Reports of Cases

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

24 February 2021 *

(Arbitration clause – Tempus IV Programmes – Grant agreements – Contractual nature of the dispute – Reclassification of the action – Eligible costs – Systemic and recurrent irregularities – Full repayment of amounts paid – Proportionality – Right to be heard – Obligation to state reasons – Article 41 of the Charter of Fundamental Rights)

In Case T-108/18,

Universität Koblenz-Landau, established in Mainz (Germany), represented by C. von der Lühe and I. Felder, lawyers,

applicant,

v

Education, Audiovisual and Culture Executive Agency (EACEA), represented by H. Monet, acting as Agent, and by R. van der Hout and C. Wagner, lawyers,

defendant,

APPLICATION principally under Article 263 TFEU seeking annulment of the letters of 21 December 2017 and 7 February 2018 of the EACEA relating to the amounts paid to the applicant in the context of grant agreements concluded for the implementation of three projects in the field of higher education and, alternatively, under Article 272 TFEU for a declaration that the right to recovery claimed is not established,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of S. Papasavvas, President, A. Kornezov (Rapporteur), E. Buttigieg, K. Kowalik-Bańczyk and G. Hesse, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure and further to the hearing on 16 September 2020,

gives the following

* Language of the case: German.

Judgment [1]

Background to the dispute

1 The applicant, Universität Koblenz-Landau, is a German higher education institution governed by public law.

2 In 2008 and 2010, within the framework of the European Union's cooperation programmes with third countries for the modernisation of their higher education systems, known as Tempus IV, the applicant signed the following three grant agreements:

– the grant agreement of 5 December 2008, bearing the reference number 2008-4744, for the implementation of the project 'Educational Centers Network on Modern Technologies of Local Governing' ('the Ecesis Agreement'), signed between the applicant, as sole beneficiary, and the European Commission;

– the grant agreement of 18 October 2010, bearing the reference number 2010-2844, for the implementation of the project 'Development and Integration of University Self-assessment Systems' ('the Diusas Agreement'), signed inter alia between the applicant, as coordinator and co-beneficiary, and the Education, Audiovisual and Culture Executive Agency (EACEA);

– the grant agreement of 30 September 2010, bearing the reference number 2010-2862, concerning the implementation of the project 'Development of Quality Assurance System in Turkmenistan on the base of Bologna Standards' ('the Deque Agreement'), signed inter alia between the applicant, as coordinator and co-beneficiary, and the EACEA.

…

19 By letter of 21 December 2017 ('the letter of 21 December 2017'), the EACEA informed the applicant that it had decided to recover an amount of EUR 756 381.89 under the Ecesis Agreement. As regards the Diusas and the Deque Agreements, it informed the applicant of its intention solely to seek repayment of the amounts which it had received under those agreements as final beneficiary, thus excluding the amounts transferred by it to co-beneficiaries, the amount of which had yet to be communicated to it. The EACEA stated that, if it did not obtain information concerning the amounts paid to the co-beneficiaries under those two agreements, it would request the full repayment of those amounts or the repayment of a 'higher' amount.

20 By letter of 7 February 2018 ('the letter of 7 February 2018'), first, the EACEA found that the applicant had not submitted the information necessary to determine the amount of the amounts which had been paid to it under the Diusas and the Deque Agreements, which had been subsequently transferred to other co-beneficiary entities. Secondly, the EACEA stated that it had itself contacted those entities and received the requested information from some of them. On the basis of the information thus collected, the EACEA set the amount to be repaid at EUR 695 919.31 for the Diusas Agreement and EUR 343 525.10 for the Deque Agreement. The EACEA requested the applicant to submit its observations, if any, within a time limit of 15 calendar days, stating that, in the absence of such observations, it would proceed with the recovery of the abovementioned amounts.

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

21 On 13 February 2018, the EACEA sent to the applicant a debit note amounting to EUR 756 381.89 under the Ecesis Agreement ('the debit note').

22 The total sum claimed under those three agreements thus amounted to EUR 1 795 826.30.

Procedure

23 By application lodged at the Court Registry on 22 February 2018, the applicant brought the present action. That action was directed against the 'Commission …, represented by [the] EACEA'.

24 In accordance with the decision of the President of the General Court of 28 March 2018, the present action has been regarded as directed against the EACEA as well as against the Commission.

