Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

18 December 2024*

(Public procurement – Financial regulation – Exclusion for a period of two years from procurement and grant award procedures funded by the general budget of the European Union and by the EDF – Significant deficiencies in complying with main obligations in the implementation of a prior contract – Article 136(1)(e) of the Financial Regulation – No automatic link between a finding of a failure to comply with contractual obligations by the court having jurisdiction over the contract and the adoption of an exclusion measure by the authorising officer responsible – Obligation to conduct a specific and individual assessment of the conduct of the person concerned – Prior contract awarded to a group of economic operators – Joint and several contractual liability)

In Case T-776/22,

TP, represented by T. Faber, F. Bonke and I. Sauvagnac, lawyers,

applicant,

v

European Commission, represented by P. Rossi, F. Behre and F. Moro, acting as Agents,

defendant,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of S. Papasavvas, President, P. Škvařilová-Pelzl (Rapporteur), I. Nõmm, G. Steinfatt and D. Kukovec, Judges,

Registrar: A. Marghelis, Administrator,

having regard to the order of 22 March 2023, *TP* v *Commission* (T-776/22 R, not published, EU:T:2023:158),

having regard to the written part of the procedure,

further to the hearing on 29 May 2024,

gives the following

* Language of the case: English.

Judgment

1 By its action based on Article 263 TFEU, the applicant, TP, seeks the annulment of the decision of the European Commission of 1 October 2022 by which it was excluded, first, from participating in award procedures governed by 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'), or funded by the 11th European Development Fund (EDF) and, secondly, from being selected for implementing EU Funds ('the contested decision').

Background to the dispute

2 On 26 June 2009, the applicant concluded a consortium agreement with another company ('the partner') in order to participate in a procedure for the award of a public works contract launched by the Commission. That contract concerned the upgrading of a facility.

3 The Commission decided to award the contract to the consortium formed by the applicant and its partner ('the consortium'). A contract was concluded in that regard on 5 October 2009 ('the contract at issue').

4 The works commenced in November 2009 and were completed two years later, in November 2011.

5 In February 2012, defects were detected in the facility. The engineer responsible for the works then conducted a survey. The partner, on behalf of the consortium, carried out repairs on the basis of that survey and the engineer's instructions.

6 Since it was not satisfied with the repairs carried out by the partner, the Commission issued the consortium, on 17 December 2013, with an anticipated notice of termination of the contract at issue. On 14 January 2014, the consortium sent in turn a notice of early termination of the contract at issue.

7 The Commission and the consortium agreed to resolve their dispute relating to the termination of the contract by referring it to a dispute adjudication board.

8 By decision of 3 July 2014, the dispute adjudication board stated that the defects at the facility had been caused by a combination of design and implementation failures, responsibility for which was attributable to both the Commission and the consortium.

9 The Commission then asked for a new survey of the facility to be conducted, which gave rise to the communication of a report on 17 July 2017.

10 On the basis, inter alia, of that report, on 15 September 2017 the Commission initiated arbitration proceedings under the arbitration rules of the International Chamber of Commerce (ICC).

11 On 11 February 2020, an arbitral tribunal established under the auspices of the ICC ('the arbitral tribunal') issued a partial award in which it was found that there were 6 757 defects resulting from the work carried out under the contract at issue. In its view, 4 206 of them fell under the exclusive responsibility of the consortium and 2 551 of them fell under the shared responsibility of the Commission, in the amount of 60%, and the consortium, in the amount of 40%.

12 On 19 July 2022, the arbitral tribunal issued its final award, in which it found, inter alia, that the applicant and the partner were jointly and severally liable to pay to the European Union an amount corresponding to the costs necessary to repair the facility.

13 In order to reach that decision, the arbitral tribunal referred to the conduct of the consortium as grossly negligent, which allowed it not to apply a clause in the contract at issue limiting the contractual liability of the parties.

