Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

6 October 2015 *

(Financial assistance — Sixth framework programme for research, technological development and demonstration activities — Recovery of sums paid by the Commission in connection with a research contract in line with the conclusions of a financial audit — Set-off of claims — Reclassification in part of the action — Application for a declaration that a contractual claim is non-existent — Arbitration clause — Eligible costs — Unjust enrichment — Obligation to state reasons)

In Case T-216/12,

Technion — Israel Institute of Technology, established in Haifa (Israel),

Technion Research & Development Foundation Ltd, established in Haifa,

represented by D. Grisay, lawyer,

applicants,

v

European Commission, represented by D. Calciu and F. Moro, acting as Agents, assisted initially by L. Defalque and S. Woog, and subsequently by L. Defalque and J. Thiry, lawyers,

defendant,

APPLICATION (i) for annulment, under Article 263 TFEU, of the Commission's set-off decision contained in the letter of 13 March 2012 addressed to Technion — Israel Institute of Technology, seeking recovery of the sum of EUR 97 118.69, corresponding to the amount of the adjusted sums, plus interest, for contract No 034984 (Mosaica), following the conclusions of a financial audit concerning, inter alia, that contract concluded under the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European research area and to innovation (2002-2006), and (ii) for a declaration, under Article 272 TFEU, that the Commission's alleged claim on Technion under the Mosaica contract, which is the subject matter of the disputed set-off, is non-existent.

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, I. Pelikánová and E. Buttigieg (Rapporteur), Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2015,

* Language of the case: French.

gives the following

Judgment

Background to the dispute

1 Article 71(1) to (3) of 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) ('the Financial Regulation'), provides:

'1. Establishment of an amount receivable is the act by which the authorising officer by delegation or sub-delegation:

(a) verifies that the debt exists;

(b) determines or verifies the reality and the amount of the debt;

(c) verifies the conditions according to which the debt is due.

2. The own resources made available to the Commission and any amount receivable that is identified as being certain, of a fixed amount and due must be established by a recovery order to the accounting officer followed by a debit note sent to the debtor, both drawn up by the authorising officer responsible.

3. Amounts wrongly paid shall be recovered.'

2 Under Article 73(1) of the Financial Regulation:

'The accounting officer shall act on recovery orders for amounts receivable duly established by the authorising officer responsible. He/She shall exercise due diligence to ensure that the Communities receive their revenue and shall see that their rights are safeguarded.

The accounting officer shall recover amounts by offsetting them against equivalent claims that the Communities have on any debtor who himself/herself has a claim on the Communities that is certain, of a fixed amount and due.'

3 Article 79 of Commission Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1), provides:

'To establish an amount receivable the authorising officer responsible shall ensure that:

(a) the receivable is certain and not subject to any condition;

(b) the receivable is of fixed amount, expressed precisely in cash terms;

(c) the receivable is due and is not subject to any payment time;

…'

4 Article 83 of Regulation No 2342/2002, as amended by Commission Regulation (EC, Euratom) No 1248/2006 of 7 August 2006 (OJ 2002 L 227, p. 3), reads:

‘1. Where the debtor has a claim on the Communities that is certain, of a fixed amount and due, relating to a sum established by a payment order, the accounting officer shall, once the deadline referred to in Article 78(3)(b) has passed, recover established amounts receivable by offsetting.

…

3. The offsetting referred to in paragraph 1 shall have the same effect as a payment and discharge the Communities for the amount of the debt and, where appropriate, of the interest due.’

5 The applicants, Technion — Israel Institute of Technology and Technion Research & Development Foundation Ltd (‘TRDF’), are two bodies active in teaching and research. Specifically, Technion is a higher education institution in the field of technology, founded in 1912, whereas TRDF was founded by Technion in 1952 as its wholly owned subsidiary and is entirely funded by the latter; TRDF manages the administrative and financial aspects of the projects in which Technion is involved.

6 In December 2003 and in July 2006, Technion, as a member of various consortia of contractors, concluded four contracts with the Commission of the European Communities, acting on behalf of the European Community, during the course of the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006), namely, the Terregov contract, signed on 3 December 2003 (Contract No 507749), the Cocoon contract, signed on 11 December 2003 (Contract No 507126), the Qualeg contract, signed on 17 December 2003 (Contract No 507767), and the Mosaica contract, signed on 24 July 2006 (Contract No 034984).

7 The purpose of the Mosaica contract was to carry out a project entitled ‘Semantically Enhanced, Multifaceted, Collaborative Access to Cultural Heritage’ (Mosaica), consisting in a series of works described in Annex I to the contract (‘the project’). According to Article 4(2) of the Mosaica contract, the project was to run for 30 months from 1 June 2006.

8 According to Article 5 of the Mosaica contract, the Community had undertaken to make a financial contribution to the project in the form of a grant to the budget.

9 Article 12 of the Mosaica contract designated Luxembourg law as the applicable law. Furthermore, Article 13 of that contract stated that the Courts of the European Union — the Court of Justice or the General Court — had exclusive jurisdiction to adjudicate upon any dispute between the parties in which the validity, performance or interpretation of the Mosaica contract was contested.

