Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

26 September 2024*

(Appeal – Public supply contracts – Irregularities in the contract award procedure – Decision to recover sums unduly paid – Enforceable decision – Article 299 TFEU – Jurisdiction of the EU judicature)

In Case C-597/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 September 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 appeal, the European Commission asks the Court of Justice to set aside in part the judgment of the General Court of the European Union of 6 July 2022, *HB* v *Commission* (T-408/21, 'the judgment under appeal', EU:T:2022:418), by which it annulled, first, Commission Decision C(2021) 3339 final of 5 May 2021 relating to the recovery of a debt in the amount of EUR 4 241 507 payable by HB under the contract with reference TACIS/2006/101-510 ('the TACIS contract'), and, secondly, Commission Decision C(2021) 3340 final of 5 May 2021 relating to the recovery of a debt in the amount of EUR 1 197 055.86 payable by HB under the contract with reference CARDS/2008/166-429 ('the CARDS contract') (together, 'the decisions at issue').

Legal context

The 2002 Financial Regulation

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(EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1) ('the 2002 Financial Regulation'), which was repealed with effect from 31 December 2012, provided: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

3 Article 100 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'), entitled 'Authorisation of recovery', provides, in paragraph 2:

'A[n EU] institution may formally establish an amount as being receivable from persons other than Member States by means of a decision which shall be enforceable within the meaning of Article 299 TFEU.

…’

4 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 dispute

5 The background to the dispute was set out in paragraphs 2 to 33 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

6 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 (‘contract TACIS/2006/101-510’). That contract was awarded to the consortium coordinated by HB and the corresponding TACIS contract was signed on 17 July 2006 for a maximum contract value of EUR 4 410 000.

7 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, which sought 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 ('contract CARDS/2008/166-429'). That contract was awarded to the consortium coordinated by HB and the corresponding CARDS contract was signed on 30 July 2008 for a maximum contract value of EUR 1 999 125.

8 Following a fact-finding mission, undertaken by the European Anti-Fraud Office (OLAF), that office confirmed, in two final investigation reports, sent to the Commission on 19 April 2010 and on 28 November 2011 respectively, 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. Moreover, OLAF suggested terminating those contracts and carrying out recoveries.

9 On 15 October 2019, the Commission adopted Decision C(2019) 7318 final to reduce the amounts due under contract TACIS/2006/101-510 and to recover the amounts unduly paid ('the TACIS recovery decision') and Decision C(2019) 7319 final to reduce the amounts due under contract CARDS/2008/166-429 and to recover the amounts unduly paid ('the CARDS recovery decision'). By those decisions, concerning, inter alia, Article 103 of the 2002 Financial Regulation and Article 131 of the 2018 Financial Regulation, the Commission found that the procedures for the award of contract CARDS/2008/166-429 and contract TACIS/2006/101-510 were vitiated by a substantial irregularity, within the meaning of Article 103 of the 2002 Financial Regulation, that that irregularity was attributable to the consortium coordinated by HB and that its seriousness justified the reduction of the amount of those contracts to zero. All payments made under those contracts were thus considered to have been unduly paid and to be subject to recovery.

10 On 19 November 2019, HB brought two actions before the General Court challenging the lawfulness of the CARDS and TACIS recovery decisions and seeking compensation for the non-contractual liability of the European Union. By judgments of 21 December 2021, *HB* v *Commission* (T-795/19, 'the judgment in T-795/19', EU:T:2021:917), and of 21 December 2021, *HB* v *Commission* (T-796/19, 'the judgment in T-796/19', EU:T:2021:918), the General Court dismissed those actions, first, as inadmissible, in so far as they sought the annulment of those decisions and, secondly, as unfounded, in so far as they sought to establish the non-contractual liability of the European Union. On 3 March 2022, the Commission brought appeals against those two judgments, registered as Cases C-160/22 P and C-161/22 P respectively.

11 On 5 May 2021, the Commission adopted the decisions at issue concerning Article 299 TFEU and Article 100(2) of the 2018 Financial Regulation. After recalling that, in accordance with Article 299 TFEU, enforcement is to be governed by the rules of civil procedure in force in the State in the territory of which it is carried out and that the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner, those decisions state, in their Article 5, that they are to be enforceable in accordance with Article 299 TFEU.

12 By order of 25 April 2022, *HB* v *Commission* (T-408/21 R, EU:T:2022:241), the President of the General Court granted HB's application for interim measures and ordered the suspension of the operation of those decisions, reserving the costs.

The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 9 July 2021, HB brought an action asking the General Court to:

– annul the decisions at issue;

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

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

– order the Commission to pay all the costs.