14 The two awards of the arbitral tribunal were the subject of actions, which were still pending on the date on which the present action was brought.

15 In February 2021, the Commission referred the matter to the interinstitutional panel established pursuant to Article 143 of the 2018 Financial Regulation, which, as is apparent from recital 38 of that regulation, is set up to assess requests and issue recommendations on the need to take decisions on exclusion and imposition of financial penalties referred to it by the Commission or other Union institutions and bodies.

16 On 1 October 2022, following the recommendation of the interinstitutional panel referred to in paragraph 15 above, the Commission adopted the contested decision.

Forms of order sought

17 The applicant claims, in the final form of its pleadings, that the Court should:

– annul the contested decision;

– order the Commission to pay compensation to the applicant for the loss suffered as a result of the contested decision;

– order the Commission to pay the costs.

18 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

The application for omission of information

19 By separate document lodged at the Registry of the General Court on 5 January 2023, the applicant submitted an application for omission of certain information vis-à-vis the public.

20 In reconciling the need to make judicial decisions public, on the one hand, and the right to protection of personal data and of business secrets, on the other, the court must seek, in the circumstances of each case, to find a fair balance, taking into account the public's right of access to judicial decisions (judgment of 27 April 2022, *Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii* v *Commission*, T-4/20, EU:T:2022:242, paragraph 29).

21 Moreover, it should be borne in mind that the publicity of judicial decisions aims to ensure scrutiny of the judiciary by the public and constitutes a basic safeguard against arbitrariness (ECtHR, 16 April 2013, *Fazliyski v. Bulgaria*, CE:ECHR:2013:0416JUD004090805, § 69).

22 Accordingly, it is necessary to grant, as far as possible, the applicant's application, in so far as the requirement for scrutiny of the judiciary by the public does not preclude it. As to the remainder, that application is rejected.

The claim for annulment

23 In support of its claim for annulment, the applicant relies on three pleas in law, alleging, first, infringement of the provisions of Article 136(1)(e) of the 2018 Financial Regulation, secondly, infringement of the provisions of Article 136(3) of the 2018 Financial Regulation and breach of the principle of proportionality and, thirdly, the retroactive application of a more severe penalty.

24 With regard to the first plea in law, the applicant submits that it is for the authorising officer responsible when adopting a penalty under Article 136(1)(e) of the 2018 Financial Regulation to carry out an individual assessment of the conduct of the person concerned, including where a number of persons or entities are concerned by an exclusion situation. The applicant claims that the Commission did not do so in respect of the applicant, in that the Commission relied exclusively on the applicant's joint and several liability as a member of the consortium and infers from that that the Commission infringed Article 136(1) of the 2018 Financial Regulation.

25 The Commission, after observing that the contested decision does not constitute a criminal penalty, contends that the applicant has failed to rebut the findings of fact communicated to it in the course of the administrative procedure prior to the adoption of that decision.

26 The Commission states that the arbitral tribunal found that the conduct of the applicant, as part of the contractor, had been grossly negligent and that no limitation of liability could apply on account of the significance and severity of the defects found. The Commission adds that it adopted the contested decision on the basis of that finding by the arbitral tribunal, which enabled the Commission to conclude that the applicant had personally failed to comply with main obligations in the implementation of the contract at issue.

27 The Commission furthermore recalls that the applicant and the partner undertook jointly and severally to perform the contract at issue.

28 The Commission also relies on the competition case-law of the Court of Justice, which relates to the liability of the parent company for the acts of its subsidiary, and, in particular, the judgment of 14 September 2016, *Ori Martin and SLM* v *Commission* (C-490/15 P and C-505/15 P, not published, EU:C:2016:678, paragraph 60).

29 The examination of the present plea leads to a determination as to whether the finding by the court having jurisdiction over the contract of a failure to comply with the contractual obligations attributable to a group of persons with which an EU institution or body has signed a contract, which results in the joint and several contractual liability of each of the persons participating in that group, enables the authorising officer responsible, on the basis of that joint and several contractual liability alone, to adopt an exclusion measure against one of those persons.