10 According to Article 14 of the Mosaica contract, the General Conditions, which appeared in Annex II to the contract (‘General Conditions FP6’) formed an integral part of that contract.

11 Article II.19(1) of General Conditions FP6 provided as follows:

‘Eligible costs incurred for the implementation of the project must fulfil all of the following conditions:

(a) they must be actual, economic and necessary for the implementation of the project; and

…

(d) they must be recorded in the accounts of the contractor that incurred them … The accounting procedures used in the recording of costs and receipts shall respect the accounting rules of the State in which the contractor is established as well as permit the direct reconciliation between the costs and receipts incurred for the implementation of the project and the overall statement of accounts relating to the overall business activity of the contractor …'

12 Article II.19(2) of General Conditions FP6 defined the non-eligible costs which could not be charged to the project. These included, in subparagraph (e), costs declared, incurred, or reimbursed in respect of another Community project and, in subparagraph (i), any other cost which did not meet the conditions established in Article II.19.1.

13 Article II.20(1) of General Conditions FP6 defined direct costs as being any costs which met the conditions established in the abovementioned Article II.19 which could be identified by the contractor by means of his accounting system and which could be attributed directly to the project.

14 Article II.24(1)(a) of General Conditions FP6 provided, inter alia, that, where the Community contributed to the project by means of a grant to the budget, its contribution was to be based on reimbursement of the eligible costs claimed by the contractors.

15 Article II.29(1) of General Conditions FP6 provided, inter alia, that the Commission could, at any time during the contract and until five years after the end of the project, arrange for audits to be carried out, covering scientific, financial or technological aspects relating to the proper execution of the project and the contract. According to that clause, any amounts due to the Commission as a result of the findings of any such audit could be the subject of a recovery as provided for in Article II.31 of General Conditions FP6.

16 Article II.31(5) of General Conditions FP6 provided that sums could be recovered by offsetting them against any sums owed to the contractor, after informing the latter accordingly, or by calling in any financial guarantee. The contractor's prior consent was not required.

17 By letter of 29 April 2009, the Commission informed Technion of its decision to carry out a financial audit on the costs claimed in the context of the Mosaica, Cocoon and Qualeg contracts, pursuant to Article II.29 of General Conditions FP6. The audit was to be carried out by an external audit firm ('the auditor') acting as the Commission's representative.

18 On 10 May 2010, the auditor sent a copy of the draft audit report to Technion. For each of the contracts which were ultimately audited — Terregov, Cocoon, Qualeg and Mosaica — the auditor proposed an adjustment to the costs claimed by Technion from the Commission.

19 As far as the Cocoon, Terregov and Mosaica contracts in particular were concerned, the proposed adjustments related inter alia to the staff costs claimed by Technion for the services of Mr K., who was said to have been employed by Technion on a temporary basis for the performance of these contracts. The auditor, in essence, considered that it was impossible for it to establish that the time and the costs declared to the Commission by Technion for services performed by Mr K. reflected the actual time and costs, for the purposes of Article II.19(1)(a) of General Conditions FP6, and expressed doubts as to whether those services had actually been performed. Consequently, the draft audit report found, inter alia, that all the direct costs claimed by Technion for services performed by Mr K. in connection with the three contracts mentioned above must be rejected. In the case of the Mosaica contract, those direct costs amounted to EUR 81 487.38.

20 On 10 June 2010, Technion sent a letter to the auditor requesting a 15-day extension of the time limit for submitting its comments on the draft audit report. It also asked the auditor to provide it with all information relating to services performed by Mr K. for bodies other than Technion while he was employed full time by the latter.

21 By letter of 19 July 2010, the Commission granted the extension requested. The Commission also explained that it was unable to provide copies of administrative or financial documents relating to the services performed by Mr K. for bodies other than Technion since they were confidential.

22 By letter of 13 August 2010, Technion disputed the confidentiality of the abovementioned documents and asked for at least partial access to them. It also pointed out, for the sake of completeness, that the evidence mentioned in the draft audit report and in the Commission's letter of 19 July 2010 did not prove the allegations against Mr K. to the requisite legal standard.

23 The Commission replied by letter of 4 October 2010. In that letter, it stated that, in respect of the EU-funded projects in which Technion was involved and for which amounts corresponding to the services performed by Mr K. had been claimed by bodies other than Technion, it could send Technion a copy of the project management reports ('PMRs') on the ground that these had been drawn up by consortia of which Technion was a member and the latter was, therefore, aware of their contents. The Commission accordingly annexed to that letter copies of the third PMR for the Qualeg project and the first PMR for the Mosaica project.

24 On the other hand, the Commission stated that documents obtained in the context of audits carried out on members of other consortia, relating to projects in which Technion was not participating, and documents obtained in the context of an investigation were covered by the exception provided for in Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), concerning the protection of the purpose of inspections, investigations and audits.

25 Lastly, the Commission granted Technion an extension of fifteen days from the date of receipt of the letter of 4 October 2010 so that it could examine the two documents attached to that letter.

