Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

8 November 2018 *

(Public procurement – Tender procedure – Investigation by private auditor – OLAF investigation – Finding of irregularities – Decision of the Commission imposing an administrative sanction on the applicant – Exclusion from procurement and grant award procedures covered by the general EU budget for a six-month period – Inclusion on the early detection and exclusion system database – New plea – Rights of the defence)

In Case T-454/17,

"Pro NGO!" (Non-Governmental-Organisations/Nicht-Regierungs-Organisationen) e.V., established in Cologne (Germany), represented by M. Scheid, lawyer,

applicant,

v

European Commission, represented by F. Dintilhac and B.-R. Killmann, acting as Agents,

defendant,

ACTION under Article 263 TFEU for the annulment of the Commission's decision of 16 May 2017 imposing an administrative sanction consisting of the exclusion of the applicant for a period of six months from participation in procurement and grant award procedures covered by the general budget of the European Union and 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 the exclusion of the applicant for the same period from the award of funds 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),

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, L. Madise and R. da Silva Passos (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 The applicant, "Pro NGO!" (Non-Governmental-Organisations/Nicht-Regierungs-Organisationen) e.V., is an association registered in Germany which offers advice and support to non-governmental organisations in applications for financial aid and in the implementation of their actions.

2 On 15 July 2011, the applicant signed a 'Partnership Statement' in connection with an action funded by the European Commission, in which it authorised the lead partner to sign a 'contract with the European Commission' and to represent it in all dealings with the European Commission in the context of the action's implementation.

3 On 29 December 2011, the European Union, represented by the Delegation of the European Union to the Republic of Moldova, signed a grant contract ('the grant contract') with the International Society for Human Rights – Moldavian Section ('the ISHR-MS') in relation to the action entitled 'Strengthening Moldovan civil society organisations in HIV/AIDS prevention and care for women and juvenile prisoners' ('the action'). The total eligible cost of the action was estimated at EUR 517 531. EU financing was set at a maximum of EUR 414 025.

4 Under Article 5.3 of Annex IV to the grant contract, supply contracts worth more than EUR 10 000 and less than EUR 60 000 had to be awarded by means of a negotiated procedure without publication, in which ISHR-MS was to consult at least three suppliers and negotiate the terms of the contract with one or more of them.

5 On 17 January 2012, ISHR-MS and the applicant entered into a cooperation agreement for the implementation of the action ('the cooperation agreement').

6 At the Commission's request, an auditing firm ('the auditor') carried out an audit of the action ('the audit'). The audit was divided into two phases: the first phase lasted from 8 to 12 April 2013 and covered the period from 30 December 2011 to 31 December 2012 and the second phase lasted from 21 to 23 July 2014 and covered the remaining period until 26 April 2013.

7 Following the first phase of the audit, the auditor informed the Commission, by a letter of 3 May 2013, that, at a meeting on 9 April 2013, it had requested further information in relation to the procurement procedure used to select the publications supplier for the action. In its letter, the auditor reported that it had initially been informed by the applicant and by ISHR-MS that no specific procedure had been followed, due to the fact that the amounts in question, totalling EUR 42 424.44, had been put under different budget lines. The auditor also stated that, at a meeting the following day, a representative of the applicant had produced three offers from different publishing houses, claiming that he had misunderstood the auditor's question and that the three offers had been consulted before the supplier was chosen.

8 ISHR-MS subsequently submitted its observations to the auditor on a draft report dated 17 October 2013 relating to the first phase of the audit. ISHR-MS stated that 'the auditor [had] asked [it] [at the meeting of 9 April 2013] if a tender procedure was followed [for the selection of the publications supplier]', that '[its] answer [had been] that there was no tender procedure because according to [its] contract there was no need to perform it', that 'there was a negotiated procedure without publication', that 'next morning [it had shown] the auditor three offers from three different print houses and a contract with the selected publication supplier' and that '[it had] explained [to the auditor] the negotiated procedure [it had] followed' and that 'no more evidence [had been] requested.'

