

Decision in case 2432/2013/NF on the European Commission's issuing of debit notes under supply contracts entered into by the ACP Secretariat

Decision

Case 2432/2013/NF - Opened on 31/01/2014 - Decision on 06/11/2015 - Institution concerned European Commission (No maladministration found) |

The complainant concluded a number of supply contracts with the Secretariat of the African, Caribbean and Pacific Group of States ('ACP Secretariat') which implemented an EU-funded programme. The complainant did not meet a number of delivery deadlines and the ACP Secretariat therefore imposed penalties on the complainant. The complainant turned to the Ombudsman about the European Commission issuing debit notes for the penalties. The Ombudsman found that, when issuing the debit notes, the Commission was acting on behalf of the ACP Secretariat and the Commission did not have any discretion in this regard. The complainant had to settle any contractual dispute directly with the ACP Secretariat, which is not an EU institution, body, office or agency. The Ombudsman found no maladministration but encouraged the Commission to explain in future the role it plays in this context to avoid similar issues arising.

The background to the complaint

1. The complainant, an Italian company, concluded 12 contracts with the Secretariat of the African, Caribbean, and Pacific Group of States ('ACP Secretariat') [1] in the framework of the EU-funded programme 'Strengthening Fishery Products Health Conditions in African, Caribbean and Pacific states ('ACP') and Overseas Countries and Territories of the Netherlands and the United Kingdom' ('SFP Programme'). The contracts were for the supply, delivery, maintenance and after-sales service of health equipment and cars. The contracts were endorsed by the European Commission for financing out of the European Development Fund ('EDF').
2. The complainant failed to meet the delivery dates under 11 of the supply contracts, but did not consider itself to be responsible for the delays. The complainant and the ACP Secretariat entered into amicable settlement negotiations in an attempt to settle the dispute, but the negotiations were unsuccessful. As a consequence, the ACP Secretariat imposed on the complainant damages for delays in performance [2] . The Commission then issued debit notes to the complainant.



3. The complainant then turned to the Ombudsman.

The inquiry

4. The Ombudsman opened an inquiry into the complaint and, after having obtained clarifications from the complainant, identified the following allegations and claims:

When issuing debit notes to the complainant for contractual penalties, the Commission acted incorrectly and unfairly, given that it failed to take into account the following circumstances:

1. The ACP Secretariat, as the Contracting Authority, had consistently informed the complainant that the period for performing the contracts could not be extended and the complainant had therefore understood that no request for an extension could be made.
2. The delays in performing the contracts were not imputable to the complainant but mainly to the ACP Secretariat being late in providing certificates related to the VAT and import duties exemptions as well as to *force majeure* circumstances.

The complainant claimed that the Commission should, in light of the principle of proportionality (i) revoke the debit notes and (ii) reimburse the already recovered amount of EUR 27 779.83 to the complainant and waive the recovery of the remaining amount of EUR 43 087.20.

5. The complainant also put forward allegations of maladministration on the part of the ACP Secretariat and the SFP Programme staff. Given that the ACP Secretariat is not an EU institution, body, office or agency, and given that the SFP Programme staff acted on behalf of the ACP Secretariat when communicating with the complainant, these allegations fell outside the Ombudsman's mandate and were thus not covered by her inquiry.
6. The Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

The allegation that the Commission acted incorrectly and unfairly when issuing the debit notes

Arguments presented to the Ombudsman

7. The complainant's two main arguments for opposing the debit notes concerned (i) the question of responsibility for the delays in performance and (ii) the alleged impossibility to request an extension of the periods of performance under the contracts. On the first point, the



complainant argued that most of the delays in performance were caused by the ACP Secretariat, which failed to comply with its contractual obligation to obtain all import permits or licenses required for the supplies in reasonable time. In addition, the complainant stated that some delays in performance were caused by the civil war in the Ivory Coast and the inability of one of its sub-contractors to deliver on time. The delays were thus beyond the complainant's control. On the second point, the complainant argued that it had received information from the SFP Programme staff leading it to understand that it would not be able to obtain an extension of the deadline for performing the contracts.