25 By separate document lodged at the Court Registry on 4 May 2018, the Commission raised a plea of inadmissibility under Article 130 of the Rules of Procedure of the General Court, in so far as the action was directed against it. The applicant lodged its observations on that objection on 18 June 2018.

26 By a document lodged at the Court Registry on 15 June 2018, the EACEA lodged the defence.

27 By document lodged at the Court Registry on 7 August 2018, the applicant lodged the reply.

28 By document lodged at the Court Registry on 25 September 2018, the EACEA lodged the rejoinder.

29 By letter of 8 October 2018, the Court requested the Commission, pursuant to Article 89(3)(d) of the Rules of Procedure, to produce certain documents. The Commission complied with that request within the prescribed period.

30 By letter lodged at the Court Registry on 2 November 2018, the applicant submitted its observations on the documents produced by the Commission.

31 At the request of the applicant, the procedure was suspended twice, by decisions of 28 February and 11 June 2019, on the ground that the applicant and the EACEA had entered into discussions aimed at reaching a possible amicable settlement.

32 By decision of 5 September 2019, a third request for a stay of the proceedings was dismissed.

33 By order of 23 October 2019, *Universität Koblenz-Landau* v *Commission and EACEA* (T-108/18, not published, EU:T:2019:768), the Court dismissed the action as inadmissible in so far as it was directed against the Commission and ordered the applicant to pay the costs relating to those proceedings.

34 Since the composition of the Chambers of the General Court was altered by a decision of the President of the General Court of 24 October 2019 pursuant to Article 27(5) of the Rules of Procedure, the present case has been reassigned to the Tenth Chamber.

35 In accordance with Article 106(2) of the Rules of Procedure, on 6 November 2019, the EACEA made a request for an oral hearing.

36 By decision of 11 March 2020, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case back to the Tenth Chamber sitting as an Extended Composition of five judges.

37 In the context of the measures of organisation of procedure of 12 March and 27 May 2020, adopted under Article 89(3)(a) and (d) of the Rules of Procedure, the Court put questions to the parties, which complied with that request within the prescribed period.

38 On a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure.

39 On 16 September 2020, the parties presented oral argument and answered questions put by the Court at the hearing, at the end of which the oral part of the procedure was closed.

40 By document lodged at the Court Registry on 3 February 2021, the applicant submitted an application for the reopening of the oral phase of the proceedings under Article 113(2)(c) of the Rules of Procedure on the basis of an order of the public prosecutor's office in Koblenz of 28 December 2020, which had been served on it on 28 January 2021. By decision of 4 February 2021, the President of the Tenth Chamber (Extended Composition) of the General Court dismissed that application, which the parties were informed of by letters from the Registry of 5 February 2021.

Form of order sought

41 In the application, the applicant claims that the Court should:

– annul the letter of 21 December 2017;

– annul the letter of 7 February 2018;

– suspend the execution of the letter of 21 December 2017 and the letter of 7 February 2018 and of the debit note until there is a final ruling on the present action for annulment;

– order the defendant to pay the costs.

42 In the reply, the applicant claims, in the alternative, that the Court should reclassify the present action as an action under Article 272 TFEU and declare that the debt of EUR 756 381.89 claimed under the Ecesis Agreement and that of EUR 1 039 444.41 claimed under the Diusas and the Deque grant agreements do not exist.

43 In addition, the applicant stated that there was no longer any need to rule on the third head of claim set out in the application, in so far as the EACEA had decided to suspend the recovery of the amounts claimed in the letters of 21 December 2017 and 7 February 2018, which the applicant was informed of by letter of 9 April 2018, set out in Annex C.5 to the defence. The applicant confirmed at the hearing, in response to a question put by the Court in that regard, that it had withdrawn its third head of claim, which was noted in the minutes of the hearing.

44 The EACEA contends that the Court should:

– dismiss the action as manifestly inadmissible and, in the alternative, as unfounded;

– order the applicant to pay the costs.

45 At the hearing, the EACEA stated that it waived its right to challenge its status as defendant and therefore the admissibility of the action in so far as that action was directed against it, which was noted in the minutes of the hearing.

Law

The jurisdiction of the Court and the pleas of non-admissibility raised by the EACEA

…

The reclassification of the action as being based on Article 272 TFEU

…

65 It follows from the foregoing that, first, the present action initially brought under Article 263 TFEU must be reclassified as an action brought under Article 272 TFEU and, secondly, the Court has jurisdiction to rule on that action in accordance with Article 272 TFEU and with the arbitration clauses contained in Article I.8 of the Ecesis Agreement and Article I.9 of the Diusas and the Deque Agreements.