30 In that regard, as a first stage, it is necessary to determine whether Article 136(1)(e) of the 2018 Financial Regulation must be interpreted as automatically requiring the adoption of an exclusion measure by the authorising officer responsible.

31 Where such a link exists, the finding by the court having jurisdiction over the contract of a failure to comply with the contractual obligations attributable to a group of persons with which an EU institution or body has signed a contract, which results in the joint and several contractual liability of each of the persons participating in that group, enables the authorising officer responsible, on the basis of that joint and several contractual liability alone, to adopt an exclusion measure against one of those persons.

32 If, at the end of the first stage of the reasoning, Article 136(1)(e) of the 2018 Financial Regulation cannot be interpreted as automatically requiring the adoption of an exclusion measure by the authorising officer responsible, it will then be necessary, in a second stage, to ascertain whether that provision must be interpreted as imposing on the authorising officer responsible an obligation to carry out an individual assessment of the conduct of the person concerned when the authorising officer responsible intends to apply that provision.

The existence of an automatic link between the finding of a failure to comply with the contractual obligations and the adoption of an exclusion measure

33 According to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins (see judgment of 18 October 2022, *IG Metall and ver.di*, C-677/20, EU:C:2022:800, paragraph 31 and the case-law cited).

– *The literal interpretation of Article 136(1)(e) of the 2018 Financial Regulation*

34 Article 136 of the 2018 Financial Regulation, entitled ‘Exclusion criteria and decisions on exclusions’, provides in paragraph 1 thereof, as follows:

‘1. The authorising officer responsible shall exclude a person or entity referred to in Article 135(2) from participating in award procedures governed by this Regulation or from being selected for implementing Union funds where that person or entity is in one or more of the following exclusion situations:

…

(e) the person or entity has shown significant deficiencies in complying with main obligations in the implementation of a legal commitment financed by the budget which has:
(i) led to the early termination of a legal commitment;
(ii) led to the application of liquidated damages or other contractual penalties; …
(iii) been discovered by an authorising officer, [the European Anti-Fraud Office] or the Court of Auditors following checks, audits or investigations;

…'

35 Article 136(1)(e) of the 2018 Financial Regulation thus refers to a failure to comply with obligations in the implementation of a legal commitment.

36 The concept of a 'legal commitment' is defined in Article 2 of the 2018 Financial Regulation. A 'legal commitment' means an act whereby the authorising officer responsible enters into or establishes an obligation which results in subsequent payment or payments and the recognition of expenditure charged to the budget, and which includes specific agreements and contracts concluded under financial framework partnership agreements and framework contracts. That very broad definition includes contracts.

37 In addition, recital 67 of the 2018 Financial Regulation refers, in respect of the decision on the exclusion of a person or entity from participation in award procedures, to a breach of 'contract'.

38 Lastly, Article 136(1)(e) of the 2018 Financial Regulation, which provides, inter alia, that the established failure to comply led to an 'early termination' or the application of 'contractual' penalties, refers to a contractual context.

39 Consequently, Article 136(1)(e) of the 2018 Financial Regulation is applicable in the event of a failure to comply with contractual obligations.

40 However, Article 136(1)(e) of the 2018 Financial Regulation does not provide that any failure to comply with a contractual obligation automatically leads to the adoption of an exclusion measure. That provision refers to showing 'significant deficiencies' in complying with 'main obligations'. They are additional conditions imposed specifically by that financial regulation for the adoption of an exclusion measure.

41 The existence of such conditions, which do not follow from the contract or from the law applicable to it, but from the 2018 Financial Regulation, implies that what is at issue is, in such a situation, a legal classification of the facts made by the authorising officer responsible, which is distinct from that made, where appropriate, by the court having jurisdiction over the contract.

