with the principle of proportionality.

26 Second, Vialto submits that the General Court distorted the facts as regards the identification of factors justifying, separately, the penalty of exclusion and the publication measure. In particular, Vialto submits that the General Court accepted, in paragraph 175 of the judgment under appeal, that the decision at issue had not drawn a strict distinction between the factors justifying the penalty of exclusion and those justifying the publication measure, before finding that that did not necessarily give rise to any confusion of the two statements of reasons for those measures that could infringe the principle of proportionality. However, according to Vialto, it is apparent from recitals 77 and 80 of the decision at issue that the two statements of reasons were identical. Judicial review of compliance with the principle of proportionality and with the requirement laid down in Article 106(16) of Regulation No 966/2012 makes it necessary to identify the statement of reasons for adopting the additional publication measure, not merely for exclusion from public procurement procedures.

27 The Commission contends that the first ground of appeal should be rejected as manifestly unfounded.

Findings of the Court

28 First, it must be recalled that, under Article 106(16) of Regulation No 966/2012, where it appears necessary to reinforce the deterrent effect of the exclusion and/or financial penalty, the Commission is, subject to a decision of the contracting authority, to publish on its website the information related to the exclusion and, where applicable, the financial penalty.

29 It is clear from the wording of that provision that the penalty of exclusion and the publication measure are two separate measures, and that the Commission may adopt the publication measure where it considers that measure to be necessary in order to reinforce the deterrent effect of the penalty of exclusion of an economic operator from participation in public procurement procedures.

30 That interpretation is confirmed by recital 21 of Regulation 2015/1929, from which it is apparent, in essence, that the intention of the EU legislature was to reinforce the deterrent effect achieved by the penalty of exclusion and the financial penalty by providing for the possibility of publishing the information related to the exclusion, such a measure being likely to contribute to ensuring that the conduct concerned is not repeated.

31 The General Court was therefore correct in holding, in essence, in paragraph 171 of the judgment under appeal, that, although those two measures are not equivalent in their effects, the penalty of exclusion being primarily punitive whereas the publication measure pursues more of an objective of deterrence and prevention, they nevertheless remain complementary because they are directed towards the same objective of ensuring that all persons concerned refrain from breaching the rules.

32 Second, as regards the complaint alleging that there was no reasoning for the publication measure that was specific and distinct from the reasoning for the penalty of exclusion, it must be borne in mind that the institutions' obligation to state reasons means, according to settled case-law, that, in accordance with the second paragraph of Article 296 TFEU, the institution concerned must disclose in a clear and unequivocal fashion the reasoning underlying the measure adopted by it in such a way as to enable the persons concerned to ascertain the reasons for the measure and thereby enable them to defend their rights and to enable the Court to exercise its power of review (see, to that effect, judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission*, C-660/15 P, EU:C:2017:178, paragraph 43 and the case-law cited).

33 As the General Court correctly recalled in paragraph 64 of the judgment under appeal, the statement of reasons does not necessarily have to be exhaustive, provided that it is sufficient, which is the case where the institution concerned sets out the facts and the legal considerations having decisive importance in the context of the decision (see, to that effect, judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 96, and of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 169).

34 In the present case, it is apparent from recital 80 of the decision at issue that publication was justified by the fact that Vialto had prevented OLAF from conducting its investigation and that that serious breach of the main contractual obligations had undermined the protection of the European Union's financial interests.

35 As the General Court stated in paragraph 175 of the judgment under appeal, that recital clearly sets out why the publication measure appears to be justified. The General Court was therefore entitled to decide that the fact that the decision at issue did not draw a strict distinction between the factors justifying the penalty of exclusion and those justifying the publication measure was not, in itself, sufficient for it to be held that there had been a confusion of the two statements of reasons for those measures that could infringe the principle of proportionality.

36 Third, Vialto also claims that there is a contradiction between paragraphs 175 and 173 of the judgment under appeal, the General Court having stated in the latter paragraph that the publication measure had to be the subject of a proportionality analysis independent of that carried out in respect of the penalty of exclusion, even though the facts giving rise to those two measures might be common to both and could be examined at the same time.