Merits

66 In support of the action, the applicant relies on four pleas in law, alleging (i) infringement of the right to be heard, (ii) 'misapplication of EU law', (iii) failure to state reasons and (iv) infringement of the principle of proportionality.

67 It is appropriate to examine, first of all, the first and the third pleas in law, then the second plea in law and, finally, the fourth plea in law.

The first and the third pleas in law, alleging, respectively, (i) infringement of the right to be heard and (iii) failure to state reasons

– Whether the right to be heard and the obligation to state reasons can be relied on in the context of a dispute of a contractual nature

68 The EACEA claims that the right to be heard and the obligation to state reasons cannot be usefully relied on in the context of a dispute of a contractual nature. Therefore, according to the EACEA, it had neither the obligation to hear the applicant before sending it the letters of 21 December 2017 and 8 February 2018 and the debit note, nor the obligation to state reasons in them.

69 That objection must be dismissed.

70 In that regard, it should be pointed out that the right to be heard and the obligation to state reasons, relied on by the applicant in the context of its first and third pleas in law, have been enshrined in Article 41(2)(a) and (c) of the Charter of Fundamental Rights of the European Union ('the Charter'), under which the EU institutions, bodies, offices and agencies are (i) required to respect the right of every person to be heard before any individual measure adversely affecting him or her is taken against him or her and (ii) obliged to state the reasons for their decisions.

71 Thus, the General Court has already had occasion to rule that the Charter, which forms part of primary law, provides, in Article 51(1), without exception, that its provisions 'are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity' and, therefore, fundamental rights are designed to preside over the exercise of the powers conferred on the EU institutions, including in contractual matters (judgments of 3 May 2018, *Sigma Orionis* v *Commission*, T-48/16, EU:T:2018:245, paragraphs 101 and 102, and of 3 May 2018, *Sigma Orionis* v *REA*, T-47/16, not published, EU:T:2018:247, paragraphs 79 and 80; see also, by analogy, judgment of 13 May 2020, *Talanton* v *Commission*, T-195/18, not published, under appeal, EU:T:2020:194, paragraph 73).

72 Similarly, according to the Court of Justice, when EU institutions, bodies, offices and agencies perform a contract, they remain subject to their obligations under the Charter and the general principles of EU law (see, to that effect, judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraph 86).

73 The Court of Justice has also pointed out that, if the parties decide, in their contract, to confer on the EU judicature, by means of an arbitration clause, jurisdiction over disputes relating to that contract, that judicature will have jurisdiction, independently of the applicable law stipulated in that contract, to examine any infringement of the Charter or of the general principles of EU law (judgment of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraph 81).

74 Furthermore, it should be pointed out that EU institutions, bodies, offices and agencies are not entirely comparable to private parties to a contract when they act in contractual matters. Thus, first, the grants awarded by them draw on public funds of the European Union, so that, when awarding such grants, the EU institutions, bodies, offices and agencies remain bound, in particular, by the budgetary requirements arising from Article 317 TFEU and the financial rules laid down in that regard by the Financial Regulation applicable. Secondly, in the presence of a contract containing, as in the present case, an arbitration clause conferring jurisdiction on the EU judicature, in particular, the Commission has exorbitant prerogatives under ordinary law enabling it to formalise a finding of a contractual claim by unilaterally adopting, on the basis of Article 72(2) 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) or Article 79(2) of Regulation No 966/2012, an enforceable recovery order under Article 299 TFEU, the effects and binding force of which derive from those provisions (see, to that effect, judgment of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraphs 68 to 70 and 73). In addition, it must be held that, under the second subparagraph of Article 108(1) of Regulation No 1605/2002 and the second subparagraph of Article 121(1) of Regulation No 966/2012, a grant may be awarded either by means of a written agreement or by means of a Commission decision notified to the beneficiary. Thus, the EU legislature has provided that a grant may be awarded

both by contract and by administrative procedure. However, the EU institutions, bodies, offices and agencies cannot, at their discretion, avoid their obligations under primary law, including the Charter, on the basis of their choice to award grants by agreement rather than by decision.

75 Therefore, the objection of the EACEA concerning whether the right to be heard and the obligation to state reasons can be relied on in disputes of a contractual nature should be dismissed.