9 On 23 January 2015, the European Anti-Fraud Office (OLAF) produced a report on an investigation into potential irregularities committed in the context of the project ('the OLAF report').

10 On 8 September 2015, the auditor produced its final audit report ('the final audit report').

11 By letter of 16 January 2017, the panel established in accordance with Article 108(5) to (10) of 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) for the early detection of risks threatening the Union's financial interests and the imposition of administrative sanctions ('the panel') notified the applicant that it had been asked by the Commission to adopt a recommendation before a decision was taken on the exclusion of the applicant from participation in procurement procedures and grant award procedures. Paragraph 3.2 of that letter stated that the audit had established that ISHR-MS did not organise any procurement procedure pursuant to Annex IV of the grant contract. It also stated that the applicant had submitted fake documents to the auditor in order to give the impression that the procurement procedures had been complied with.

12 The applicant submitted its observations by letter of 30 January 2017.

13 By letters of 9 February and 6 March 2017, the panel provided further information to the applicant. The applicant submitted its observations by letters of 15 February and 8 March 2017.

14 On 24 March 2017, the panel adopted a recommendation that the Commission should exclude the applicant for grave professional misconduct from participation in procurement procedures and grant award procedures for a period of six months.

15 By decision of 24 March 2017, the Commission excluded ISHR-MS from participation in procurement procedures and grant award procedures for a period of two years.

16 Further to the recommendation referred to in paragraph 14 above, the Commission adopted the decision of 16 May 2017 imposing an administrative sanction consisting of the exclusion of the applicant for grave professional misconduct from participation in procurement procedures and grant award procedures covered by the general budget of the European Union and governed by Regulation No 966/2012, for a period of six months, and the exclusion of the applicant from the award of funds 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), also for a period of six months ('the contested decision').

17 In recital 39 of the contested decision, the Commission found that the fact that the documents at issue had been prepared at the request of ISHR-MS did not contradict the fact that the applicant had submitted them to the auditor with a view to convincing it that the procurement procedures had been complied with. According to that same recital, the sole fact that the applicant submitted those documents, after having admitted during the audit that no procurement procedure had been followed, made its professional integrity highly questionable, even though the applicant had not prepared those documents itself.

18 In recital 45 of the contested decision, the Commission added that, 'in opening the adversarial procedure with [the applicant], the panel indicated a possible exclusion of one year, taking into account: … the intentional behaviour of [the applicant] since the established submission of documents regarding procurement procedures to the private auditor had an obvious underlying purpose to mislead them'.

Procedure and forms of order sought

19 By application lodged at the Court Registry on 14 July 2017, the applicant brought this action.

20 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

21 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

22 In its application, the applicant puts forward four pleas in law in support of its application for the annulment of the contested decision. First, the applicant claims that the Commission's assessment of the facts which formed the basis for the sanction imposed on it was incomplete. Secondly, the applicant claims that the Commission's assessment of the facts contradicted the final audit report. Thirdly, the applicant claims that the Commission's assessment of the facts contradicted the OLAF report. Fourthly, the applicant claims that the Commission infringed its right to be heard. In its reply, the applicant also challenges the proportionality of the sanction.

23 It is appropriate first of all to examine the first three pleas in law together, in which the applicant maintains, in essence, that the Commission's assessment of the facts which formed the basis for the sanction imposed upon it was incomplete and contradicted the documents in its possession, in particular the final audit report and the OLAF report.

The first three pleas, alleging an incomplete determination of the relevant facts, an assessment of the facts in contradiction with the final audit report and an assessment of the facts in contradiction with the OLAF report

24 The applicant claims, first of all, that the Commission based the contested decision exclusively on the auditor's letter of 3 May 2013. The applicant submits that the Commission should not have relied solely on those provisional findings and ought instead to have made its decision on the basis of an overall analysis of all the available evidence, in particular that contained in the final audit report, and thus ought to have acknowledged that the facts as presented in that letter had not been upheld in the final audit report.