26 By letter of 18 October 2010, Technion made a confirmatory application for access to the documents at issue.

27 By letter of 19 October 2010 addressed to the Commission, Technion pointed out that the Commission's position prevented Technion from making observations on the content of the documents on the basis of which the draft audit report had found that all the costs relating to payments to Mr K. must be rejected, also pointing out that that position infringed the principle that both parties must be heard and the rights of the defence. Technion added that the information sent by the Commission in the letters of 19 July and 4 October 2010 and the draft audit report did not prove the allegations against Mr K. to the requisite legal standard. Lastly, Technion stated that it was waiting for a date to be proposed for the meeting that would bring the audit procedure to a close.

28 By letter of 26 October 2010, the Secretariat-General of the Commission acknowledged receipt of Technion's confirmatory application for access to documents and informed Technion that a reply to its application would be sent within 15 working days.

29 By letters of 18 November and 9 December 2010, the Secretariat-General of the Commission stated that it would have to extend the time limit provided for in Article 8(1) of Regulation No 1049/2001 in order to respond to that application for access to the documents.

30 By decision of 30 June 2011, the Secretary-General of the Commission confirmed the refusal to grant Technion access to the documents.

31 By letter of 2 August 2011, the Commission informed Technion that it was confirming the findings of the audit report concerning the adjustments that must be carried out, attaching a copy of that report, also informing it that it considered the audit to be closed. In that letter the Commission stated that Technion had had an opportunity to submit its observations even though it had not formally made

any and that, nonetheless, it understood that Technion was not fully in agreement with the findings of the audit report. The Commission also stated that adjustments would be made subsequently with regard to future payments or through the recovery of claims.

32 By letter of 26 August 2011, the applicants, challenging the findings of the audit report, informed the Commission of their intention to bring an action against the decision of 30 June 2011 and asked for the audit procedure to be suspended pending the outcome of the legal proceedings.

33 On 9 September 2011, the applicants brought an action for annulment of the decision of 30 June 2011, registered as Case T-480/11. That action was dismissed by the judgment of 12 May 2015 in *Technion and Technion Research & Development Foundation* v *Commission* (T-480/11, ECR, EU:T:2015:272).

34 By letter of 22 September 2011, the Commission replied to the applicants that it could not grant their request for the audit procedure to be suspended, since it considered that the documents that had been sent to them provided sufficient proof of the unreliability of the times and the costs declared by Technion.

35 On 11 October 2011, the applicants brought an action for annulment of the decision allegedly contained in the Commission's letter of 2 August 2011, registered as Case T-546/11. That action was dismissed as inadmissible by order of 14 June 2012 in *Technion and Technion Research & Development Foundation* v *Commission* (T-546/11, EU:T:2012:303).

36 By letter of 19 October 2011, la Commission informed Technion of its intention to recover the sum of EUR 97 106.72, corresponding to the total adjusted amount for the Mosaica contract following the audit report. That letter stated that if Technion sent no further observations within a period of two weeks the Commission would send it a debit note. It also stated that sums owed to the Commission and interest on account of late payment might be offset or form the subject of a compulsory collection procedure.

37 By letter of 2 November 2011, the applicants asked the Commission to suspend the audit procedure pending the outcome of Case T-546/11.

38 On 21 December 2011, the applicants brought an action for annulment of the decision allegedly contained in the Commission's letter of 19 October 2011, registered as Case T-657/11. That action was dismissed as inadmissible by order of 6 September 2012 in *Technion and Technion Research & Development Foundation* v *Commission* (T-657/11, EU:T:2012:411).

39 In reply, inter alia, to the letter of 2 November 2011, the Commission stated, in a letter dated 22 December 2011, that, in the absence of any evidence that would alter the findings of the audit report, it was not in a position to suspend the enforcement measures or to postpone the issuing of the recovery order announced in its letter of 19 October 2011.

40 On 19 January 2012, the Commission issued debit note No 3241200225 in respect of Technion for the sum of EUR 97 106.72, setting 5 March 2012 as the deadline for payment.

41 By letter of 13 March 2012, the Commission informed Technion of its decision to offset within a period of two weeks, under Article 73(1) of the Financial Regulation, the amount of EUR 97 118.69 which Technion owed it under the Mosaica contract, plus interest for delayed payment, against the amount of EUR 130 000 which it owed to Technion under three contracts with references PCIG10-GA-2011-303921-NLO, PIRG05-GA-2009-249084 AC Removal Mechanism and PCIG10-GA-2011-304020-CHAMP RNA HEL ('the contested decision'). The debit note of 19 January 2012 was attached to that letter.

Procedure and forms of order sought

42 By application lodged at the Court Registry on 18 May 2012, the applicants brought the present action, under Article 263 TFEU, for annulment of the contested decision.

43 After the Commission lodged the rejoinder, the applicants, by a document lodged at the Court Registry on 25 December 2012, sought leave to reply to the rejoinder, in order to correct a clerical error in the reply and to explain why that error did not affect their arguments.