– ***The right to be heard***

…

78 In the first place, it is appropriate to check whether the EACEA has allowed the applicant the opportunity to make its views usefully and effectively known before communicating the letters of 21 December 2017 and 7 February 2018 and the debit note of 13 February 2018 to it.

79 The Court of Justice has already had occasion to rule that the EU institutions, bodies, offices or agencies were required, in accordance, in particular, with the requirements of the principle of good administration, to respect the principle of adversarial proceedings in the context of an audit procedure such as that laid down in Article II.19 of the contested agreements. The EU institutions, bodies, offices or agencies must obtain all relevant information, in particular that which the other party to the contract is in a position to provide, before taking a decision to proceed with recovery, issue a debit note, terminate a contract or refuse to make additional payments to the other party to the contract (see, to that effect, judgment of 11 June 2015, *EMA* v *Commission*, C-100/14 P, not published, EU:C:2015:382, paragraph 123).

80 In that regard, first, the Court finds that the draft audit report was communicated to the applicant and that the EACEA requested that applicant to put forward its position concerning the auditors' findings, which it actually did in a detailed manner in its letters of 29 September and 11 November 2016 (see paragraphs 10 and 11 above). In particular, the draft audit report referred to the potentially systemic and recurrent nature of the irregularities found. In the letters mentioned above, the applicant took a position on all the findings set out in the draft audit report.

81 Secondly, by letter of 26 July 2017, the EACEA communicated to the applicant the final audit report and the final report of OLAF. The former set out the observations and evidence submitted by the applicant in its letters of 29 September and 11 November 2016, in relation to each of the 35 financial findings (Financial Audit Findings) and to the 7 findings concerning management (Management Audit Findings), by explaining in each case the assessments made by the auditors in that regard.

82 Thirdly, in its letter of 26 July 2017, the EACEA stated that, on the basis of the seriousness of the irregularities found, as well as their systemic and recurrent nature, it intended a full recovery of the amounts paid to the applicant under the contested agreements. The applicant was requested to submit its observations on the intended recovery within a 60-day period.

83 The applicant complied with that request by letter of 25 September 2017 and filed documents once again.

84 Accordingly, by letter of 21 December 2017, the EACEA stated, in particular, with regard to the Diusas and the Deque Agreements, its intention to claim the repayment of an amount corresponding to that received by the applicant as final beneficiary and that, based on the fact

that the applicant had not provided the necessary information enabling it to establish whether that amount is correct, it had no other choice but to ascertain that amount on the basis of the information available. The EACEA also informed the applicant of its decision to recover the full amount paid by it under the Ecesis Agreement, under which the applicant was the sole beneficiary.

85 By letter of 7 February 2018, the EACEA set the amounts to be recovered under the Diusas and the Deque Agreements on the basis of the information it was able to collect on its own from certain co-beneficiaries.

86 Accordingly, it must be held that the applicant had the opportunity to make its views usefully and effectively known on several occasions before the letters of 21 December 2017 and 7 February 2018 and the debit note were communicated to it, both as regards the nature and the extent of the irregularities found and as regards the amounts to be recovered.

87 In the second place, the applicant, however, claims that it was impossible for it to submit originals of certain invoices, as requested by the EACEA in its letter of 26 July 2017, on the ground that, at that time, it no longer had them in its possession, as those invoices had been attached in the context of ongoing criminal investigation proceedings conducted by the public prosecutor's office in Koblenz.

88 In that regard, it should be noted that, in principle, the objective and proven impossibility, for reasons not attributable to the person concerned, to submit certain documents at the request of the EACEA may, in certain cases, deprive that person of any possibility of making his or her point of view usefully or effectively known, with regard to the facts which are the subject of those documents, where the failure to submit those documents has had an impact on the determination of the amounts which are the subject of requests for repayment.

89 However, the present case does not fall within this situation. While it is not contested that the applicant was in an objective and proven impossible situation, for reasons not attributable to it, to submit originals of the invoices requested by the EACEA in its letter of 26 July 2017, the fact remains that that failure to submit them has had no impact on the determination of the amounts which were the subject of claims for repayment contained in the letters of 21 December 2017 and 7 February 2018 and in the debit note of 13 February 2018.