25 Next, the applicant maintains that, in determining that its behaviour amounted to grave professional misconduct, the Commission wrongly stated that the applicant had submitted fake documents to the auditor in order to give the impression that the procurement procedures had been complied with, even though the applicant had not prepared those documents itself. The applicant also submits that, in the final audit report, the suggestion that its representative had submitted the documents was not upheld. The applicant concludes that an overall analysis of the available evidence would have led the Commission to acknowledge that it had not submitted the documents at issue to the auditor and therefore had not engaged in any unlawful conduct.

26 Lastly, the applicant submits that, when taking its decision, the Commission should have also taken account of the OLAF report and thus acknowledged that it had not submitted the documents at issue and, therefore, that it could not be accused of any unlawful conduct. According to the applicant, the OLAF prosecutors did not reach the conclusion that a representative of the applicant had submitted the three offers in question to the auditor.

27 The Commission disputes those arguments.

28 In that regard, it should be noted in the first place that, in its letter of 3 May 2013, the auditor stated that it had initially been informed by the applicant and by ISHR-MS that no specific procedure had been followed. In addition, the auditor stated in that letter that it was a representative of the applicant who, the following day, had presented to the auditor three offers from different publishing houses, claiming that he had misunderstood the auditor's question and that the three offers had been taken into account before the supplier was chosen.

29 In the second place, according to the OLAF report, the documents submitted to the auditor in the context of the audit were fake documents that had been prepared at the request of the representative of ISHR-MS, in view of the audit, in order to give the impression that the contract had been complied with. In that report, OLAF states that it carried out a mission in Moldova and had been able to confirm the fraudulent scheme used by the beneficiary of the grant.

30 In the third place, according to the final audit report, the project coordinator initially explained to the auditor that no negotiated procedure had been followed. However, according to the report, the following day, the auditor received three different offers from publications suppliers and, one week after the audit, the beneficiary sent the auditor scanned copies of the missing documents. The only person who signed all the documents was, according to the auditor, Ms N., the project coordinator.

31 In the fourth place, it appears from the applicant's observations of 30 January 2017, as well as from paragraph 19 of the application and paragraphs 11 and 12 of the reply, that the applicant itself informed the auditor, at the meeting on 9 April 2013, that it had not organised any 'tender procedure'. On the same occasion, IHSR-MS also stated that it had not organised any 'tender procedure' either.

32 In the fifth place, in paragraphs 13 and 14 of the reply, the applicant states that, when the auditor then requested documents relating to a 'negotiated procedure' at that same meeting on 9 April 2013, it explained that it had not organised any 'tender procedure', meaning that it could not supply documents relating to any 'negotiated procedure' either. However, according to the applicant's assertions in those same paragraphs, the representative of ISHR-MS stated on that same occasion that she had in fact received three offers. The documents relating to those three offers were, according to the applicant, provided to the auditor the following day, that is, on 10 April 2013, by the same representative of ISHR-MS, in the presence of the representative of the applicant. The applicant states that it was unaware that ISHR-MS had organised a tender or received any offers.

33 It is apparent from the foregoing that the applicant admits having stated to the auditor that it had not followed any 'tender procedure' or any 'negotiated procedure' concerning the selection of the publications supplier for the action. Moreover, it is also apparent from the foregoing that the representative of ISHR-MS stated however that she had received three offers and that she then produced the documents relating to those offers at the meeting of 10 April 2013 with the auditor, at which the applicant was present.

34 Nonetheless, the applicant, whilst admitting the version of events as set out in the previous paragraph, disputes any liability for the preparation of the documents referred to in that paragraph and denies having personally submitted any such documents to the auditor at the meeting with the auditor on 10 April 2013. It is in that context that the applicant challenges the contested decision.

