Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

26 September 2024*

(Appeal – Public supply contracts – Irregularities in the procedure for the award of a public contract – European Commission recovery decision adopted after the signature of the contract – Legal nature – Decision not having effects exclusively in the context of that contract – Protection of the European Union's financial interests – Administrative measures – Exercise of powers as a public authority – Action for annulment – Article 263 TFEU – Jurisdiction of the EU judicature)

In Joined Cases C-160/22 P and C-161/22 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 March 2022,

European Commission, represented initially by B. Araujo Arce, J. Baquero Cruz and J. Estrada de Solà, acting as Agents, and subsequently by J. Baquero Cruz, F. Blanc, J. Estrada de Solà and P. Ortega Sánchez de Lerín, acting as Agents,

appellant,

the other party to the proceedings being:

HB, represented by L. Levi, avocate,

applicant at first instance,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Piçarra (Rapporteur), N. Jääskinen and M. Gavalec, Judges,

Advocate General: J. Kokott,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 27 September 2023,

after hearing the Opinion of the Advocate General at the sitting on 25 January 2024,

gives the following

* Language of the case: French.

Judgment

1 By its appeals, the European Commission seeks to have set aside in part the judgments of the General Court of the European Union of 21 December 2021, *HB* v *Commission* (T-795/19, 'the first judgment under appeal', EU:T:2021:917), and of 21 December 2021, *HB* v *Commission* (T-796/19, 'the second judgment under appeal', EU:T:2021:918) (together, 'the judgments under appeal'), by which it dismissed as inadmissible the actions for annulment brought by HB against Commission Decision C(2019) 7319 final of 15 October 2019 to reduce the amounts due under contract CARDS/2008/166-429 and to recover the amounts unduly paid ('the CARDS recovery decision') and Commission Decision C(2019) 7318 final of 15 October 2019 to reduce the amounts due under contract TACIS/2006/101-510 and to recover the amounts unduly paid ('the TACIS recovery decision'), respectively (together, 'the decisions at issue').

Legal context

Regulation (EC, Euratom) No 2988/95

2 Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1) provides:

'"Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

3 Article 2(1) of that regulation provides:

'Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.'

4 According to Article 4(1) of that regulation:

'As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

– by an obligation to pay or repay the amounts due or wrongly received,

– by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.'

The 2002 Financial Regulation

5 Article 103 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), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1) ('the 2002 Financial Regulation'), which was repealed with effect from 31 December 2012, provided:

'Where the award procedure proves to have been subject to substantial errors, irregularities or fraud, the institutions shall suspend the procedure and may take whatever measures are necessary, including the cancellation of the procedure.

Where, after the award of the contract, the award procedure or the performance of the contract prove to have been subject to substantial errors, irregularities or fraud, the institutions may, depending on the stage reached in the procedure, refrain from concluding the contract or suspend performance of the contract or, where appropriate, terminate the contract.

Where such errors, irregularities or fraud are attributable to the contractor, the institutions may in addition refuse to make payments, may recover amounts already paid or may terminate all the contracts concluded with this contractor, in proportion to the seriousness of the errors, irregularities or fraud.'

The 2018 Financial Regulation

6 Entitled 'Assigned revenue', Article 21 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1) ('the 2018 Financial Regulation'), provides, in paragraph 3(b):

'The following shall constitute internal assigned revenue:

…

(b) revenue arising from the repayment, in accordance with Article 101, of amounts wrongly paid'.

7 Article 131 of the 2018 Financial Regulation, entitled 'Suspension, termination and reduction', provides, in paragraphs 2 and 4 thereof:

'2. Where, after the award, the award procedure proves to have been subject to irregularities or fraud, the authorising officer responsible may:

(a) refuse to enter into the legal commitment or cancel the award of a prize;

(b) suspend payments;

(c) suspend the implementation of the legal commitment;

(d) where appropriate, terminate the legal commitment in whole or with regard to one or more recipients.