42 In addition, the terms used are sufficiently imprecise to leave a margin of discretion to the authorising officer responsible in the legal classification of the facts, which confirms that the authorising officer responsible, before adopting an exclusion measure, must make an independent legal classification of the facts.

43 In the light of the considerations set out in paragraphs 34 to 42 above, it may be concluded that it is apparent from the wording of Article 136(1)(e) of the 2018 Financial Regulation that there is no automatic link between a finding of a failure to comply with contractual obligations made by the court having jurisdiction over the contract and the adoption of an exclusion measure by that

authorising officer responsible, since the authorising officer responsible must make an independent legal classification of the conduct of the person concerned on the basis of the specific criteria laid down in that article.

– *The contextual interpretation of Article 136(1)(e) of the 2018 Financial Regulation*

44 In the first place, as regards the cases referred to in Article 136(1)(b) to (d) and (f) to (h) of the 2018 Financial Regulation, reference is made to conduct, such as a failure to comply with the obligations relating to the payment of taxes or social security contributions, grave professional misconduct or fraud affecting the financial interests of the European Union, the legal classification of which has already been made in a final judgment or in a final administrative decision.

45 In such situations, the authorising officer responsible when adopting the exclusion measure therefore appears bound by the legal classification adopted by an authority distinct from the authorising officer responsible, without having the slightest margin of discretion in that regard.

46 On the other hand, as regards Article 136(1)(e) of the 2018 Financial Regulation, that refers directly to the conduct at issue, and not to the administrative judgment or decision by which an authority distinct from the authorising officer responsible, for example the court having jurisdiction over the contract, has previously classified that conduct.

47 Such a substantial difference in the wording of Article 136(1)(e) of the 2018 Financial Regulation precludes any automatic link between the finding by the court having jurisdiction over the contract that the person concerned has failed to comply with its contractual obligations and the adoption by the authorising officer responsible of an exclusion measure. As regards specifically the situation covered by that provision, the authorising officer responsible must therefore make an independent legal classification of the conduct at issue.

48 In the second place, Article 136(2) of the 2018 Financial Regulation provides for the relationship between the legal classification of the facts adopted by the authorising officer responsible and the findings made by the authorities distinct from the authorising officer responsible.

49 It is apparent from Article 136(2) of the 2018 Financial Regulation that the findings made in a final judgment or in a final administrative decision are binding on the authorising officer responsible in the cases referred to in Article 136(1)(c), (d) and (f) to (h) of the 2018 Financial Regulation, but not in the case referred to in paragraph 1(e) of that article.

50 Indeed, in its first subparagraph, Article 136(2) of the 2018 Financial Regulation distinguishes between those two situations in order to indicate that, in the former situation, the authorising officer responsible makes an independent classification of the facts in the absence of a final judgment or a final administrative decision, whereas, in the latter situation, he or she may make such a classification without that proviso arising.

51 Since Article 136(2) of the 2018 Financial Regulation does not provide that the existence of a final judgment or a final decision adopted by an authority distinct from the authorising officer responsible is to have an impact on the assessment made by the authorising officer responsible in the situation provided for in Article 136(1)(e) of that regulation, any automatic link between the finding by the court having jurisdiction over the contract of a failure to comply with its contractual obligations by the person concerned and the adoption by the authorising officer

responsible of an exclusion measure is precluded. On the contrary, as regards specifically that provision, the authorising officer responsible must make an independent legal classification of the conduct of the person concerned.

52 It follows from the overall analysis of the context of Article 136(1)(e) of the 2018 Financial Regulation that that provision cannot be interpreted as establishing an automatic link between a finding of failure to comply with contractual obligations by the court having jurisdiction over the contract and the adoption of an exclusion measure by the authorising officer responsible.

– The historical and teleological interpretation of Article 136(1)(e) of the 2018 Financial Regulation

53 It should be recalled that the exclusion measures were created by Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; 'the 2002 Financial Regulation'). Those measures, from the outset, were part of an autonomous legal regime which also included financial penalties.