90 First, it is apparent from the file that the attachment of the documents by the public prosecutor's office in Koblenz took place on 22 June 2017, while both the audit and the OLAF investigation were carried out in the period from 2014 to 2016, that is, before the attachment in question, so that both the auditors and OLAF were able to inspect the content of the invoices in question and to draw appropriate conclusions, as the applicant moreover admits in its observations in response to the measure of organisation of procedure adopted by the Court on 27 May 2020. Similarly, that attachment took place after the communication of the draft audit report to the applicant on 22 April 2016, which already contained the main findings concerning the management of the contested agreements. It is apparent from that report, in particular, that the auditors' conclusions are based on an examination of almost all of the costs claimed under the contested agreements (see paragraph 7 above). Moreover, by letters of 29 September and 11 November 2016, that is, still well before the attachment in question, the applicant submitted its observations regarding the findings set out in the draft audit report, so that it was able, at that time, to inspect all of the relevant documentation in its possession, including the invoices which were the subject of the subsequent attachment, and thus to submit its position in full knowledge of the facts.

91 Secondly, it is true that the EACEA requested the production of some original invoices in its letter of 26 July 2017. However, in the letter of 21 December 2017, the EACEA took note of the fact that the applicant was not in possession of the original invoices requested and that it was therefore impossible for it to submit them. However, it did not draw any inferences from it. Nothing in that letter or in the letter of 7 February 2018 shows that the failure to submit those invoices had any impact whatsoever on the determination of the amounts which were the subject of the claims for repayment contained in the letters of 21 December 2017 and 7 February 2018 and in the debit note of 13 February 2018. As explained by the EACEA in its reply to a question raised in the context of the measure of organisation of the procedure of 12 March 2020 and at the hearing, without being contradicted in that regard by the applicant, among the numerous irregularities detected in the final audit reports and the OLAF report, some of those invoices related in particular to inconsistencies relating to the content of the invoices (see paragraph 15 above) and not to the fact that they were not originals.

92 Furthermore, the fact that the applicant was not in possession of the original invoices requested was not such as to prevent the submission of the information necessary for the purposes of the breakdown, requested by the EACEA, between the amounts received by the applicant as final beneficiary of the Diusas and the Deque Agreements and those transferred by it to the co-beneficiaries of those agreements. According to the letter of the EACEA of 26 July 2017, that breakdown had to be made on the basis of bank transfers or bank statements and not on the basis of those invoices.

93 It follows that the failure to submit the original invoices requested by the EACEA in its letter of 26 July 2017 had no impact on the determination of the amounts which were the subject of the claims for repayment set out in the letters of 21 December 2017 and 7 February 2018 and in the debit note.

94 Therefore, the first plea in law, alleging infringement of the right to be heard, must be dismissed as unfounded.

– ***The obligation to state reasons***

…

97 The extent of the obligation to state reasons must be assessed depending on the specific circumstances, in particular, the content of the measure, the nature of the reasons given and the interest which the addressee of the measure may have in obtaining explanations, and it matters, in order to assess whether reasons have been sufficiently stated, to place it in the factual and legal context in which the measure in question was adopted. Thus, the reasons given for a measure are sufficient if that measure was adopted in a context which was known to the addressee concerned and which enables him or her to understand the scope of the measure concerning him or her (see, by analogy, judgments of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraphs 53 and 54 and the case-law cited; of 24 October 2011, *P* v *Parliament*, T-213/10 P, EU:T:2011:617, paragraph 30; and of 27 September 2012, *Applied Microengineering* v *Commission*, T-387/09, EU:T:2012:501, paragraphs 64 to 67).

98 In the present case, first, the Court finds that the letters of 21 December 2017 and 7 February 2018 clearly identify the legal basis for the intended recovery, namely Article II.19(3) and (5) of the contested agreements and Article 135(4) of Regulation No 966/2012 (see paragraphs 16 to 20 above), and the amounts which the EACEA considered should be recovered.

99 Secondly, the numerous written exchanges between the parties which took place from the communication of the draft audit report to the applicant by letter of 22 April 2016 and recalled in paragraphs 7 to 20 above contain sufficient and consistent information allowing the applicant to understand the reasons why the EACEA decided to claim the repayment in question and the manner in which the amounts to be repaid were determined. In particular, as noted in paragraphs 80 and 81 above, the final audit report, the conclusions of which the EACEA relies on for the purposes of the intended recovery, took account of all of the applicant's observations and evidence submitted by it, examined them, and rejected them individually, explaining on each occasion the reasons why those observations or evidence did not call into question the findings reached by the auditors.