…

4. In addition to measures referred to in paragraph 2 or 3, the authorising officer responsible may reduce the grant, the prize, the contribution under the contribution agreement or the price due under a contract in proportion to the seriousness of the irregularities, fraud or of the breach of obligations, including where the activities concerned were not implemented or were implemented poorly, partially or late.

…'

Background to the disputes

8 The background to the two disputes at issue was set out by the General Court in paragraphs 1 to 29 of the first judgment under appeal and in paragraphs 1 to 24 of the second judgment under appeal, respectively, and may, for the purposes of the present proceedings, be summarised as follows.

9 As regards the case that gave rise to the second judgment under appeal, on 25 January 2006, the European Union, represented by its Delegation to Ukraine, launched a call for tenders with a view to concluding a contract for the provision of technical assistance services to the Ukrainian authorities for the approximation of Ukrainian legislation to that of the European Union. That contract formed part of the Technical Assistance to the Commonwealth of Independent States (TACIS) programme, which aimed to promote the transition to a market economy and to strengthen democracy and the rule of law in the partner countries of Eastern Europe and Central Asia.

10 On 17 July 2006, the contract TACIS/2006/101-510 ('contract TACIS/2006/101-510') was awarded to the consortium coordinated by HB from among eight tenderers that had submitted bids. The corresponding contract ('the TACIS contract') was signed the same day for a maximum contract value of EUR 4 410 000.

11 As regards the case that gave rise to the first judgment under appeal, on 24 October 2007, the European Union, represented by the European Agency for Reconstruction (EAR), launched a call for tenders with a view to concluding a contract for the provision of technical assistance services to the High Judicial Council in Serbia. That contract formed part of the Community Assistance for Reconstruction, Development and Stabilisation (CARDS) programme, the purpose of which was to provide EU assistance to the countries of south-eastern Europe with a view to their participation in the stabilisation and association process with the European Union.

12 On 10 June 2008, the contract CARDS/2008/166-429 ('contract CARDS/2008/166-429') was awarded to the consortium coordinated by HB from among five tenderers that had submitted bids. The corresponding contract ('the CARDS contract') was signed on 30 July 2008 for a maximum contract value of EUR 1 999 125.

13 Both the CARDS contract and the TACIS contract (together, 'the contracts at issue') stipulated, inter alia, that any matter not covered by the respective contract would be governed by Belgian law and that any dispute relating to that contract that could not be settled amicably would fall within the exclusive jurisdiction of the courts of Brussels (Belgium). Where a party contracting with the European Union is guilty of errors, irregularities or fraud in the procurement procedure, those contracts provided that the European Union could, first, refuse to make the payments due and/or to recover, proportionately, the amounts already paid and, secondly, terminate the contract, in particular where the other party to the contract is guilty of serious professional misconduct.

14 Following a fact-finding mission undertaken by the European Anti-Fraud Office (OLAF), that office identified, in a report dated 7 April 2009, the existence of serious irregularities and possible acts of corruption relating to HB's participation in the calls for tender concerning both contract CARDS/2008/166-429 and contract TACIS/2006/101-510. OLAF, in final investigation reports sent to the Commission on 19 April 2010 and 28 November 2011, respectively, confirmed the existence of those irregularities and of those acts and recommended the termination of the contracts at issue, the performance of which had been suspended in the meantime, and the recovery of the amounts unduly paid.

15 On 19 March 2013, the EU Delegation to Ukraine informed HB that the TACIS contract could be considered as having been performed following approval of the final report, payment of the final invoice and reimbursement of the bank guarantee. On 24 May 2018, that delegation notified HB of its intention to recover all sums paid under that contract, amounting to EUR 4 241 507. Following HB's opposition, that delegation confirmed that intention by letter of 5 December 2018.