44 By decision of 11 January 2013, the President of the First Chamber of the General Court granted the applicants leave to reply to the rejoinder, limiting their response to the matters raised in the letter of 25 December 2012.

45 The applicants submitted their response to the rejoinder on 6 February 2013 and the Commission submitted its observations on the applicants' supplementary pleading on 8 March 2013.

46 On hearing the report of the Judge-Rapporteur, the General Court (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the General Court of 2 May 1991, put written questions to the parties, to which they replied within the prescribed time limit.

47 The parties presented their oral arguments and gave their replies to the questions put by the Court at the hearing on 29 April 2015.

48 In the application, the applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

49 In the reply, the applicants claimed, in addition, that the Court should order the Commission to pay Technion the amounts unduly withheld as a result of the contested decision.

50 In the defence, the Commission contends that the Court should:

— dismiss the action as inadmissible in relation to TRDF;

— dismiss the action as unfounded in relation to Technion;

— order the applicants to pay the costs.

51 In the rejoinder, the Commission contends that the Court should dismiss as inadmissible the applicants' head of claim submitted in the reply.

Law

The subject matter of the application

52 The present action is based on Article 263 TFEU and, as is expressly stated in the introduction and in the form of order sought in the application, is strictly for annulment of the contested decision. In support of the action, the applicants put forward essentially three pleas: a 'plea alleging a manifest

error of assessment on the part of the Commission', a plea relating to the defective statement of the reasons on which the contested decision was based, and a plea alleging infringement of the principle prohibiting unjust enrichment.

53 The express founding of the action on Article 263 TFEU, and the headings of the pleas submitted in support of the action, call for the Court to exercise its powers in respect of reviewing the legality of the contested decision. As regards the nature of that decision, it must be borne in mind that an act, such as the contested decision, whereby the Commission effects an out-of-court set-off between debts and claims arising from different legal relationships with the same person is a challengeable act for the purposes of Article 263 TFEU (see, to that effect, judgments of 10 July 2003 in *Commission* v *CCRE*, C-87/01 P, ECR, EU:C:2003:400, paragraph 45; 8 October 2008 in *Helkon Media* v *Commission*, T-122/06, EU:T:2008:418, paragraph 46; and 8 November 2011 in *Walton* v *Commission*, T-37/08, ECR, EU:T:2011:640, paragraph 25). It is in the context of such an action for annulment that it is for the Court to examine the legality of a decision to off-set in the light of the effects of the failure actually to pay the contested sums to the applicant (see, to that effect, judgments in *Helkon Media* v *Commission*, EU:T:2008:418, paragraph 46, and *Walton* v *Commission*, EU:T:2011:640, paragraph 25).

54 Nonetheless, it should be noted that, in submitting the 'plea alleging a manifest error of assessment on the part of the Commission', the applicants must be considered in the present case to be seeking a declaration from the Court, under Article 272 TFEU, that the claim which the Commission alleges to have on Technion under the Mosaica contract and which is the subject matter of the disputed set-off ('the contractual claim at issue') is non-existent. The applicants challenge inter alia the finding of the audit report that Mr K's services may not 'actually', for the purposes of Article II.19(1)(a) of General Conditions FP6, have been performed and, in order to corroborate their arguments, they annexed to the application copies of the contracts between Technion and the Commission and, in particular, a copy of the Mosaica contract.

55 The present action, therefore, in reality seeks not only annulment of the contested decision but also a declaration by the Court that the Commission does not hold the contractual claim at issue on Technion.

56 In their answer to a written question from the Court (see paragraph 46 above), the applicants confirmed that understanding of the duality of the action they had brought, namely, that it is an application for annulment of the contested decision and an action for a declaration from the Court that the contractual claim at issue is non-existent.

57 Since, first, in the context of an action for annulment under Article 263 TFEU, the EU judicature does not have jurisdiction to hear an action for a declaratory judgment (see, to that effect, order of 9 December 2003 in *Italy* v *Commission*, C-224/03, EU:C:2003:658, paragraphs 20 and 21) and, secondly, the Mosaica contract contains, in Article 13, an arbitration clause within the meaning of Article 272 TFEU, giving exclusive jurisdiction to the EU judicature to hear any disputes between the parties as regards the validity, performance or interpretation of that contract, it is necessary to determine whether it is possible in the present case to reclassify the present action in part as an action brought both under Article 263 TFEU, for annulment of the contested decision, and under Article 272 TFEU, for a declaration that the Commission does not hold the contractual claim at issue. Since under Article 272 TFEU the EU Court enjoys full jurisdiction, enabling it, in contrast to a court reviewing the legality of an act under Article 263 TFEU, to hear and determine any type of action under an arbitration clause (see, to that effect, judgment of 26 February 2015 in *Planet* v *Commission*, C-564/13 P, ECR, EU:C:2015:124, paragraphs 21 to 27, and Opinion of Advocate General Kokott in *Planet* v *Commission*, C-564/13 P, ECR, C:2014:2352, points 19 to 22), Article 272 TFEU constitutes the appropriate legal basis on which to adjudicate on the applicants' application for a declaration that the contractual claim at issue is non-existent.