35 In that regard, it must be noted that, first, the applicant was present with ISHR-MS at the meeting of 10 April 2013. Secondly, it is apparent from the auditor's letter of 3 May 2013, which was contemporaneous with the facts at issue and written by an auditor independent of the Commission, that it was the applicant who, at that meeting, presented the auditor with three offers submitted by different publishing houses. Thirdly, even assuming that, as the applicant claims in the reply, it was ISHR-MS who gave the auditor the documents in question, there is nothing on the file to suggest that the applicant disassociated itself from the submission of the documents by ISHR-MS to the auditor, whereas it could have condemned the irregularity or at least abstained from participating in the meeting. Fourthly, the applicant's liability for the management of the grant contract arises from the 'Partnership Statement', from Article 16 of the grant contract and from the cooperation agreement.

36 Furthermore, despite the applicant's assertion to the contrary, the auditor's letter of 3 May 2013, stating that the applicant had given the auditor three offers submitted by different publishing houses, was not contradicted either by the OLAF report or by the final audit report. The OLAF report does not specify who gave the documents in question to the auditor, but merely states that the documents were fake and had been prepared at the request of ISHR-MS, in view of the audit, in order to give the impression that the contract had been complied with. The final audit report states that the auditor received the three offers in question at a meeting at which the applicant and ISHR-MS were both present, but without specifying the person who gave the documents to the auditor.

37 It follows from the foregoing that the Commission was right to find that the applicant had deliberately misled the auditor.

38 That finding of deliberate conduct is unaffected by the sworn statement of 10 July 2017 from Mr B., Chairman of the applicant, and annexed to the application.

39 It should be noted in that regard that, according to the case-law, although a sworn statement may have a probative value, in order to assess that value it is necessary to check the probability and the veracity of the account contained in the statement, by taking account of, inter alia, the person from whom the document originates, the circumstances in which it came into being, the person to whom it is addressed and whether, on its face, the document appears sound and reliable (see judgment of 3 July 2014, *Alchaar* v *Council*, T-203/12, not published, EU:T:2014:602, paragraph 164 and the case-law cited).

40 The sworn statement at issue originates from the applicant itself, being signed by the Chairman, and is contradicted by the version of events contained in the auditor's letter of 3 May 2013, which was written by an independent auditor at the material time. What is more, that letter is not called into question either by the final audit report or by the OLAF report.

41 In addition, in order to be able to rule on the merits of the contested decision, in particular recital 39 thereof, referred to in paragraph 17 above, a detailed analysis must be carried out of the applicant's responsibilities in connection with the action.

42 In the first place, it should be pointed out that, in signing the 'Partnership Statement' on 15 July 2011, the applicant assumed joint responsibility for the action. Through that statement, which defines a partnership as 'a relationship … between two or more organisations involving shared responsibilities in undertaking the action funded by the European Commission', the applicant was made aware of all the obligations associated with the grant contract and also authorised ISHR-MS to 'represent [it] in all dealings with the European Commission in the context of the … implementation [of the action funded by the Commission]'. The statement also provides that ISHR-MS 'must consult with [its] partners regularly and keep them fully informed of the progress of the action'.

43 In the second place, the third paragraph of Article 16.2 of Annex II to the grant contract provides that '[ISHR-MS] undertakes to give appropriate access to … all documents … concerning the technical and financial management' of the action. Article 16.3 of that annex also states that 'the documents referred to in Article 16.2 [of that annex] include … proof of procurement procedures such as tendering documents, bids from tenderers and evaluation reports'. In addition, Article 5.3 of Annex IV to the grant contract provides that 'supply contracts worth less than EUR 60 000 must be awarded by means of a negotiated procedure without publication, in which [ISHR-MS] consults at least three suppliers of its choice' and that 'for supplies of a value of EUR 10 000 or less, [ISHR-MS] may place orders on the basis of a single tender'.