14 In support of its action, in so far as it sought annulment of the decisions at issue, HB put forward three pleas in law. The first alleged lack of jurisdiction on the part of the Commission to adopt those decisions, lack of legal basis for those decisions and failure to observe the principle of the protection of legitimate expectations. The second plea alleged infringement of the 2018 Financial Regulation in that the Commission had no definite claim against HB. The third plea alleged infringement of essential procedural requirements, breach of the duty of care and failure to observe the principle of impartiality enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.

15 The General Court noted, first, in paragraph 43 of the judgment under appeal, that, as the Commission accepts, if the Court of Justice, in the context of the appeals before it in Cases C-160/22 P and C-161/22 P, were to confirm the contractual nature of the CARDS and TACIS recovery decisions, that would deprive it of the power to adopt the decisions at issue, which would therefore have to be withdrawn. Secondly, in paragraphs 48 and 50 of that judgment, the General Court recalled that the question whether the Commission could adopt an enforceable decision under Article 299 TFEU to claim a debt arising from the non-performance of a contract was examined in the judgment of 16 July 2020, *ADR Center* v *Commission* (C-584/17 P, EU:C:2020:576), in which the Court of Justice held that the Commission's power to adopt enforceable decisions in contractual relationships is limited to contracts that contain an arbitration clause conferring jurisdiction on the EU judicature.

16 Since the TACIS and CARDS contracts contain clauses conferring jurisdiction on the Belgian courts and not on the EU judicature, the General Court found, in paragraph 53 of the judgment under appeal, that the Commission did not have the power to adopt the decisions at issue on the basis of Article 299 TFEU. Consequently, it upheld the first plea, without examining the complaint alleging failure to observe the principle of the protection of legitimate expectations, or the second and third pleas.

17 Furthermore, in paragraphs 55 to 72 of the judgment under appeal, the General Court examined HB's claim for compensation and rejected it as unfounded.

Forms of order sought by the parties before the Court of Justice

18 The Commission claims that the Court should:

– set aside the judgment under appeal in so far as it annuls the decisions at issue;

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

– order HB to pay the costs.

19 HB contends that the appeal should be dismissed and asks that the Commission be ordered to pay the costs.

The appeal

Arguments of the parties

20 In support of its appeal, the Commission relies on a single ground of appeal, by which it alleges that the General Court erred in law by relying, in paragraph 45 of the judgment under appeal, on the incorrect finding, reproduced directly and 'without discussion' in the judgments in T-795/19 and T-796/19, that the CARDS and TACIS recovery decisions are contractual in nature, in order to conclude, in paragraph 53 of the judgment under appeal, that the Commission did not have jurisdiction to adopt the decisions at issue on the basis of Article 299 TFEU.

21 The Commission submits that the General Court, in the judgment under appeal, neither took into consideration nor responded to the arguments that it had set out in its defence, which related to 'the Commission's jurisdiction to adopt the decisions [at issue]' and specifically concerned 'the legal nature of the [CARDS and TACIS] recovery decisions', which was discussed in the cases giving rise to the judgments in T-795/19 and T-796/19.

22 The Commission maintains that the General Court erred in law, in that it 'contractualised' its powers as a public authority, provided for in particular in Article 103 of the 2002 Financial Regulation, by which it may find irregularities vitiating a public contract, reduce the price of that contract accordingly and recover the amounts unduly paid. Such an approach, which would mean that, when the Commission concludes contracts such as those at issue in the present case, the measures relating to the exercise of those powers are 'absorbed' into the contractual sphere and subject to review by the court having jurisdiction over the contract, would nullify the Commission's powers as a public authority and the powers conferred on it by the EU judicature.

23 According to the Commission, by the judgment under appeal, the General Court 'subverts the EU legal system', as regards the jurisdiction of the EU judicature to review the legality of secondary legislation and the Commission's capacity effectively to protect the financial interests of the European Union, in particular by correcting irregularities in the procurement procedure where that requires the adoption of measures of an administrative nature. The General Court thus erred in law by failing to take into account the legal nature of the CARDS and TACIS recovery decisions that the decisions at issue sought to implement. In so doing, the General Court's analysis disregards the judgment of 16 July 2020, *ADR Center* v *Commission* (C-584/17 P, EU:C:2020:576, paragraphs 69 to 72), in which the Court of Justice confirmed that, where the

Commission adopts measures falling within the exercise of its powers as a public authority, those measures are, by their nature, outside the scope of contractual relationships and may be challenged under Article 263 TFEU.