16 On 15 October 2019, the Commission adopted the TACIS recovery decision.

17 On 11 July 2014, the EU Delegation to Serbia, to which the CARDS contract had been transferred following the EAR's closure, informed HB of its intention to terminate that contract on account of serious allegations that contract CARDS/2008/166-429 was awarded unlawfully and confirmed that intention by letter of 8 May 2015. On 9 November 2015, that delegation sent HB a recovery order in the amount of EUR 1 197 055.86.

18 On 15 October 2019, the Commission adopted the CARDS recovery decision.

19 By the decisions at issue, concerning, inter alia, Article 103 of the 2002 Financial Regulation, Article 131 of the 2018 Financial Regulation and Article 4 of Regulation No 2988/95, the Commission found that the procedures for the award of contract CARDS/2008/166-429 and contract TACIS/2006/101-510 had been the subject of an irregularity, within the meaning of those Articles 103 and 131, attributable to the respective consortia coordinated by HB (Article 1). Consequently, the amounts of those contracts were reduced to EUR 0 (Article 2) and all payments made under those contracts were considered to have been unduly paid and to be subject to recovery (Article 3). Article 5 of those decisions stated that, in accordance with Article 263 TFEU, 'an action for annulment of [those decisions could] be brought within two months to the Court of Justice of the European Union'.

The proceedings before the General Court and the judgments under appeal

Case T-795/19

20 By application lodged at the Registry of the General Court on 19 November 2019, HB brought an action under Article 263 TFEU and the second paragraph of Article 340 TFEU claiming that the General Court should:

– annul the CARDS recovery decision;

– order the reimbursement of any amounts recovered by the Commission on the basis of the CARDS recovery decision, together with default interest calculated on the basis of the rate applied by the European Central Bank (ECB) increased by seven points;

– order the Commission to pay the last invoice issued, in the amount of EUR 437 649.39, plus default interest calculated on the basis of the rate applied by the ECB increased by seven points;

– order the release of the bank guarantee and compensation for the material damage suffered as a result of its late release;

– order the symbolic payment of EUR 1 by way of damages, 'subject to adjustment';

– order the Commission to pay all the costs.

21 The Commission contended that the General Court should:

– dismiss the application for annulment of the CARDS recovery decision as being unfounded;

– dismiss the other claims as being inadmissible or, in any event, as being unfounded;

– order HB to pay the costs.

22 By the first judgment under appeal, the General Court raised of its own motion the inadmissibility of the action in so far as it sought the annulment of the CARDS recovery decision. After examining, in paragraphs 67 to 88 of that judgment, the content of that decision, the General Court found, in paragraph 89 of that judgment, that that decision was only capable of producing effects in the context of the CARDS contract and that it could not be separated from that contract. The General Court concluded, in paragraph 90 of that judgment, that the CARDS recovery decision was not, in view of its nature, an act that could be the subject of an action for annulment on the basis of Article 263 TFEU. It thus rejected as inadmissible the head of claim seeking annulment of that decision. Furthermore, in so far as that action sought to establish the non-contractual liability of the European Union, the General Court dismissed it, in paragraphs 97 to 103 of the first judgment under appeal, as unfounded. Lastly, in paragraphs 107 and 108 of that judgment, the General Court held that, in the present case, Article 5 of that decision had been at the origin of the dispute and, therefore, also ordered the Commission to pay HB's costs, even though HB had been unsuccessful.

Case T-796/19

23 By application lodged at the Registry of the General Court on 19 November 2019, HB brought an action under Article 263 TFEU and the second paragraph of Article 340 TFEU, claiming that the General Court should:

– annul the TACIS recovery decision;

– order the reimbursement of any amounts recovered by the Commission on the basis of the TACIS recovery decision, together with default interest calculated on the basis of the rate applied by the ECB increased by seven points;

– order the symbolic payment of EUR 1 by way of damages, 'subject to adjustment';

– order the Commission to pay all the costs.

24 The Commission contended that the General Court should:

– dismiss the action for annulment of the TACIS recovery decision as unfounded;

– dismiss the entire claim for damages as inadmissible or as unfounded; and

– order HB to pay the costs.