54 Accordingly, both those financial penalties and the exclusion measures had, under the provisions of the 2002 Financial Regulation, to be proportionate in the light of a set of criteria defined by that regulation. Moreover, the adoption of exclusion measures and financial penalties was facilitated by the establishment, within each EU institution, of a database accessible to the other institutions.

55 The autonomous legal regime referred to in paragraph 53 above and stated in paragraph 54 above was maintained in the various amendments to the Financial Regulation, until the adoption of the 2018 Financial Regulation. An entire section of the 2018 Financial Regulation, which comprises eight articles and provides, inter alia, for the establishment of a single database set up by the Commission, now concerns that regime.

56 It follows from the considerations set out in paragraphs 53 to 55 above that the EU legislature intended to establish, from the outset, an autonomous regime of penalties, which was maintained and detailed over time and, in particular, when the 2018 Financial Regulation was adopted.

57 An automatic link between, on the one hand, the finding by an authority distinct from the authorising officer responsible of fault the existence of which is provided for by national or EU legislation and, on the other, the adoption by the authorising officer responsible of an exclusion measure covered by an autonomous regime of penalties established by the Financial Regulation cannot be presumed.

58 In that regard, in matters relating to a contract, namely in the situation provided for in Article 136(1)(e) of the 2018 Financial Regulation (see paragraphs 37 to 39 above), the absence of an automatic link is established in recital 76 of the 2018 Financial Regulation, which states that the possibility to adopt exclusion measures or to impose financial penalties is independent from the possibility to apply contractual penalties, such as liquidated damages.

59 In addition, the autonomous regime of penalties laid down by the Financial Regulation pursues, since its establishment, specific objectives in the public interest, which are distinct from the proper performance of the contract or from the protection and compensation of the parties to the contract which a system of contractual liability seeks to ensure. As stated in recital 25 of the 2002 Financial Regulation, the aim is to prevent irregularities and to combat fraud and

corruption and promote sound and efficient management. The difference between the objectives pursued by the autonomous regime of penalties established by the financial regulation and those pursued by a system of contractual liability confirms that there is no automatic link established in paragraph 58 above.

– *Conclusion*

60 It follows from a literal, contextual, historical and teleological interpretation of Article 136(1)(e) of the 2018 Financial Regulation that there is no automatic link between a finding of failure to comply with contractual obligations by the court having jurisdiction over the contract and the adoption of an exclusion measure by the authorising officer responsible.

The existence of an obligation to carry out an individual assessment of the conduct of the person concerned prior to the adoption of an exclusion measure

61 In so far as Article 136(1)(e) of the 2018 Financial Regulation cannot be understood as automatically implying the adoption of an exclusion measure, it is necessary to ascertain whether that provision must be interpreted as imposing on the authorising officer responsible an obligation to carry out an individual assessment of the conduct of the person concerned when the authorising officer responsible intends to apply that provision.

62 As regards, in the first place, the literal interpretation of Article 136(1)(e) of the 2018 Financial Regulation, it follows from the wording of that provision that it is the 'person' or 'entity' that has failed to comply with its contractual obligations that is excluded by the authorising officer responsible. That presupposes, in principle, the identity of the party failing to comply with its contractual obligations with the addressee of the penalty, and therefore an individual failure to comply with its contractual obligations on the part of the addressee of the penalty.

63 As regards, in the second place, the contextual interpretation of Article 136(1)(e) of the 2018 Financial Regulation, it should be stated, as a preliminary point, that such an interpretation may be based on an analysis of provisions in texts other than that of the provision that is being interpreted, in particular where the provisions at issue are similar or where the texts in which they appear have the same objectives (see, to that effect, judgment of 16 March 2022, *MEKH and FGSZ* v *ACER*, T-684/19 and T-704/19, EU:T:2022:138, paragraph 109; Opinion of Advocate General Jääskinen in *Commission* v *United Kingdom*, C-582/08, EU:C:2010:286, point 44; and Opinion of Advocate General Mengozzi in *Belgian Electronic Sorting Technology*, C-657/11, EU:C:2013:195, point 43).