58 As regards the possibility of partial reclassification of the present action as an action brought under Article 272 TFEU, it should be noted that, according to settled case-law, when an action for annulment or an action for damages is brought before the Court when the dispute is, in point of fact, contractual in nature, the Court reclassifies the action, provided that the conditions for such a reclassification are satisfied (judgment of 19 September 2001 in *Lecureur* v *Commission*, T-26/00, ECR, EU:T:2001:222, paragraph 38; order of 10 May 2004 in *Musée Grévin* v *Commission*, T-314/03 and T-378/03, ECR, EU:T:2004:139, paragraph 88; and judgment of 17 June 2010 in *CEVA* v *Commission*, T-428/07 and T-455/07, ECR, EU:T:2010:240, paragraph 57).

59 On the other hand, when faced with a dispute which is contractual in nature, the Court considers itself unable to reclassify an action for annulment either where the applicant's express intention not to base his application on Article 272 TFEU precludes such a reclassification or where the action is not based on any plea alleging infringement of the rules governing the contractual relationship in question, whether they be contractual clauses or provisions of the national law designated in the contract (see judgment in *CEVA* v *Commission*, cited in paragraph 58 above, EU:T:2010:240, paragraph 59 and the case-law cited).

60 It follows that reclassification of the action is possible, without the rights of defence of the defendant institution being affected, where, first, the express intention of the applicant does not preclude it and, secondly, at least one plea alleging infringement of the rules governing the contractual relationship in question is put forward in the application pursuant to the provisions of Article 44(1)(c) of the Rules of Procedure of 2 May 1991. These two criteria are cumulative (see, to that effect, judgment of 24 October 2014 in *Technische Universität Dresden* v *Commission*, T-29/11, ECR, EU:T:2014:912, paragraph 44).

61 In the present case, first, in their answers to a written question put by the Court (see paragraph 46 above), the applicants agreed to the partial reclassification of the action.

62 Secondly, as stated in paragraph 54 above, the applicants disputed the existence of the contractual claim at issue, making express reference to Article II.19(1) of General Conditions FP6.

63 It should moreover be noted that, in the defence, the Commission gave a detailed presentation of the Mosaica contract, highlighting the clauses that were relevant for the purpose of resolving the dispute. Furthermore, it also put forward the argument that Technion had failed to fulfil its obligations under Article II.19 of General Conditions FP6, which, according to the Commission, limits the EU's financial contribution to eligible costs, namely costs that are actual and justified. That argument shows that the Commission understood that the applicants disputed, in essence, the existence of the contractual claim at issue and were therefore able properly to defend themselves in the defence. Moreover, at the hearing the Commission stated that, in the event of partial reclassification of the action, its rights of defence would not be affected.

64 On the other hand, at the hearing the Commission expressed disagreement with partial reclassification of the action.

65 In particular, first, the Commission argued that, as is clear from the judgments in *Commission* v *CCRE*, cited in paragraph 53 above (EU:C:2003:400), and *Helkon Media* v *Commission*, cited in paragraph 53 above (EU:T:2008:418), the validity of a set-off decision can be challenged only in the context of Article 263 TFEU.

66 That argument does not call into question partial reclassification in the present case, since the objective of such reclassification is not to enable the Court to examine the validity of the contested decision. Such examination may be conducted, without reclassification, under Article 263 TFEU, which constitutes the express legal basis for the action brought. However, partial reclassification in the present case is intended to enable the Court to give a ruling on the applicants' action for a declaration

that the contractual claim at issue is non-existent. That possibility of partial reclassification is by no means called in question by the judgments in *Commission* v *CCRE*, cited in paragraph 53 above (EU:C:2003:400), and *Helkon Media* v *Commission*, cited in paragraph 53 above (EU:T:2008:418), relied on by the Commission.

67 Secondly, the Commission has relied on the circumstance that, in the orders in *Technion and Technion Research & Development Foundation* v *Commission*, cited in paragraph 35 above (EU:T:2012:303), and *Technion and Technion Research & Development Foundation* v *Commission*, cited in paragraph 38 above (EU:T:2012:411), the Court had decided not to reclassify the respective actions for annulment as actions based on Article 272 TFEU, notwithstanding the fact that the pleas relied upon in support of those actions for annulment were the same as those relied on in the present case.

68 In that regard, it should be noted that no parallel can be drawn between the cases giving rise to the abovementioned orders and the present case. In the abovementioned orders, the Court found that the applicants had not put forward, even summarily, any plea, argument or complaint alleging infringement of the provisions of the contracts at issue or of those of the relevant national law (orders in *Technion and Technion Research & Development Foundation* v *Commission*, cited in paragraph 35 above, EU:T:2012:303, paragraphs 62 to 65, and *Technion and Technion Research & Development Foundation* v *Commission*, cited in paragraph 38 above, EU:T:2012:411, paragraphs 58 to 60). However, in the present case, as stated in paragraphs 54 and 62 above, the applicants have claimed such infringement of contractual provisions. It follows that the legal and factual circumstances which led the Court not to proceed to reclassification of the actions in the cases giving rise to the abovementioned orders are different from the circumstances giving rise to the present case.