25 By the second judgment under appeal, the General Court raised of its own motion the inadmissibility of the action in so far as it sought the annulment of the TACIS recovery decision. After examining, in paragraphs 62 to 85 of that judgment, the content of that decision, the General Court found, in paragraph 86 of that judgment, that that decision was only capable of producing effects in the context of the TACIS contract and could not be separated from that contract. The General Court concluded, in paragraph 87 of that judgment, that the TACIS recovery decision was not, in view of its nature, an act that could be the subject of an action for annulment on the basis of Article 263 TFEU. Consequently, it rejected as inadmissible the head of claim seeking the annulment of that decision. Furthermore, in so far as that action sought to establish the non-contractual liability of the European Union, the General Court dismissed it, in paragraphs 93 to 99 of the second judgment under appeal, as unfounded. Lastly, in paragraphs 103 and 104 of that judgment, the General Court held that, in the present case, Article 5 of that decision had been at the origin of the dispute and, therefore, also ordered the Commission to pay HB's costs, even though HB had been unsuccessful.

Forms of order sought and procedure before the Court of Justice

26 By its appeal in Case C-160/22 P, the Commission claims that the Court of Justice should:

– set aside the first judgment under appeal, in so far as it dismissed as inadmissible HB's action for annulment of the CARDS recovery decision and ordered the Commission to pay the costs, including those relating to the proceedings for interim relief;

– refer the case back to the General Court for it to rule on the substance of the action for annulment and on costs; and

– order HB to pay the costs.

27 By its appeal in Case C-161/22 P, the Commission claims that the Court of Justice should:

– set aside the second judgment under appeal, in so far as it dismissed as inadmissible HB's action for annulment of the TACIS recovery decision and ordered the Commission to pay the costs, including those relating to the proceedings for interim relief;

– refer the case back to the General Court for it to rule on the substance of the action for annulment and on costs; and

– order HB to pay the costs.

28 In its response to both appeals, HB contends that the Court should:

– dismiss both appeals and

– order the Commission to bear all of the costs.

29 By decision of the President of the Court of 11 May 2022, Cases C-160/22 P and C-161/22 P were joined for the purposes of the written and oral parts of the procedure and of the judgment.

The appeals

30 In support of the appeals brought in Cases C-160/22 P and C-161/22 P, the Commission relies on three ground of appeal that, in its view, are 'closely linked', since the articles that make up the decisions at issue constitute an inseparable unit, which would be devoid of any legal meaning in the absence of any one of those articles.

Admissibility

Arguments of the parties

31 HB submits that, in so far as the actions brought against the decisions at issue were dismissed by the General Court as inadmissible, the appeals brought by the Commission are themselves inadmissible, since that institution has not even been partially unsuccessful in its submissions at first instance, as required by Article 56 of the Statute of the Court of Justice of the European Union.

32 The Commission contends that, in so far as the General Court dismissed the actions for annulment brought against the decisions at issue as inadmissible, it was unsuccessful in its claim that those actions should be declared unfounded, which presupposed that the General Court had jurisdiction and, therefore that the actions were admissible.

Findings of the Court

33 Under the second paragraph of Article 56 of the Statute of the Court of Justice of the European Union, an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions.

34 In the present case, as recalled in paragraphs 21 and 24 of the present judgment, the Commission contended, at first instance, that the actions for annulment brought against the decisions at issue should be dismissed as unfounded.

35 By dismissing those actions as inadmissible, the General Court rejected the premiss that that court has jurisdiction to hear those actions, on which the Commission's reasoning was based. It must therefore be held that the Commission was unsuccessful in its claims at first instance.