44 In the third place, the cooperation agreement provides that 'ISHR-MS and [the applicant] … agree to work together for the implementation of the … project'. It states that 'ISHR-MS is ultimately responsible for the management of the project as a whole; this includes preparation and implementation of all project activities …; project accounting and monitoring, and reporting to the [Delegation of the European Union to the Republic of Moldova]'. It also provides that 'ISHR-MS will call on the advice of [the applicant] whenever needed' and that 'major issues of staff or project implementation will be discussed between the [parties] before decisions are taken'. Lastly, the cooperation agreement provides that '[the applicant] will be responsible – amongst other – for the … provision of experienced staff to support and coach [ISHR-MS] in all aspects of project management (implementation, reporting, accounting)'.

45 In view of all the foregoing, the applicant is wrong to dispute the factual assessment made by the Commission in the contested decision and to deny liability for giving the auditor the three offers relating to publications referred to in paragraph 33 above. Even though the contested decision did not cast any doubt on the fact that ISHR-MS was responsible for preparing the documents, the Commission was right to find that this did not absolve the applicant from liability for providing the documents to the auditor.

46 It is clear from the evidence described in paragraphs 42 to 44 above that ISHR-MS was ultimately responsible for the management of the project as a whole, including the preparation and implementation of all project activities. Under Article 16 of Annex II to the grant contract and Article 5.3 of Annex IV to that contract, the negotiated procedure without publication at issue in this case should have been organised. It is also clear from the matters described that, since the contract to supply publications for the action had a value of EUR 42 424.44, it should have been awarded following a negotiated procedure without publication, in which at least three suppliers ought to have been consulted.

47 However, according to the evidence described in paragraphs 42 to 44 above, ISHR-MS was to call on the advice of the applicant whenever needed and, in any event, major issues – including those relating to project implementation – were supposed to be discussed between the parties before decisions were taken. Under the cooperation agreement, in particular, the applicant was responsible for the provision of experienced staff to support and coach ISHR-MS in all aspects of the management the action, namely implementation, reporting and accounting.

48 In view of its role to support ISHR-MS, inter alia in the implementation of the project, and also given the value of the publications supply contract, namely EUR 42 424.44, which therefore represented more than 10% of the amount set as the EU's maximum funding (namely EUR 414 025), the applicant was responsible for ensuring compliance with the requirement to consult three suppliers and ensuring the veracity of the documents referred to in paragraph 33 above when they were supplied to the auditor, even though the applicant had not prepared those documents itself.

49 First, the fact that the applicant itself initially informed the auditor that it had not followed any 'tender procedure' or any 'negotiated procedure' concerning the selection of the publications supplier for the project is, in itself, a significant factor to bear in mind in relation to its liability for later providing the

documents to the auditor. In actual fact, the mere existence of the documents referred to in paragraph 33 above contradicts the information given to the auditor by the applicant, as a partner in the action..

50 Secondly, it should be noted that the documents referred to in paragraph 33 above were provided to the auditor at a meeting at which the applicant was present. In view of the applicant's responsibilities under the 'Partnership Statement', under Article 16 of the grant contract and under the cooperation agreement, its mere presence at that meeting renders the applicant liable for the provision of the documents. In the context of its role supporting ISHR-MS in the implementation of the project, the applicant had a duty, at the time the documents in question were handed over, to ensure that the negotiated procedure had been followed and the documents related to offers which had actually been received by ISHR-MS. As explained in paragraph 35 above, there is nothing on the file to suggest that the applicant disassociated itself from the provision of the documents by the ISHR-MS to the auditor at the meeting on 10 April 2013, even though the applicant was aware, in particular as a result of the auditor being informed on 9 April 2013 that no 'tender procedure' or 'negotiated procedure' had been followed, that the documents handed over were not genuine.

51 The applicant is therefore wrong to claim that, in the contested decision, the Commission's determination of the facts which formed the basis for the sanction imposed was incomplete and contradicted the documents in its possession, in particular the final audit report and the OLAF report.

52 Consequently, the first, second and third pleas must be rejected as unfounded. It is therefore unnecessary to examine the applicant's request for evidence to be taken contained in paragraphs 18 and 31 of the application.

