

## Decision in case 22/2018/CEC on the European Commission's decision to derogate from the rule of origin in a tender procedure organised by the Delegation of the European Union to the former Yugoslav Republic of Macedonia

Decision

**Case 22/2018/CEC - Opened on 03/10/2018 - Decision on 14/12/2018 - Institution concerned** European Commission ( No maladministration found ) |

1. The complaint concerns a tender procedure, organised by the Delegation of the European Union to the former Yugoslav Republic of Macedonia ('the Delegation') [1] . The purpose of the tender was to supply equipment to certain government offices in Macedonia in order to increase their efficiency and effectiveness for managing the migration crisis. The tender was divided in three lots. The Delegation derogated from the rule of origin [2] for Lot 1 (terrain vehicles) [3] .
2. On 14 July 2017, the complainant, who is the general manager of a private company in Albania, wrote to the Commission, asking it to justify the decision to derogate from the rule of origin for the tender in question.
3. On 2 August 2017, the Commission replied, stating that the basis of the decision to derogate from the rule of origin for Lot 1 was the "*urgency or the unavailability of products and services in the markets of the countries concerned, or in other duly substantiated cases where application of the eligibility rules would make the realisation of a project, programme or action impossible or exceedingly difficult*".
4. In further correspondence, the complainant argued that the Commission had not given clear reasons for derogating from the rule of origin, but had simply stated the relevant rules. He asked whether the market study that the Delegation carried out before the publication of the tender showed that there were no available products or suppliers in the eligible countries. In response, the Commission confirmed its previous reply.
5. On 23 December 2017, the complainant turned to the Ombudsman. He complained that the Commission had not justified the decision to derogate from the rule of origin for Lot 1 of the tender. He argued that the Commission's reference to the "unavailability of products" in eligible countries did not correspond to the reality of the markets in those countries. In addition, since Lot 1 of the tender procedure had been cancelled [4] , "urgency" could not be the reason for the



derogation either.

**6.** The Ombudsman's inquiry team contacted the Commission and asked it to reply to the complainant's concerns.

**7.** On 6 November 2018, the Commission replied, stating that the decision to derogate from the rule of origin was due to reasons of "urgency" [5] . It explained that the tender was part of the Commission Special Measure on strengthening the response capacity of the most affected countries in the Western Balkans to effectively cope with the increased mixed migration flows [6] . It stated that in view of the urgent nature of the tender and the delay due to the cancellation of Lot 1, the tender for this Lot had been re-launched through a negotiated procedure. The Commission explained that due to the urgent circumstances concerning the migration crisis, the derogation from the rule of origin had been maintained. It noted that the contract had been awarded to a tenderer based in the UK [7] .

**8.** On 14 November 2018, the complainant made comments on the Commission's reply. He reiterated his view that there were available suppliers in the eligible countries capable to provide the vehicles concerned, even in a situation of urgency [8] .

**9.** The Ombudsman considers that the Commission has now explained in a clear and comprehensive manner why it derogated from the rule of origin for Lot 1 of the tender. As the Commission clarified, that decision was due to the urgent circumstances created by the increased migration flows since late spring 2015, and not to the unavailability of the products concerned in the eligible countries. Therefore, the complainant's argument that there were available suppliers in the eligible countries has no bearing on whether there was a situation of urgency justifying derogating from the rule of origin.

**10.** As a sufficiently clear and convincing reply has now been sent, there was no maladministration by the Commission in this case and I have decided to close the case [9] .

Lambros Papadias

Head of Inquiries - Unit 3

Strasbourg, 14/12/2018

[1] [EuropeAid/137656/DH/SUP/MK](#) [Link]

[2] According to the rule of origin, all supplies under a procurement contract must originate from one of the eligible countries mentioned in the relevant financing instrument. See Article 8(4) of [Regulation \(EU\) No 236/2014](#) [Link] of the European Parliament and of the Council of 11 March



2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external actions, OJ L 77, 15.3.2014, p. 95. This tender was financed under [Regulation \(EU\) No 231/2014 \[Link\]](#) of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II), OJ L 77, 15.3.2014, p. 11. Article 10(1) of Regulation 236/2014 defines the eligible countries under IPA II.

[3] [EuropeAid/137656/DH/SUP/MK \[Link\]](#), Tender Contract Notice, Article 8.

[4] Lot 1 of the tender procedure (international open tender procedure) was cancelled “ *due to non-compliant tenderers offer with the minimum criteria required in the technical specification* ”, see [EuropeAid/137656/DH/SUP/MK \[Link\]](#), Cancellation Notice.

[5] In accordance with Article 10(2) of EU Regulation 236/2014.

[6] Commission decision no. 2015/038-754.

[7] [EuropeAid/137656/DH/SUP/MK \[Link\]](#), Award Notice.

[8] In support, he stated that the EU produces 18,5% of the vehicles worldwide, and he attached a list of vehicle manufacturers.

[9] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of the [Decision of the European Ombudsman adopting Implementing Provisions \[Link\]](#)