36 It follows that the appeals in Cases C-160/22 P and C-161/22 P are admissible.

Substance

Arguments of the parties

37 By the three grounds of appeal in Cases C-160/22 P and C-161/22 P, concerning, respectively, paragraphs 67 to 90 of the first judgment under appeal and paragraphs 62 to 87 of the second judgment under appeal, which, on account of the connection between them, it is appropriate to examine together, the Commission complains that the General Court erred in that it 'contractualised' the powers of a public authority conferred on it in particular by Article 103 of the 2002 Financial Regulation and by which it may find irregularities vitiating a public contract and, consequently, reduce the price of that contract and recover amounts unduly paid.

38 The Commission submits, in the first place, that the General Court 'subverts the EU legal system' in holding, in paragraphs 75 and 76 of the first judgment under appeal and in paragraphs 70 and 71 of the second judgment under appeal, that the contracts at issue 'absorb' the measures of a public authority on the basis of the combined provisions of that Article 103 and of Article 4 of Regulation No 2988/95, referred to in Articles 1 to 3 of the decisions at issue, with the consequence that those measures are subject to review by the court having jurisdiction over the contract. By failing to take account of the legal nature of those decisions and by relying solely on the fact that a contract had been signed before those decisions were adopted, the General Court disregarded the judgment of 16 July 2020, *ADR Center* v *Commission* (C-584/17 P, EU:C:2020:576, paragraphs 69 to 72).

39 By considering, in paragraphs 76 and 77 of the first judgment under appeal and in paragraphs 71 and 72 of the second judgment under appeal, that the decisions at issue are 'contractual' in nature, even though they were the expression of the powers of a public authority, the General Court also acted in breach of 'the spirit and the letter' of Regulation No 2988/95 and the 2002 and 2018 Financial Regulations and altered the very nature of the powers conferred on the Commission by the EU legislature.

40 Furthermore, by holding, in paragraph 77 of the first judgment under appeal and in paragraph 72 of the second judgment under appeal, that the Commission should assert those powers before the court having jurisdiction over the contract, the General Court distorted those powers. An

administration that must apply to the court having jurisdiction over the contract and await its judgment in order to suspend a contractual relationship in respect of which it has suspicions of fraud would not be effective in combating fraud and irregularities. That would also be contrary to Article 325(1) TFEU.

41 In the second place, in the Commission's view, in paragraphs 78 and 86 of the first judgment under appeal and in paragraphs 73 and 83 of the second judgment under appeal, the General Court erred in law in classifying Articles 1 to 3 of the decisions at issue as 'contractual' measures or acts. The General Court thus disregarded the Commission's own power unilaterally to determine what constitutes an irregularity, even where that irregularity was committed during the administrative phase preceding the conclusion of the contract. Furthermore, the measures that, on that occasion or subsequently, the Commission might adopt, pursuant, in particular, to Article 103 of the 2002 Financial Regulation or Article 131 of the 2018 Financial Regulation, would not be intended to remedy contractual damage. Moreover, the recovery of sums paid according to the seriousness of the irregularity, as provided for in that Article 131, is a measure falling outside the contractual framework. Furthermore, the reduction of the amount of the contract to EUR 0 and the full recovery of the amount paid cannot be regarded as direct consequences of the finding of irregularities committed by HB, in its capacity as a contracting party, which affected the award of contract TACIS/2006/101-510 and contract CARDS/2008/166-429 and, therefore, the conclusion of the contracts at issue.

42 In addition, the Commission criticises the General Court for having held, in paragraph 73 of the first judgment under appeal and in paragraph 68 of the second judgment under appeal, that the Commission 'intended, in essence, to establish that there was a defect affecting the conclusion of [the] contract', whereas it is apparent from the decisions at issue that it intended to adopt measures relating to the exercise of its powers as a public authority in order to protect the financial interests of the European Union.

43 According to the Commission, in so far as, at the time when the irregularities were committed, HB was, at most, a tenderer, the General Court also erred in law, in paragraph 79 of the first judgment under appeal and in paragraph 74 of the second judgment under appeal, by referring to the substantial irregularities committed by HB 'in its capacity as a contracting party'.