Fourth plea, alleging infringement of the right to be heard

53 In the first part of this plea, the applicant submits that it was given the opportunity to consult the auditor's letter of 3 May 2013 and the OLAF report only after it had made a complaint alleging infringement of its right to be heard. It also maintains that it was denied the ability to adopt a position on potentially decisive points contained in those documents, since numerous passages had been redacted in the version of each of the documents sent to it. In the second part of the plea, the applicant submits that it was heard and given access to the file solely by the panel and that the Commission itself did not allow it a hearing prior to adoption of the contested decision.

54 The Commission contests those arguments. In addition, relying on Article 84 of the Rules of Procedure of the General Court, the Commission claims that the applicant's argument, raised for the first time at the stage of the reply, that that it was heard and given access to the file solely by the panel and was not given a hearing by the Commission prior to adoption of the contested decision is inadmissible.

55 In that regard, it must first be recalled that, pursuant to Article 41(1) of the Charter of Fundamental Rights of the European Union, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Pursuant to Article 41(2) of the Charter, that right includes, inter alia, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.

56 The obligation to respect the right to be heard, which applies directly to every EU institution, body, office and agency, guarantees every person directly affected by the actions of those administrations the opportunity to make known his or her views effectively during an administrative procedure that may give rise to an individual measure liable to affect his or her interests adversely (see judgment of 19 October 2017, *Bernaldo de Quirós* v *Commission*, T-649/16, not published, EU:T:2017:736, paragraph 70 and the case-law cited).

57 In relation to the first part of the fourth plea, it must be noted that the mere fact that certain passages of the documents supplied to the applicant were redacted did not, as the Commission rightly observed, infringe the applicant's right to be heard.

58 First, with regard to the auditor's letter of 3 May 2013, the facts described therein and upheld in the contested decision are those referred to in paragraph 7 above. By that letter, the auditor informed the Commission that, at a meeting, it had requested further information in relation to the procurement procedure used to select the publications supplier for the action. In its letter, the auditor reported that it had initially been informed by the applicant and by ISHR-MS that no specific procedure had been followed, due to the fact that the amounts in question, totalling EUR 42 424.44, had been put under different budget lines. The auditor also stated that, the following day, a representative of the applicant had produced three offers from different publishing houses, claiming that he had misunderstood the auditor's question and that the three offers had been consulted before the supplier was chosen.

59 It should be noted that this description of the facts was in essence upheld in the contested decision, in particular in recitals 19 and 20 thereof, and that the contested decision was not based on and does not even make reference to the passages in the auditor's letter of 3 May 2013 which, in the version of the letter sent to the applicant, had been redacted.

60 Secondly, with regard to the OLAF report, the facts described therein and upheld in the contested decision are those referred to in paragraph 29 above. It appears from that report that the documents supplied to the auditor in the context of the audit were fake documents which had been prepared at the request of the representative of ISHR-MS, in view of the audit, in order to give the impression that the contract had been complied with. In that report, OLAF states that it had been able to confirm the fraudulent scheme used by the beneficiary of the grant.

61 It is apparent that the description of the facts upheld in the contested decision, in particular in recitals 19 and 20, is also consistent with the findings of the OLAF report, referred to in paragraphs 29 and 60 above. Moreover, even though, in its report, OLAF refers only to the role of ISHR-MS and does not address the specific facts relating to the applicant on which the Commission based its adoption of the contested decision, the fact remains that in the contested decision the Commission does not rely on or even make reference to passages of that report which, in the version sent to the applicant, had been redacted.

62 In conclusion, with regard to the documents in question, the contested decision relies only on facts concerning the applicant and which are referred to in the un-redacted passages, of which the applicant was aware and on which it had the opportunity to adopt a position.

63 The first part of the fourth plea in law must therefore be rejected as unfounded.

64 In relation to the second part of the fourth plea, it is first necessary to analyse the EU legislation applicable in this case.