37 In that regard, it should be recalled, as the General Court did in paragraph 172 of the judgment under appeal, that Article 106(17)(b) of Regulation No 966/2012 provides that 'the information referred to in paragraph 16 of this Article shall not be published … where publication would cause disproportionate damage to the economic operator concerned or would otherwise be disproportionate on the basis of the proportionality criteria set out in paragraph 3 of this Article'.

38 The proportionality criteria set out in Article 106(3) of that regulation concern decisions to exclude and/or to impose financial penalties.

39 It does not therefore follow from Article 106(17)(b) of Regulation No 966/2012 that the analysis of the proportionality of the publication measure must necessarily relate to factors different from those taken into account for the purposes of the analysis relating to the proportionality of the penalty of exclusion. On the contrary, that provision refers, for the purpose of analysing the proportionality of the publication measure, in particular to the proportionality criteria relating to the penalty of exclusion. Thus, the mere fact that, in essence, the same reasons are relied on to justify the two types of measure does not, in itself, constitute an infringement of the principle of proportionality, provided that each of those measures has been justified, as in the present case.

40 Fourth, as regards the appropriateness of the publication measure to attain the objective of protecting the European Union's financial interests, it should be noted that Article 105a of Regulation No 966/2012 provides, in paragraph 1 thereof, that, in order to protect the European Union's financial interests, the Commission is to set up and operate an early detection and exclusion system. The purpose of that system is, inter alia, to facilitate the exclusion of an economic operator who is in one of the exclusion situations listed in Article 106(1) of that regulation.

41 Admittedly, it follows from the wording of Article 105a of Regulation No 966/2012 that the penalty of exclusion is intended to protect the European Union's financial interests, without that provision referring to the publication measure as a measure that pursues the same objective.

42 That being so, it must be recalled, as is apparent from paragraph 31 of the present judgment, that those two types of measure are complementary. In addition, and above all, by reinforcing the deterrent effect of the penalty of exclusion and the financial penalty, the publication of the information related to the exclusion also pursues, in the long term, the objective of protecting the European Union's financial interests. Such a publication measure, in so far as it is intended to

ensure that economic operators do not infringe their obligations in the performance of contracts financed by the EU budget, clearly contributes to the pursuit of the objective of protecting the European Union's financial interests.

43 Accordingly, the General Court did not err in law in concluding that the publication measure was appropriate to attain the objective of protecting the European Union's financial interests.

44 Fifth, Vialto submits that the General Court distorted the facts as regards the identification of factors justifying, separately, the penalty of exclusion and the publication measure in accepting, in paragraph 175 of the judgment under appeal, that the decision at issue had not drawn a distinction between the factors justifying the penalty of exclusion, on the one hand, and the publication measure, on the other, before reaching the conclusion that that did not necessarily give rise to any confusion of the two statements of reasons for those measures that could infringe the principle of proportionality.

45 In that regard, it should be borne in mind that it follows from paragraph 39 of the present judgment that the General Court was correct in concluding, in paragraph 175 of the judgment under appeal, that the fact that the decision at issue did not draw a strict distinction between the factors justifying exclusion and those justifying publication is not, in itself, sufficient for it to be held that there was a confusion of the two statements of reasons for those measures that could infringe the principle of proportionality.

46 Consequently, in so far as the complaint alleging distortion is not capable of calling into question the soundness of the judgment under appeal, it must be held that that argument is ineffective.

47 It follows from all of the foregoing that the first ground of appeal must be rejected as in part unfounded and in part ineffective.

The second ground of appeal

Arguments of the parties

48 By its second ground of appeal, Vialto submits that the General Court erred in law in paragraphs 183 to 186 of the judgment under appeal in holding that the failure to indicate that there was no final judgment or final administrative decision concerning Vialto in the publication of the exclusion on the Commission's website did not infringe the requirements laid down in the second subparagraph of Article 106(16) of Regulation No 966/2012.

49 First, Vialto claims that the failure to indicate, in that publication, that there was no final judgment or final administrative decision constitutes an infringement of an essential procedural requirement. According to Vialto, such indication is a clear and unconditional requirement the purpose of which is to inform third parties and the failure to comply with which would mislead them. Thus, the General Court erred in holding that the infringement of that procedural requirement had not adversely affected Vialto's legal and factual situation.