44 Lastly, in paragraphs 80 and 81 of the first judgment under appeal and in paragraphs 77 and 78 of the second judgment under appeal, the General Court wrongly held that the recovery measures could be adopted by the Commission as measures implementing the contracts at issue and that the measures referred to in Articles 2 and 3 of the decisions at issue consist of a 'finding that the contract has been terminated with the consequent annulment of the contract'. The General Court thus confused the concepts of termination and *ex tunc* annulment of contracts and their effects. In any event, Article 4 of Regulation No 2988/95 establishes neither the nullity nor the termination of the contract as a condition for the application of administrative recovery measures. Nor does Article 131(4) of the 2018 Financial Regulation make the adoption of a price-reduction measure subject to a termination or another measure of a contractual nature.

45 HB counters that the Commission gives the judgments under appeal a scope that they do not have. The reasoning followed by the General Court in paragraph 72 of the first judgment under appeal and in paragraph 67 of the second judgment under appeal, according to which the powers that the Commission derives from the 2002 Financial Regulation or from other secondary legislation fall, from the time of the signature of the contract, within the framework of contractual relationships, is in no way innovative or disruptive of the European Union's legal system. It follows from the

judgment of 16 July 2020, *ADR Center* v *Commission* (C-584/17 P, EU:C:2020:576, paragraph 67), first, that, although the Financial Regulations and Regulation No 2988/95 confer on the Commission the power to compel a contracting party to fulfil its obligations of a financial nature, the existence of a contract precludes the Commission from exercising the powers conferred on it unilaterally by those regulations. Secondly, it is apparent from paragraph 73 of that judgment that if the adoption of an enforceable decision falls within the exercise, by the Commission, of its powers as a public authority, that institution exceeds its powers by adopting such a decision regarding contractual relationships and where the EU judicature is not the court having jurisdiction over the contract.

46 In addition, it is apparent from the judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission* (C-506/13 P, EU:C:2015:562, paragraph 21), that, in the event that the Commission chooses to allocate financial contributions by means of a contract falling within the framework of Article 272 TFEU, it is bound to stay within that framework. Thus, in HB's view, the fact that the Commission wished to exercise its own powers does not mean that it is authorised to do so or that, in so doing, it exercises its powers outside of the contractual arena.

47 Lastly, HB submits that the General Court was right to classify it as a contracting party and to find, for the reasons set out in paragraphs 67 to 78 of the first judgment under appeal and in paragraphs 62 to 73 of the second judgment under appeal, that the irregularities must be assessed in the context of the contractual relationship, since the decisions at issue were adopted after the contracts at issue were concluded. The same is true of the classification of the reduction to EUR 0 of the amount of the contracts as retroactive annulment of the contract and the finding that the effect of the termination is the *ex tunc* annulment of the binding effects of the contract. It is apparent from Article 103 of the 2002 Financial Regulation that the termination of the contract concluded is envisaged with or without recovery of the amounts already paid. In the present case, the Commission decided to recover all the amounts already paid, which amounts to termination of the contract.

Findings of the Court

48 It should be recalled that an action for annulment under Article 263 TFEU is generally available against all measures adopted by the EU institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his or her legal position. However, the EU judicature shall not have jurisdiction to hear an action for annulment where the applicant's legal position falls exclusively within the framework of contractual relationships whose legal status is governed by the national law agreed to by the contracting parties (judgments of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraphs 16 and 18; of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraphs 71 and 72; and of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraphs 62 and 63).

49 First, Article 274 TFEU states that disputes to which the European Union is a party are not, on that ground, to be excluded from the jurisdiction of the courts or tribunals of the Member States. Secondly, it is apparent from Article 272 TFEU that the Court has jurisdiction to give judgment on disputes arising from a contract governed by public law or a contract governed by private law concluded by or on behalf of the European Union only if that contract contains an arbitration clause to that effect.