69 Thirdly and lastly, the Commission has contended that reclassification in the present case was not necessary since the Court's review of legality could extend to cover the interpretation and application of the Mosaica contract. To support that contention, first, the Commission drew a parallel between review of the legality of the contested decision and review of the legality of a decision awarding a public contract and held that, since, in the context of the latter review, the court could examine the specification, by analogy, in the context of review of the legality of the contested decision, the court could examine the Mosaica contract. Secondly, the Commission relied on the judgments of 21 September 2011 in *Berliner Institut für Vergleichende Sozialforschung* v *Commission* (T-34/08, EU:T:2011:504); of 28 March 2012 in *Berliner Institut für Vergleichende Sozialforschung* v *Commission* (T-296/08, EU:T:2012:162), of 13 September 2013 in *Berliner Institut für Vergleichende Sozialforschung* v *Commission* (T-73/08, EU:T:2013:433), and of 12 December 2013 in *Berliner Institut für Vergleichende Sozialforschung* v *Commission* (T-171/08, EU:T:2013:639), arguing that in those judgments the Court had examined the contracts at issue in the context of a review of the legality of the contested measures.

70 In that regard, first of all, it is necessary to reject the parallel drawn by the Commission between the present case and proceedings relating to public contracts, since the specification does not constitute a contract in the context of a tendering procedure. Secondly, the reference made by the Commission, in general and abstract terms, to the case-law referred to in paragraph 69 above does not show that partial reclassification of the action in the present case is impossible or inopportune, since such reclassification satisfies the cumulative conditions laid down in that regard by the well-established case-law referred to in paragraphs 58 to 60 above.

71 In the light of the above considerations, it is necessary to reclassify the present action in part as an action brought both on the basis of Article 263 TFEU for annulment of the contested decision and on the basis of Article 272 TFEU for a declaration that the Commission does not hold the contractual claim at issue.

72 It is appropriate to examine, first, the part of the action based on Article 272 TFEU.

The application for a declaration that the contractual claim at issue is non-existent

73 As a preliminary point, it should be noted, with regard to the application for a declaration that the contractual claim at issue is non-existent, that the action is admissible only so far as Technion is concerned. As TRDF is not a party to the Mosaica contract containing the arbitration clause, the action, in so far as the abovementioned application is concerned, is not admissible since it was brought by that body (see, to that effect, judgment of 16 December 2010 in *Commission* v *Arci Nuova associazione comitato di Cagliari and Gessa*, T-259/09, EU:T:2010:536, paragraph 40 and the case-law cited). The applicants moreover accepted, at the hearing, that the part of the action based on Article 272 TFEU was inadmissible so far as TRDF was concerned.

74 As regards the substance, Technion challenges before the Court the auditor's finding, approved by the Commission, that the costs claimed from the Commission in connection with Mr K's services may not 'actually', for the purposes of Article II.19(1)(a) of General Conditions FP6, have been incurred. In that regard, Technion maintains that the documents at its disposal, and in particular the first PMR for the Mosaica project, which was sent to it by letter of 4 October 2010, do not show that Mr K. had been working on the Mosaica project for several bodies at one and the same time. In that context, Technion also contends that, during the audit procedure, its rights of defence were infringed, since the Commission denied it access to the documents on which the auditor had, allegedly, based its findings. Technion was therefore unable to put forward its case effectively.

75 The Commission rejects those arguments.

76 It should be noted that the auditor found that all the direct costs claimed from the Commission by Technion in connection with Mr K.'s services were ineligible, on the ground that it was impossible for the auditor to establish that those costs had 'actually', for the purposes of Article II.19(1)(a) of General Conditions FP6, been incurred.

77 In the first place, the auditor discovered a number of errors in Mr K.'s timesheets, which cast doubt on the accuracy of their content. Firstly, the timesheets were all signed together, on the same date and in retrospect for the previous year. Secondly, some of the timesheets were not signed by the project manager. Thirdly, the hours worked as recorded by Mr K. appeared to be budgeted hours and not actual hours, since they were the same for every day throughout the period audited.

78 In the second place, on the basis of information supplied by the Commission and on the basis of its audit, the auditor found that Mr K. had worked for other bodies besides Technion at one and the same time. According to the auditor's finding, the contracts concluded between Mr K. and Technion showed that Mr K. was employed full time by that body. Furthermore, the auditor was informed during the audit that the contracts concluded between Technion and Mr K. did not allow the latter to work for other bodies at the same time without notifying Technion of that fact. According to the information available to the auditor, Mr K. had not notified Technion to that effect.

79 On the basis of that evidence, the auditor expressed doubts as to whether Technion had declared to the Commission the actual times and costs relating to Mr K.'s services and noted that it was unable to establish that they were the actual times and costs. The auditor also noted that neither was Technion in a position to establish that they were the actual times and costs. It therefore proposed that all the direct costs claimed in connection with Mr K.'s work should be excluded.