24 By categorising the CARDS and TACIS recovery decisions taken on the basis, inter alia, of the 2018 Financial Regulation and intending to protect the financial interests of the European Union as measures implementing the CARDS and TACIS contracts, the General Court breached the spirit and the letter of that regulation by altering the very nature of the powers which it confers on the Commission.

25 HB replies that the Commission cannot refer, in the present case, to the arguments set out in the context of the appeals brought against the judgments in T-795/19 and T-796/19, nor take the opportunity of the present case to challenge those judgments. In any event, according to HB, the Commission gives those judgments a scope that they do not have, in particular since it would not suffice for the Commission to claim to exercise its powers as a public authority for this to be the case. In that regard, HB observes that, in paragraph 72 of the judgment in T-795/19 and in paragraph 67 of the judgment in T-796/19, the General Court correctly held that the powers that the Commission derives from the 2002 Financial Regulation or other secondary legislation fall, as from the signature of the contract at issue, within the scope of contractual relationships.

26 Furthermore, according to HB, 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 applicable Financial Regulations 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 where there are contractual relationships and where the EU judicature is not the court having jurisdiction over the contract.

27 Lastly, HB observes that the Commission 'does not appear to contest' the argument that, if the debts are contractual in nature and, therefore, the court with jurisdiction over contracts is not the EU judicature, it cannot adopt decisions under Article 299 TFEU.

Findings of the Court

28 It follows from the very wording of the first paragraph of Article 299 TFEU that acts of the Council of the European Union, the Commission or the ECB which impose a pecuniary obligation on persons other than States are enforceable. That provision contains no restriction as to the nature of the acts establishing a pecuniary obligation, except that it does not apply to acts addressed to Member States. However, Article 299 TFEU does not, in itself, constitute a sufficient legal basis for the adoption of enforceable measures. Indeed, the power of the institutions referred to in that provision to adopt such acts must be apparent from other provisions (judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraphs 51 and 53).

29 Furthermore, where the Commission adopts a recovery order that is enforceable within the meaning of Article 299 TFEU, the effects and binding force of such a unilateral decision derive not from the contractual clauses but from that article itself, combined with the provisions of the applicable Financial Regulation. To that extent, such a unilateral decision based on the exercise of powers of a public authority constitutes an act that may give rise to an objection which may be

the subject of an action for annulment before the EU judicature on the basis of Article 263 TFEU (see, to that effect, judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraphs 69 and 72).

30 However, the Commission cannot adopt an enforceable decision, within the meaning of Article 299 TFEU, in the context of contracts that do not contain an arbitration clause in favour of the EU judicature and therefore fall within the jurisdiction of the courts of a Member State (see, to that effect, judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraph 73).

31 In the present case, the decisions at issue relate not only to Article 299 TFEU but also to Article 100(2) of the 2018 Financial Regulation, which confers on the Commission the power formally to establish an amount as being receivable from persons other than Member States by means of a decision that is enforceable, within the meaning of Article 299 TFEU, without drawing a distinction according to whether the claim formally established by such a decision is of contractual or non-contractual origin (see, to that effect, judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraph 57).

32 In that regard, as the Court held in paragraph 58 of the judgment dated today, *Commission* v *HB* (C-160/22 P and C-161/22 P), the CARDS and TACIS recovery decisions, which the decisions at issue seek to enforce coercively, involve the exercise of powers of a public authority and they do not fall exclusively within the framework of contractual relationships.

33 Accordingly, the Court held, in paragraph 66 of that judgment, that the CARDS and TACIS recovery decisions must be categorised as a 'challengeable act' for the purposes of Article 263 TFEU, so an action seeking their annulment must be brought before the EU judicature.

34 The General Court thus erred in law in holding, in paragraphs 52 and 53 of the judgment under appeal, that the debts which the Commission seeks to recover arose from agreements and that, in view of the absence of an arbitration clause in those agreements in favour of the EU judicature, the Commission did not have the power to adopt the decisions at issue on the basis of Article 299 TFEU.

35 In the light of the foregoing reasons, the appeal must be allowed and the judgment under appeal set aside.

Referral of the action back to the General Court

36 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.

37 In the present case, the General Court annulled the decisions at issue on the basis of the first plea raised by HB in support of its action without examining the complaint alleging failure to observe the principle of the protection of legitimate expectations or the second and third pleas raised in support of that action.

38 In that context, it must be held that the Court of Justice does not have the necessary information in order to give a final ruling on that complaint and those pleas, which have not been debated before it.

39 It follows that the case must be referred back to the General Court for it to rule on that complaint and those pleas.

Costs

40 As the case is 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 6 July 2022, *HB* v *Commission* (T-408/21, EU:T:2022:418);**

2. **Refers Case T-408/21 back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]