50 It follows that, if, in the absence of an arbitration clause, the EU judicature were to hold that it had jurisdiction to hear disputes concerning the annulment of acts falling exclusively within a contractual framework, not only would it risk depriving Article 272 TFEU of all effectiveness, but it would also risk extending its jurisdiction beyond the limits laid down by Article 274 TFEU (see, to that effect, judgments of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 19; of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraph 73 and the case-law cited; and of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraphs 63 and 64).

51 Therefore, where there is a contract between the applicant and one of the EU institutions, an action may be brought before the EU judicature on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside of the contractual relationship between the parties and which involve the exercise of the prerogatives of a public authority conferred on the contracting institution acting in its capacity as an administrative authority (judgments of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 20, and of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraph 74 and the case-law cited).

52 In the event that an institution chooses to allocate financial contributions by means of a contract falling within the framework of Article 272 TFEU, it is bound to stay within that framework. Accordingly, the institution is obliged, in particular, to ensure that it does not use, in its relationships with its counterparties, ambiguous formulations which might be understood by the parties to the contract as constituting unilateral decision-making powers going beyond the contractual provisions (judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 21).

53 In the present case, the General Court found, in paragraphs 71 and 72 of the first judgment under appeal and in paragraphs 66 and 67 of the second judgment under appeal, that, without prejudice to the administrative nature of tendering procedures, the powers conferred on the contracting authority by the provisions of secondary legislation fall, from the time of signature of the contract, within the framework of contractual relationships.

54 In paragraphs 75 and 76 of the first judgment under appeal and in paragraphs 70 and 71 of the second judgment under appeal, the General Court, relying on the case-law cited in paragraph 51 above, dismissed the Commission's argument that the decisions at issue, solely because they refer, inter alia, to Article 103 of the 2002 Financial Regulation, Article 131 of the 2018 Financial Regulation and Article 4 of Regulation No 2988/95, fall, wholly or in part, within the administrative sphere. According to the General Court, even if those provisions authorise the Commission, under certain conditions, to adopt measures falling within the exercise of the powers of a public authority, that would not be sufficient to exclude those measures from the contractual framework at the outset, since it is as a result of breaches attributed to a party engaged in a contractual relationship with the European Union that those provisions were implemented.

55 In those circumstances, after noting, in paragraph 80 of the first judgment under appeal and in paragraph 75 of the second judgment under appeal, that the decisions at issue were adopted at a time where the parties were bound to each other under the contracts at issue and that those parties had already performed a substantial part, or even all, of their respective obligations, the General Court found, in paragraphs 89 and 90 of the first judgment under appeal and in

paragraphs 86 and 87 of the second judgment under appeal, that the decisions were only capable of producing effects falling within those contracts, that they could not be separated from them and, therefore, that they did not belong to the category of acts the annulment of which may be sought from the EU judicature under Article 263 TFEU.

56 As the Commission rightly submits, in so ruling, the General Court failed to have regard to the case-law of the Court of Justice referred to in paragraphs 48 and 52 above.

57 As is apparent in particular from the case-law cited in paragraphs 48 and 51 above, an action for annulment under Article 263 TFEU is not available to an applicant whose legal situation falls exclusively within the framework of contractual relationships whose legal status is governed by the national law agreed to by the contracting parties. Accordingly, where there is a contract between the applicant and one of the EU institutions, an action may be brought before the EU judicature only on the twofold condition that the contested measure aims to produce binding legal effects that, first, fall outside of the contractual relationship between the parties and, secondly, involve the exercise of the powers of a public authority conferred on the contracting institution acting in its capacity as an administrative authority.

58 In the present case, it must be held that the decisions at issue involve the exercise of powers of a public authority and that they do not fall exclusively within the framework of contractual relationships.

59 First, by those decisions, which were adopted on the basis, inter alia, of Article 103 of the 2002 Financial Regulation, Article 131 of the 2018 Financial Regulation and Article 4 of Regulation No 2988/95, the Commission intended to remedy irregularities, within the meaning of Article 1(2) of the latter regulation, which affected the conduct of the procedures for the award of contract TACIS/2006/101-510 and contract CARDS/2008/166-429 and which were therefore committed prior to the conclusion of the contracts at issue.