50 Second, Vialto challenges the application by analogy, in paragraph 183 of the judgment under appeal, of the judgment of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council* (T-443/11, EU:T:2014:774, paragraph 98), concerning the failure to comply with a rule relating to consultation of a committee.

51 Third, Vialto submits that the General Court's finding, in paragraph 185 of the judgment under appeal, that the omission referred to in paragraph 49 of the present judgment was remedied by the Commission on 24 October 2018 should not have been a decisive factor in its assessment as to whether the provision at issue was infringed. The legality of an EU measure should be examined in the light of the factual and legal elements existing at the time of its adoption.

52 The Commission contends that the second ground of appeal should be rejected as manifestly unfounded.

Findings of the Court

53 The second subparagraph of Article 106(16) of Regulation No 966/2012 requires, in essence, that the publication relating to the penalty of exclusion indicate that there has been no final judgment or final administrative decision with regard to the economic operator concerned. In such cases, that information must be supplemented with information about any appeals, their status and their outcome, as well as any revised decision of the contracting authority.

54 Vialto submits that the absence of that indication constitutes an infringement of essential procedural requirements, which has the effect of adversely affecting its legal and factual situation.

55 According to the case-law of the Court of Justice, the failure to comply with the procedural rules relating to the adoption of an act adversely affecting a person constitutes an infringement of an essential procedural requirement and if the EU judicature finds that it was not validly adopted, it must draw the necessary conclusions from the infringement of an essential procedural requirement and, consequently, annul the act vitiated by that defect (judgment of 20 September 2017, *Tilly-Sabco* v *Commission*, C-183/16 P, EU:C:2017:704, paragraph 115 and the case-law cited).

56 In that regard, it must be observed that the absence of any indication, in the publication on the Commission's website, of the fact that Vialto was not the subject of a final judgment or a final administrative decision has no bearing on the procedure for the adoption of the Commission's decision to publish the exclusion, but is a fact subsequent to the adoption of that decision.

57 In the present case, it is not the publication measure as such that is the subject of the action for annulment, but the decision at issue. The decision at issue expressly provides, in Article 2 thereof, that the publication must indicate that there is no final judgment. That decision is not therefore vitiated by any illegality and there is no error in the adoption of the decision at issue.

58 Consequently, the General Court was fully entitled to hold, in paragraph 184 of the judgment under appeal, that the absence of that indication cannot be regarded as having adversely affected Vialto's legal and factual situation and that it did not constitute an infringement of an essential procedural requirement. The absence of that indication cannot affect the legality of the decision to publish the exclusion.

59 As regards the Commission's subsequent rectification of the omission, it is apparent from the judgment under appeal that the ground set out in paragraph 185 of the judgment under appeal, introduced by the adverbial phrase 'moreover', is included purely for the sake of completeness in relation to the finding in paragraph 184 of that judgment.

60 The complaint based on the existence of a rectification subsequent to the adoption of the decision at issue must therefore be rejected as ineffective.

61 Consequently, the second ground of appeal must be rejected as in part unfounded and in part ineffective.

The third ground of appeal

Arguments of the parties

62 By its third ground of appeal, Vialto submits that the General Court erred in law in so far as it held, in paragraphs 194 to 196 of the judgment under appeal, that the condition relating to the unlawfulness of the Commission's alleged conduct was not satisfied. According to Vialto, the errors of law vitiating the judgment under appeal, as set out in the first and second grounds of appeal, demonstrate the existence of unlawful conduct on the part of the Commission, which should lead to the setting aside of paragraphs 195 and 196 of the judgment under appeal by which the claim for damages was dismissed.

63 The Commission contends that the third ground of appeal must be rejected as manifestly unfounded.

Findings of the Court

64 Since, in any event, the third ground of appeal could be declared well founded only if the first and second grounds of appeal had themselves been declared well founded, which is not the case, the third ground of appeal must be rejected and, accordingly, the appeal must be dismissed in its entirety.

Costs

65 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 costs.

66 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of 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.

67 Since the Commission has applied for costs and Vialto has been unsuccessful, Vialto must be ordered to bear its own costs and to pay those incurred by the Commission.

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

1. **Dismisses the appeal;**

2. **Orders Vialto Consulting Kft. to bear its own costs and to pay those incurred by the European Commission.**

[Signatures]