100 Thirdly, in the letter of 21 December 2017, the EACEA, first, replied to all the arguments raised by the applicant in its letters of 9 August and 25 September 2017 and, secondly, clearly explained that the amounts to be recovered were not determined on the basis of the costs regarded as ineligible, but on the basis of the finding of serious, systemic and recurrent irregularities affecting the implementation of the contested agreements.

101 It follows that the letters of 21 December 2017 and 7 February 2018 contain sufficient reasoning to enable the applicant to understand the reasons why the EACEA had decided to claim repayment of the amounts in question and to enable the EU judicature to exercise its review.

102 Therefore, the third plea in law, alleging a failure or inadequate statement of reasons, must be rejected as unfounded.

Second plea in law, alleging a 'misapplication of EU law'

…

– The first complaint alleging the lack of a legal basis for the full recovery of the amounts paid

104 The applicant takes the view that neither Article II.19(3) and (5) of the contested agreements nor Article 135(4) of Regulation No 966/2012 allows the EACEA to recover in full the amounts paid to it under the contested agreements.

105 The EACEA challenges the applicant's arguments.

106 In the present case, the Court finds that, under the first paragraph of Article I.8 of the Ecesis Agreement, the award of the grant in question is governed by the provisions of that agreement, the 'applicable EU rules' and, in the alternative, Belgian law relating to the award of grants. As for the Diusas and the Deque Agreements, under Article I.9 of each of them, those grants are governed by the contractual provisions and the applicable rules of EU law.

107 In the first place, with regard to the relevant contractual provisions, it should be noted that, under Article II.19(3) of each of those agreements, the EACEA has a right to carry out controls on the use of grants. According to that provision, the results of the controls may lead to recovery decisions. Similarly, Article II.19(5) of the agreements specifies that OLAF has the right to carry out controls which may also lead to recovery decisions.

108 Those clauses, which the applicant alleges have been breached, do not therefore exclude the possibility for the EACEA to proceed with the full recovery of the amounts paid under those agreements. They state that the EACEA may proceed to the 'recovery' of the grants, without any limitation whatsoever.

109 In the second place, as regards 'applicable EU rules' within the meaning of the first paragraph of Article I.8 of the Ecesis Agreement and Article I.9 of the Diusas and the Deque Agreements, the Court notes that, in the present case, first, Regulation No 1605/2002, repealed with effect from 1 January 2013 (Article 212 of Regulation No 966/2012) and, then, Regulation No 966/2012, that regulation having been repealed in turn with effect from 2 August 2018 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 No 966/2012 (OJ 2018 L 193, p. 1) are applicable *ratione temporis*. Under the second paragraph of Article 187 of Regulation No 1605/2002 and Article 212 of Regulation No 966/2012, Regulation No 1605/2002 applied, as a general rule, from 1 January 2003 until 1 January 2013, whereas the contested agreements were concluded in 2008 and 2010 respectively (see paragraph 2 above). Moreover, the period of execution of the agreements and, consequently, the period audited, was the period from 15 January 2009 to 14 January 2011 for the Ecesis Agreement, from 15 October 2010 to 14 October 2012 for the Diusas Agreement and from 15 October 2010 to 14 October 2013 for the Deque Agreement. It follows, first, that Regulation No 1605/2002 was applicable *ratione temporis* to the Ecesis and the Diusas Agreements and, secondly, that that regulation and Regulation No 966/2012 were successively applicable to the Deque Agreement.

110 Under Article 119(2) of Regulation No 1605/2002, 'should the beneficiary fail to comply with his/her legal or contractual obligations, the grant shall be suspended and reduced or terminated in the cases provided for by the implementing rules after the beneficiary has been given the opportunity to make his/her observations'. The use of the term 'terminated' thus refers to the case of full recovery of the amounts received.

111 Article 135(4) of Regulation No 966/2012 is worded as follows:

'Where such errors, irregularities or fraud are attributable to the beneficiary, or should the beneficiary breach his or her obligations under a grant agreement or decision, the authorising officer responsible may, in addition, reduce the grant or recover amounts unduly paid under the grant agreement or decision, in proportion to the seriousness of the errors, irregularities or fraud or of the breach of obligations, provided that the beneficiary has been given the opportunity to make observations.'