80 It should be noted that at no point did Technion challenge the auditor's findings that Mr K.'s timesheets were unreliable or, more generally, the auditor's inability to establish the extent to which Mr K. had actually performed services in connection with the various projects in which Technion took part and, in particular, in connection with the Mosaica project. Technion merely challenged the finding that Mr K. had worked at the same time for other bodies.

81 In that regard, it should be noted that, as is clear in particular from Article 19(1)(a) and (d), and from Article 20(1) of General Conditions FP6, the methods for recording and certifying working time used by a contractor must enable the Commission to verify that the costs declared represent actual expenses, correspond to economic rationality, are necessary for carrying out the project and can be directly attributed to the project.

82 It is not disputed that the timesheets of the staff employed on a project constitute a means whereby the Commission can carry out the abovementioned checks and must therefore be reliable. It is also clear from case-law that failure to comply with the obligation to submit, at the time of a financial audit, reliable timesheets to justify the personnel costs declared constitutes sufficient grounds for rejecting all those costs (see, to that effect, judgments of 22 May 2007 in *Commission* v *IIC*, T-500/04, ECR, EU:T:2007:146, paragraphs 114 to 117, and *CEVA* v *Commission*, cited in paragraph 58 above, EU:T:2010:240, paragraph 139 and the case-law cited).

83 In the present case, in the absence of any challenge by Technion in that regard, it is necessary to approve the auditor's finding that the three factors identified in paragraph 77 above rendered Mr K.'s timesheets unreliable and hence deprived the Commission of a useful tool for checking whether or not the costs declared were eligible.

84 Furthermore, it should be noted that at no time did Technion provide any evidence showing that Mr K. had actually provided the services or calling into question more generally the auditor's finding that Technion was not in a position to ensure that the costs declared in connection with Mr K.'s services had actually been incurred. As the EU Court has already pointed out in the context of a case concerning the Sixth Framework Programme, the Commission's contractors are subject to the obligation that they must be in a position to show that the expenses they declare to be eligible for funding from the EU budget have actually been incurred, and that obligation arises from the need for them to prove that the condition laid down in Article II.19(1) of General Conditions FP6 that expenses must be eligible is fulfilled (judgment of 2 October 2012 in *ELE.SI.A* v *Commission*, T-312/10, EU:T:2012:512, paragraph 115).

85 Technion has merely argued that the information which had been sent to it, inter alia the audit report and the first PMR for the Mosaica project, did not show that Mr K. worked on that project for several bodies at one and the same time.

86 First of all, that argument does not prove the reliability of Mr K.'s timesheets or, more generally, the existence within Technion of an audit system enabling the Commission to check whether the costs declared complied with the requirements laid down in Article II.19(1)(a) of General Conditions FP6 (see paragraph 84 above). That argument is therefore ineffective.

87 In any event, it should be noted that the PMRs sent to Technion, read in conjunction with the information contained in the final audit report, show that other bodies besides Technion declared hours worked and costs incurred in respect of services provided by Mr K. during periods when he was deemed to have been working full time for Technion (see paragraph 78 above). That circumstance was such as to cast doubt on whether Mr K. actually worked all the hours declared and whether the costs declared were actually incurred, given also the unreliability of the timesheets. Technion's argument was limited to a set of abstract, arbitrary deductions, and was not corroborated by any evidence to prove that Mr K. actually worked the hours declared.

88 It is also necessary to reject Technion's argument that it fulfilled the requirements of the Mosaica contract satisfactorily by providing services 'in the most effective way'. It should be recalled that, according to a fundamental principle of European Union financial aid, the Union can subsidise only expenses which have actually been incurred. It follows from that principle that it is not sufficient for the beneficiary of the aid to show that a project has been carried out for the allocation of a specific subsidy to be justified. The beneficiary of the aid must, in addition, produce evidence that he has

incurred the expenses declared in accordance with the conditions laid down for the grant of the aid concerned, with only those expenses which are properly justified being capable of being regarded as eligible. His obligation to satisfy the prescribed financial conditions is even one of his essential commitments and accordingly determines the allocation of European Union financial aid (see judgment in *Technische Universität Dresden* v *Commission*, cited in paragraph 60 above, EU:T:2014:912, paragraph 71 and the case-law cited).

89 Lastly, nor is it possible to accept Technion's complaint that its rights of defence were infringed, since the information that was available to it was sufficient to warrant the findings of the audit report. In any event, the Court, in its judgment in *Technion and Technion Research & Development Foundation* v *Commission*, cited in paragraph 33 above (EU:T:2015:272), upheld the Commission's decision to deny Technion access to certain documents under Regulation No 1049/2001.

90 In the light of the above considerations, it must be concluded that the Commission was entitled to take the view that all the costs in connection with Mr K.'s services were ineligible and that accordingly it did hold the contractual claim at issue. In consequence, Technion's application under Article 272 TFEU must be dismissed.