64 In that regard, a provision similar to Article 136(1)(e) of the 2018 Financial Regulation, namely Article 57(4)(g), appears in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65). That provision envisages the possibility of excluding any economic operator from participation in a procurement procedure where the economic operator has shown significant or persistent deficiencies.

65 In addition, the EU legislature wished to establish consistency between the 2018 Financial Regulation and Directive 2014/24, as is apparent from a number of recitals of that regulation, in particular recitals 77, 101, 105 and 106. In particular, recital 77 states that the duration of an exclusion should be limited in time, as is the case under Directive 2014/24, which shows that that requirement of consistency by the legislature applies to exclusion measures.

66 When interpreting Article 57(4)(g) of Directive 2014/24, first, the Court of Justice stated that, in order to observe the essential characteristics of the optional ground for exclusion laid down by that provision and the principle of proportionality, a national system transposing that directive had to be structured in such a way that, before the entry on the list of unreliable suppliers of an economic operator which was a member of a group to which a public contract had been awarded and that contract was terminated early, all the relevant factors adduced by that operator in order to demonstrate that its entry on that list was not justified in the light of its individual conduct must be the subject of a specific assessment. It cannot therefore be accepted, according to the Court of Justice, that such an economic operator, in the event of early termination of that contract on account of significant or persistent deficiencies in the performance of such contract, is automatically categorised as unreliable and is temporarily excluded, without first conducting a specific and individual assessment of its conduct, in the light of all the relevant factors (judgment of 26 January 2023, *HSC Baltic and Others*, C-682/21, EU:C:2023:48, paragraphs 46 and 47).

67 Secondly, although the Court of Justice has held that it was permissible for the Member States, within the margin of discretion available to them in order to transpose Directive 2014/24, to provide for a presumption that any economic operator *de jure* responsible for the proper performance of a public contract was deemed to have contributed, in the performance of that contract, to the significant or persistent deficiencies which resulted in the early termination of that contract having arisen or having continued (judgment of 26 January 2023, *HSC Baltic and Others*, C-682/21, EU:C:2023:48, paragraph 48), it nevertheless stated that, where that contract had been awarded to a group of economic operators, whose individual contributions to those deficiencies and any efforts made to remedy them were not necessarily identical, such a presumption had, if it is not to affect adversely the essential characteristics of that ground for exclusion and the principle of proportionality referred to in Article 18(1) of that directive, to be rebuttable. According to the Court of Justice, irrespective of the joint and several liability of the members of such a group, the application of the ground for exclusion laid down in Article 57(4)(g) of Directive 2014/24 must be based on the wrongful or negligent nature of that individual conduct (judgment of 26 January 2023, *HSC Baltic and Others*, C-682/21, EU:C:2023:48, paragraphs 48 and 49).

68 It must be stated that that obligation to conduct a specific and individual assessment of the conduct of the person concerned, in the light of all the relevant factors which a Member State must provide in its legislation despite the margin of discretion available to it in order to transpose Directive 2014/24 applies a fortiori in the context of the application of the 2018 Financial Regulation by the EU institutions and bodies.

69 As regards the interpretation of Article 57(4)(g) of Directive 2014/24, the Court of Justice noted the existence of such an obligation while recognising that a Member State was entitled to transpose that directive by implementing a presumption such as that referred to in paragraph 67 above, which, in view of that obligation, must be rebuttable (judgment of 26 January 2023, *HSC Baltic and Others*, C-682/21, EU:C:2023:48, paragraph 48).

70 As regards Article 136(1)(e) of the 2018 Financial Regulation, no presumption is possible, since that financial regulation cannot be interpreted as establishing an automatic link between the finding of a failure to comply with contractual obligations made by the court having jurisdiction over the contract and the adoption of an exclusion measure (see paragraph 60 above).