112 Furthermore, Article 135(5) of Regulation 966/2012 provides as follows:

'Where controls or audits demonstrate systemic or recurrent errors, irregularities, fraud or breach of obligations attributable to the beneficiary and having a material impact on a number of grants awarded to that beneficiary under similar conditions, the authorising officer responsible may suspend implementation of all the grants concerned or, where appropriate, terminate the concerned grant agreements or decisions with that beneficiary, in proportion to the seriousness of the errors, irregularities, fraud or of the breach of obligations, provided that the beneficiary has been given the opportunity to make observations.

The authorising officer responsible may, in addition, following an adversarial procedure, reduce the grants or recover amounts unduly paid in respect of all the grants affected by the systemic or recurrent errors, irregularities, fraud or breach of obligations referred to in the first subparagraph that may be audited in accordance with the grant agreements or decisions.'

113 Accordingly, neither Article 119(2) of Regulation No 1605/2002 nor Article 135(4) of Regulation No 966/2012 prevents the full recovery of a grant. It is sufficient to note, first, that the latter provision expressly requires account to be taken of the seriousness of the errors, irregularities, fraud or breaches of obligations found. Thus, the fact that they are of a systemic or recurrent nature is clearly a factor to be taken into account in assessing the seriousness of those irregularities. Therefore, when the seriousness of the errors, irregularities, fraud or breaches of obligations found is such that it compromises the entire system of control and management of the agreements in question, and thus all the expenditure claimed, then the full recovery of the amounts paid cannot be regarded as disproportionate.

114 That conclusion is further supported by the second subparagraph of Article 135(5) of Regulation No 966/2012, under which, in the event of systemic and recurrent irregularities attributable to the beneficiary which have a material impact on several grants, the authorising officer may 'recover amounts unduly paid' under all the agreements affected by those irregularities. That provision therefore does not exclude the possibility to proceed with the full recovery of a given grant if the seriousness of the irregularities found is such that all of the amounts in question are to be regarded as unduly paid.

115 That conclusion is also consistent with the principle of sound financial management of EU resources laid down in Article 317 TFEU. Thus, in the event of non-compliance with the conditions laid down in a grant agreement, EU institutions, bodies, offices or agencies are required to recover the grant paid up to the amounts considered unreliable or unverifiable.

116 Moreover, the EU judicature has already had occasion to rule that, in the system for granting EU financial aid, the use of that aid is subject to rules which may result in the partial or total repayment of aid already paid (judgments of 7 July 2010, *Commission* v *Hellenic Ventures and Others*, T-44/06, not published, EU:T:2010:284, paragraph 85, and of 16 December 2010, *Commission* v *Arci Nuova associazione comitato di Cagliari and Gessa*, T-259/09, not published, EU:T:2010:536, paragraph 61).

117 It follows, having regard to all of the foregoing, that the contractual provisions and the relevant provisions of Regulation No 1605/2002 and Regulation No 966/2012, as interpreted by the EU judicature, do not, in principle, prevent the EACEA from recovering the full amounts paid to the applicant under the contested agreements. The question whether such recovery complies, in the present case, with the principle of proportionality is the subject of the fourth plea in law of the action and shall therefore be examined below.

118 Consequently, the first complaint of the second plea in law must be rejected as unfounded.

– The second complaint, alleging the lack of irregularities of a systemic and recurring nature

…

139 Lastly, the applicant cannot derive any argument from the fact that Article 135(4) of Regulation No 966/2012 does not refer to systemic and recurrent irregularities or that those concepts are not defined in that regulation. It is sufficient to note, first, that that provision expressly requires account to be taken of the seriousness of the irregularities found. The fact that they are of a systemic or recurrent nature is clearly an element to be taken into account in assessing the seriousness of those irregularities. Secondly, the fact that Regulation No 966/2012 uses those concepts, in particular in Article 135(5) thereof, without expressly defining them, cannot have any effect on the intended recovery, since the content of those concepts derives, without any possible doubt, from their usual meaning, according to which systemic and recurrent irregularities are those which are characterised by their repetitiveness and by the fact that they affect the whole control and management system, such as those noted in paragraphs 124 to 131 above.

…

Costs

165 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EACEA has applied for costs and the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

The General Court (Tenth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Universität Koblenz-Landau to pay the costs.

Papasavvas Kornezov Buttigieg

Kowalik-Bańczyk Hesse

Luxembourg, 24 February 2021.

[Signatures]