91 It follows also that the head of claim submitted in the reply must also be rejected. In any event, that head of claim is inadmissible under Article 44(1)(c) of the Rules of Procedure of 2 May 1991 since, having been submitted for the first time in the reply, it is out of time (see, to that effect, judgment of 31 January 2001 in *Sunrider* v *OHIM (VITALITE)*, T-24/00, ECR, EU:T:2001:34, paragraph 12).

The application for annulment of the contested decision

Admissibility in relation to TRDF

92 Without formally submitting a plea of inadmissibility pursuant to Article 114 of the Rules of Procedure of 2 May 1991, the Commission contends that the application for annulment is inadmissible as regards TRDF inasmuch as the contested decision is not of direct concern to TRDF within the meaning of the fourth paragraph of Article 263 TFEU.

93 In that respect, it must be noted that it is for the General Court to assess what is required in the circumstances of the case for the proper administration of justice (judgment of 26 February 2002 in *Council* v *Boehringer*, C-23/00 P, ECR, EU:C:2002:118, paragraphs 50 to 52). In the present case, the General Court considers it appropriate to rule first of all on the substance of the application.

Substance

94 In support of the application for annulment of the contested decision, the applicants put forward a plea relating to the defective statement of the reasons on which the contested decision is based and a plea alleging breach of the principle prohibiting unjust enrichment.

– Plea claiming defective statement of reasons

95 As the Commission correctly points out, the applicants put forward no arguments in support of the plea that the statement of reasons for the contested decision is defective. In any event, it should be noted that the Commission complied with the obligation to state reasons laid down in Article 296 TFEU.

96 In that regard, it has been consistently held that this statement must be appropriate to the measure concerned and the context in which the measure was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the EU Court to carry out its review and to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether the measure is well founded (see, to that effect, judgment of 28 March 2012 in *Ryanair* v *Commission*, T-123/09, ECR, EU:T:2012:164, paragraph 177 and the case-law cited).

97 It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him (see judgment of 15 April 2011 in *Czech Republic* v *Commission*, T-465/08, ECR, EU:T:2011:186, paragraph 163 and the case-law cited).

98 The statement of reasons required for a decision to offset must be such as to allow precise identification of the claims to be offset, without there being any requirement for the initial reasons used in support of establishing each of these claims to be repeated in the act of offsetting (judgment in *Czech Republic* v *Commission*, cited in paragraph 97 above, EU:T:2011:186, paragraph 164).

99 In the present case, it should be noted that the contested decision clearly identifies the claims which are the subject matter of the disputed set-off and the legal relationships giving rise to those claims, which were, first, the Mosaica contract and, secondly, the three contracts referred to in paragraph 41 above. The contested decision also contains, in an annex, a copy of the debit note which, by referring to the results of the audit, explains, briefly but adequately, the origin of the Commission's claim in relation to Technion. The debit note refers in addition to the Commission's pre-information letter of 19 October 2011 (see paragraph 36 above), thus clarifying, should there have been any need to do so, the context in which that note was issued. Lastly, it should be noted that the contested decision clearly identifies its legal basis through reference to Article 73 of the Financial Regulation.

100 Accordingly, it must be considered that the contested decision was adopted in circumstances known to the applicants, which enabled them to understand the scope of the measure concerning them. It must therefore be held that that decision is sufficiently reasoned. The present plea must therefore be dismissed.

– The plea alleging breach of the principle prohibiting unjust enrichment

101 The applicants contend that, by applying the disputed set-off, the Commission infringed the principle prohibiting unjust enrichment, since, after that disputed set-off, its assets were enriched, to the detriment of Technion's assets, without cause or justification.

102 The Commission challenges that argument.

103 As the Court has already held, it is clear from the majority of national legal systems that actions based on unjust enrichment are designed, in specific civil law circumstances, to constitute a source of non-contractual obligation on the part of persons in the position of the enriched party involving, in general, refund of sums paid in error (judgment of 16 November 2006 in *Masdar (UK)* v *Commission*, T-333/03, ECR, EU:T:2006:348, paragraph 91).

104 In order for an action for unjust enrichment to be upheld, it is essential that there be no valid legal basis for the enrichment. That condition is not satisfied, in particular, where the enrichment derives from contractual obligations (judgment of 16 December 2008 in *Masdar (UK)* v *Commission*, C-47/07 P, ECR, EU:C:2008:726, paragraph 46).

105 In the present case, it should be noted that the Commission's alleged enrichment originates from the Mosaica contract between itself and Technion. In those circumstances, that enrichment cannot be described as 'unjust'. The present plea must therefore be dismissed.

106 In consequence, the application for annulment of the contested decision must also be dismissed, without there being any need to examine the plea of inadmissibility raised in defence by the Commission.

107 It follows from the above considerations that the action must be dismissed in its entirety.

Costs

108 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Technion — Israel Institute of Technology and Technion Research & Development Foundation Ltd to pay the costs.**

Kanninen Pelikánová Buttigieg

Delivered in open court in Luxembourg on 6 October 2015.

[Signatures]