71 It therefore follows from an application by analogy of the case-law of the Court of Justice relating to Directive 2014/24 that it is for the authorising officer responsible to conduct a specific and individual assessment of the conduct of the person concerned when the authorising officer responsible applies Article 136(1)(e) of the 2018 Financial Regulation.

72 In the third place, it should be stated that the obligation to conduct a specific and individual assessment of the conduct of the person concerned, in the light of all the relevant factors, is all the more necessary since the Court of Justice has held that the exclusion penalty established by the 2018 Financial Regulation was primarily punitive (see, by analogy, judgment of 30 May 2024, *Vialto Consulting* v *Commission*, C-130/23 P, EU:C:2024:439, paragraph 31).

73 Accordingly, in order to comply with the general principle that penalties should be applied only to the offender (see, to that effect, judgment of 8 May 2013, *Eni* v *Commission*, C-508/11 P, EU:C:2013:289, paragraph 50), and without prejudice to the possibility for the EU legislature to provide expressly for a derogation which it considers necessary and justified, a provision of EU law should not be interpreted by the EU judicature as allowing an exclusion measure to be adopted without the individual conduct of the person concerned being assessed beforehand.

74 It follows from the considerations set out in paragraphs 66 to 73 above that the authorising officer responsible, before adopting, on the basis of Article 136(1)(e) of the 2018 Financial Regulation, an exclusion measure in respect of a person or entity, must conduct a specific and individual assessment of the conduct of that person or entity, in the light of all the relevant factors.

75 It should be added that the obligation to conduct a specific and individual assessment of the conduct of the person concerned, in the light of all the relevant factors, is consistent with the objectives assigned by the EU legislature to the exclusion measures, namely to prevent irregularities, to combat fraud and corruption and to promote sound and efficient management (see paragraph 59 above).

76 The institution or body concerned is, in principle, in a position to ask the persons or services concerned to forward the monitoring documents for the contract in question, which are likely to enable it to assess the individual conduct of each of the members of a group. In that regard, Article 136(1)(e)(iii) of the 2018 Financial Regulation provides that the failures to comply with obligations may have been discovered following 'investigations by an authorising officer'.

77 In addition, the institution or body concerned is, in principle, in a position, where it signs a contract with a group of undertakings, to require the possibility of identifying the services provided by each of the participants in order to determine, where appropriate, the individual liability of each of them in the light of the regime of penalties established by the 2018 Financial Regulation, which is distinct from their possible joint and several liability (see paragraphs 53 to 58 above).

78 Lastly, the institution or body concerned will always have the possibility, where appropriate, to explain before the EU judicature that it was not possible for it to distinguish between the liability of each of the participants in a complex group. However, the institution or body concerned must

show that it at the very least attempted to carry out an individual assessment and that it did not merely base its exclusion decision solely on the finding that the person concerned was jointly and severally liable.

The nature of the examination carried out by the Commission in the contested decision

79 As a preliminary point, it must be stated that the factual premiss on which the applicant's argument is based is that the Commission merely relied on its joint and several liability, as a member of the consortium, without taking into account its individual conduct.

80 It must be stated that, at the hearing, the Commission admitted, formal note of which was taken in the minutes, that it had decided to exclude the applicant without examining the individual liability of each of the contracting parties in respect of the failures in the implementation of the contract and having carried out its assessment in the light of the joint and several liability of both parties of the consortium and the liability of the consortium as a whole.