60 Secondly, those decisions were not intended to penalise improper performance of the contracts at issue, but to draw the appropriate conclusions from HB's failure to comply with the principle of equal treatment during the procedures for the award of contract TACIS/2006/101-510 and contract CARDS/2008/166-429, procedures which the General Court rightly pointed out to be administrative in nature, in paragraph 71 of the first judgment under appeal and in paragraph 66 of the second judgment under appeal, respectively.

61 Thirdly, it is apparent from the wording of the decisions at issue that the Commission intended to recover from HB the sums that it considered had been unduly paid to it. By justifying the reimbursement of those sums not by the seriousness of the damage suffered but by the irregularity committed by HB during the procedure for the award of contract TACIS/2006/101-510 and contract CARDS/2008/166-429, the Commission intended, in accordance with Article 2 of Regulation No 2988/95, to impose on the appellant an administrative measure that was effective, proportionate and dissuasive in order to ensure adequate legal protection of the financial interests of the European Union.

62 From that point of view, the Commission also stated, in its appeals, that the sums unduly paid to HB were intended to be reused for the action or the programme initially envisaged, in so far as they constitute assigned revenue, within the meaning of Article 21(3)(b) of the 2018 Financial Regulation, and are, on that basis, returned to the original budget line in order to be reused.

63 Fourthly, contrary to what the General Court held in paragraph 80 of the first judgment under appeal and in paragraph 75 of the second judgment under appeal, the temporal nature of the measures adopted by the Commission, that is to say, the fact that they occur before or after the award of a contract and, consequently, before or after the conclusion of the contracts at issue, cannot constitute the decisive factor to be taken into account in order to establish whether a dispute is contractual or not.

64 On the contrary, the fact that the decisions at issue penalise an irregularity committed before the contracts at issue were concluded and that those decisions do not relate to the performance of those contracts is decisive. In that context, it is immaterial whether the contracting parties have already performed a substantial part, or even all, of their respective obligations or whether those decisions have repercussions on the performance of the contracts at issue. In particular, the fact that a substantial part of the contract has already been performed may, admittedly, have an impact on the substantive assessment of the proportionality of the decision ordering the recovery of all the sums that the Commissions considers to have been unduly allocated to the other contracting party. By contrast, that fact has no bearing on the assessment of the administrative or contractual nature of that decision.

65 In fact, the twofold condition, referred to in paragraph 57 above, and, consequently, jurisdiction to hear a dispute between the Commission and the other party to the contract, must be examined in the light of the objective pursued by the Commission. If the latter seeks enforcement of the contract, the action must be brought before the court having jurisdiction over the contract. By contrast, if the Commission seeks to ensure the protection of the financial interests of the European Union and if it exercises for that purpose the powers conferred on it by both Regulation No 2988/95 and the Financial Regulation applicable *ratione temporis*, the dispute must be brought before the EU judicature.

66 In those circumstances, the decisions at issue must be classified as a 'challengeable act' for the purposes of Article 263 TFEU, so an action seeking their annulment must be brought before the EU judicature.

67 It must therefore be held that the General Court erred in law in finding, in the judgments under appeal, that the decisions at issue fell within the framework of contractual relationships.

68 In the light of all the foregoing reasons, the appeals must be allowed and the judgments under appeal set aside.

Referral of the action back to the General Court

69 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

70 Since the state of the proceedings does not permit final judgment to be given, the cases must be referred back to the General Court.

Costs

71 As the cases are being referred back to the General Court, the costs relating to the appeal proceedings must be reserved.

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

1. **Sets aside the judgment of the General Court of the European Union of 21 December 2021, *HB* v *Commission* (T-795/19, EU:T:2021:917), and the judgment of 21 December 2021, *HB* v *Commission* (T-796/19, EU:T:2021:918);**

2. **Refers the cases back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]