65 The contested decision was adopted on the basis of Article 105a(2) of Regulation No 966/2012, which reads as follows:

'2. The decision to exclude and/or to impose a financial penalty shall be taken by the contracting authority. Such a decision shall be based on a final judgment or on a final administrative decision.

However, in the situations referred to in Article 106(2), the contracting authority shall refer the case to the panel referred to in Article 108 in order to ensure a centralised assessment of those situations. In such cases, the contracting authority shall take its decision based on a preliminary classification in law, having regard to a recommendation of the panel.

…'

66 Article 106 of Regulation No 966/2012 provides as follows:

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

…

(c) it has been established by a final judgment or a final administrative decision that the economic operator is guilty of grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession to which the economic operator belongs, or by having engaged in any wrongful conduct which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence, including, in particular, any of the following:

…

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, … 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.

…'

67 Under Article 108 of Regulation 966/2012:

'5. The contracting authority may take a decision to exclude and/or to impose a financial penalty and a decision to publish the related information only after having obtained a recommendation of the panel where such a decision is based on a preliminary classification as referred to in Article 106(2).

…

8. The following procedure shall apply before the panel:

(a) the requesting contracting authority shall refer the case to the panel with the necessary information referred to in paragraph 3 of this Article, the facts and findings referred to in Article 106(2) and the alleged exclusion situation;

(b) the panel shall notify the economic operator without delay of the facts in question and their preliminary classification in law, which may qualify as an exclusion situation referred to in points (c), (d), (e) and (f) of Article 106(1) and/or may lead to the imposition of a financial penalty. The panel shall simultaneously make the same notification to the other contracting authorities;

(c) before adopting any recommendation, the panel shall give the economic operator and the notified contracting authorities the opportunity to submit observations …;

9. …

Where the contracting authority envisages taking a more severe decision than what has been recommended by the panel, it shall ensure that such a decision is taken with due respect for the right to be heard and for the rules of personal data protection'.

68 In the present case, the applicant does not dispute that it was heard by the panel. There were also three occasions when it adopted a position on the letters sent by the panel on 16 January, 9 February and 6 March 2017, by means of its own letters of 30 January, 15 February and 8 March 2017. The applicant's allegation is that it was not heard by the Commission itself prior to adoption of the contested decision, whereas, in its view, that ought to have happened.

69 In that regard, first, the Commission is wrong to contest the admissibility, as described in paragraph 54 above, of the applicant's argument that the Commission did not hear the applicant itself prior to adoption of the contested decision by claiming that it constitutes a new plea, raised by the applicant for the first time at the stage of the reply.

70 Article 84(1) of the Rules of Procedure provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure. In addition, a submission which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible. Moreover, arguments which in substance have a close connection with a plea raised in the application initiating the proceedings cannot be considered new pleas and they may be raised at the stage of the reply or the hearing (see judgment of 12 September 2012, *Italy* v *Commission*, T-394/06, not published, EU:T:2012:417, paragraph 48 and the case-law cited).

71 In the present case, first, in paragraph 32 of the application, the applicant submits that 'it was only after making a complaint in this regard that the applicant was given the opportunity to consult the [auditor's letter] of 3 May 2013 … and the OLAF report … and to adopt a position in relation to those documents'. Secondly, in paragraphs 27 and 28 of the reply, the applicant maintains that '[the Commission] is confusing the procedure referred to in Article 108 of Regulation 966/2012, followed by the panel, with that referred to in Article 106(2) [of that regulation], followed by [the Commission] to adopt its own decision', that '[it was heard and given access to the file] by [the panel]', that '[the Commission itself did not allow it a hearing] prior to adoption of the contested decision' and that 'this also constitutes an infringement of the right to be heard'.

72 Even though, in the application, the applicant presents this complaint very succinctly, the fact remains that it submits that its right to be heard was infringed due to the fact that it had the opportunity to consult the documents in question and to adopt a position about them only after it had raised a complaint in this regard. In paragraphs 43 and 44 of the defence, the Commission maintained that access to those documents had taken place at the time of the proceedings before the panel, to which the applicant responded in its reply that the infringement of its right to be heard resulted from the fact that it had not been heard by the Commission itself prior to adoption of the contested decision.