81 The statements of the Commission at the hearing support the analysis of the content of the contested decision. The grounds of the contested decision relating to the conditions laid down in Article 136(1)(e) of the 2018 Financial Regulation and, in particular, to the finding that the applicant failed to comply with its contractual obligations, are set out in the first and third parts of that decision, of which there are six parts. As regards, first of all, the first part of the contested decision, reference is made, first, to the 'contractor', the term by which the consortium is designated by agreement in recital 1 of the contested decision, and, secondly, to the applicant 'as part of the contractor', that is, as a member of the consortium jointly and severally liable, as is apparent from an overall reading of the contested decision, which is confirmed by paragraph 24 of the defence. Consequently, in the first part of the contested decision, reference is made only to the conduct attributed to the consortium. In particular, in recitals 20 to 22 of that decision, it is stated, as regards the findings in the partial award of the arbitral tribunal, that the 'contractor' was found liable in whole or in part for the defects of the facility and that it was found that it had failed to comply with a number of its contractual obligations. As regards, next, the third part of the contested decision, which deals with the assessment of the factual situation on which the Commission relied in order to find that the applicant failed to comply with its contractual obligations, reference is made only to the applicant's failure to comply with its obligations 'as part of the contractor', that is, as a member of the consortium jointly and severally liable. That is the case, in particular, in recitals 84 to 92 of the contested decision, in which the Commission, in reproducing the findings set out in the partial decision of the arbitral tribunal, recalled which contractual obligations had been infringed. As regards, lastly, a reading of the contested decision as a whole, it does not appear that, in order to find that the applicant failed to comply with its contractual obligations, the Commission relied on findings other than those made by the arbitral tribunal. It follows from the two awards made by the arbitral tribunal that it ruled on the joint and several contractual liability of the members of the consortium, without distinguishing the individual liability of each of them.

82 It follows from the foregoing that, for the purposes of the application of Article 136(1)(e) of the 2018 Financial Regulation, the Commission relied on the joint and several liability of the applicant, as a member of the consortium, without taking into account its individual conduct.

83 It follows from the foregoing that since the authorising officer responsible, before adopting, on the basis of Article 136(1)(e) of the 2018 Financial Regulation, an exclusion measure in respect of a person or entity, must conduct a specific and individual assessment of the conduct of that person

or entity, in the light of all the relevant factors (see paragraph 74 above) and that, in the present case, the Commission merely relied on the joint and several liability of the applicant, as a member of the consortium, without taking into account its individual conduct (see paragraph 82 above), that the first plea in law relied on by the applicant is well founded.

84 Consequently, the applicant's claim for annulment must be granted, without it being necessary to examine the other two pleas in law which the applicant relied on in support of that claim.

The other form of order sought

85 As regards the claim that the Commission should be ordered to compensate the applicant for the damage suffered as a result of the contested decision (see paragraph 17 above), in its reply, the applicant stated that it did not intend to pursue an action for damages on the basis of Article 268 TFEU, but rather that it intended to ask the General Court to specify in the grounds of the future judgment that the Commission had to take all necessary measures to eliminate the consequences of the contested decision.

86 It should be noted that that claim, which the applicant stated did not seek to obtain a direction, does not constitute a separate head of claim in relation to the applicant's claim for annulment.

87 Under the first paragraph of Article 266 TFEU, the institution whose act has been declared void by a judgment of the General Court is required to take the necessary measures to comply with that judgment. The annulled act is retroactively eliminated from the legal order and is deemed never to have existed (see judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461, paragraph 48 and the case-law cited).

88 Accordingly, the annulment of the contested decision will itself require the Commission to take all necessary measures to eliminate the consequences of that decision, without it being necessary for the General Court to specify that in its judgment.

89 It follows from all of the foregoing that the contested decision must be annulled.

Costs

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

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Annuls the decision of the European Commission of 1 October 2022 by which TP was excluded from participating in award procedures governed by 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 or funded by the 11th European Development Fund (EDF) and from being selected for implementing EU Funds;

2. Orders the Commission to pay the costs, including those of the interim proceedings.

Papasavvas Škvařilová-Pelzl Nõmm

Steinfatt Kukovec

Delivered in open court in Luxembourg on 18 December 2024.

V. Di Bucci
Registrar

S. Papasavvas
President