73 Consequently, despite the Commission's assertions to the contrary, the applicant did not raise a new plea in this regard in the reply but supplemented the fourth plea that it had put forward in the application by responding to the arguments relating to that plea raised by the Commission in the defence.

74 Therefore, the applicant's argument that the Commission itself did not allow it a hearing prior to adoption of the contested decision, which was raised in paragraphs 27 and 28 of the reply and which is closely connected to the plea set out in the application, is admissible.

75 However, that argument must be rejected on its substance.

76 As was mentioned in paragraph 14 above, the panel adopted a recommendation inviting the Commission to exclude the applicant for grave professional misconduct from participation in procurement procedures and grant award procedures for a period of six months. That recommendation was followed by the Commission in the contested decision.

77 Consequently, since the Commission did not envisage taking a more severe decision than what had been recommended by the panel, and since, in the contested decision, the Commission effectively followed that recommendation, there was no requirement for the applicant to be given a further hearing.

78 In that regard, as the Commission rightly submits, the applicant had been heard by the panel in accordance with the procedure under Article 108(8) and (9) of Regulation 966/2012 and, under Article 108(9), a further hearing is required only where the Commission envisages taking a more severe decision than what has been recommended by the panel, which was not so in the present case.

79 The second part of the fourth plea must therefore be rejected as unfounded and, accordingly, so must the fourth plea in its entirety.

The alleged infringement of the principle of proportionality

80 In its reply, the applicant disputes the proportionality of the sanction imposed upon it, particularly in view of the many years during which it had participated in various projects co-financed by the Commission, including as contractual partner, without this giving rise to any complaints about the impeccable work that it had carried out, the lack of any judicial or administrative decisions made against it, the one-off nature of the alleged breach and the absence of any financial loss on the part of the Commission.

81 The Commission contends that this is a new complaint raised for the first time at the stage of the reply, which is inadmissible pursuant to Article 84 of the Rules of Procedure or, in any event, unfounded.

82 In that regard, it should be noted that, pursuant to Article 108(11) 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 amending Regulation No 966/2012 (OJ 2015 L 286, p. 1), the General Court has 'unlimited jurisdiction to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed'.

83 However, according to the Court of Justice, the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas. The failure to review the whole of the contested decision of the Court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the General Court – which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts – should be obliged to undertake of its own motion a new and comprehensive investigation of the file (see, by analogy, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraphs 64 and 66).

84 In the present case, as is mentioned in paragraph 22 above, in its application the applicant relied on four pleas in law to oppose the contested decision. In the first place, the applicant claimed that the Commission's assessment of the facts forming the basis for the sanction imposed on the applicant was incomplete; in the second place, that the Commission's assessment of the facts contradicted the final audit report; in the third place, that the Commission's assessment of the facts contradicted the OLAF report; and in the fourth place, that the Commission infringed the applicant's right to be heard.

85 It must be noted that, in the application, the applicant sought the annulment of the contested decision but without disputing either the lawfulness or the proportionality of the sanction imposed upon it.

86 The complaint alleging infringement of the principle of proportionality, raised for the first time at the stage of the reply, does not therefore amount to the amplification of a plea made previously, directly or by implication, in the original application, and which is closely connected therewith.

87 Moreover, the complaint alleging infringement of the principle of proportionality is based on information that was known to the applicant when it brought its action. Under Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure. Consequently, this complaint, raised at the stage of the reply, is inadmissible.

88 Therefore, the action must be dismissed in its entirety.

Costs

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

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

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders "Pro NGO!" (Non-Governmental-Organisations/Nicht-Regierungs-Organisationen) e.V. to pay the costs.

Gervasoni Madise da Silva Passos

Delivered in open court in Luxembourg on 8 November 2018.

[Signatures]