8. In its opinion, the Commission clarified its role with regard to the complainant's supply contracts and the issuing of debit notes. In 2002, the Commission and the ACP Secretariat signed a Financing Agreement for the implementation of the SFP Programme. The Financing Agreement was drawn up on the basis of the revised Lomé IV Convention, which is an ACP-EU partnership agreement with the aim of furthering development in ACP countries. The Financing Agreement provided that the SFP Programme was to be funded by the EDF and defined the respective legal responsibilities of the ACP Secretariat and the Commission. Under the Financing Agreement, the ACP Secretariat was to procure, sign, and manage contracts to implement the SFP Programme. The Commission stressed that it was not a party to any of the contracts concluded by the ACP Secretariat for the implementation of the SFP Programme and the Financing Agreement, such as the supply contracts entered into with the complainant. However, the Commission endorsed those contracts for financing out of the EDF.

9. The Commission stated that the implementation of the complainant's supply contracts, as well as any other operation carried out with EDF resources, was governed by a specific Financial Regulation. According to that Financial Regulation, operations funded with EDF resources were implemented through either centralised or decentralised management. The Commission stated that the SFP Programme was carried out by means of decentralised management. This meant that as regards the complainant's supply contracts, the Commission remained in charge of payments and the management of funds, such as the issuing of debit notes/recovery orders. [3] The Commission stressed that in making payments, or refraining from doing so, as well as in issuing debit notes, it acted on behalf of the ACP Secretariat.

10. In summary, the Commission described its role with regard to the complainant's supply contracts as that of a 'paying authority' and it put forward that it acted by virtue of its obligations under the legal framework governing the EU's cooperation with the ACP Secretariat, in particular the relevant Financing Agreement and the Financial Regulation, when issuing debit notes to the complainant.

11. The complainant did not comment on or question the Commission's explanations as regards its role as 'paying authority'.

The Ombudsman's assessment

12. The EU has supported the ACP States' development through the conclusion of cooperation



agreements since the late 1950s. It has also set up an EDF to provide financial assistance to the ACP States in the framework of these cooperation agreements. The EDF is directly financed by the EU Member States and it is managed outside the framework of the EU's general budget in accordance with the provisions of a specific Financial Regulation. At the time of the conclusion of the supply contracts between the complainant and the ACP Secretariat, the EU's development cooperation with the ACP States was based on the revised Lomé IV Convention [4] . The Commission and the ACP Secretariat signed a Financing Agreement [5] for the implementation of the SFP Programme which was to be funded from the 8th EDF. The Commission was responsible for managing the EDF in accordance with the rules laid down in the relevant Financial Regulation [6] . [7]

13. The SFP Programme was implemented through contracts entered into between the ACP Secretariat and third-party contractors, such as the complainant. The complainant concluded 12 supply contracts with the ACP Secretariat. Six of the contracts served the implementation of the SFP Programme's Project 'Strengthening National Health Control Capacity', the other six supply contracts were dedicated to the implementation of the Project 'Strengthening Fishery Laboratories and Technical Institutes'. The Commission was not a party to those contracts. However, given the financing of the contracts from the EDF, the Commission endorsed the supply contracts, which meant that it approved them for financing.

14. According to the Commission, its concrete role with regard to the financing of the complainant's supply contracts was determined by the fact that the EDF resources dedicated to the SFP Programme were to be implemented through decentralised management. Under decentralised management, the Commission's role was limited to *authorising* the financing of the contracts from the EDF and to checking that all provisions related to the financing were correctly applied in the implementation of the SFP Programme. Moreover, the Commission had the task of undertaking the financial *implementation* of the SFP Programme, and thus also of the contracts entered into by the ACP Secretariat for the implementation of the SFP Programme, by effecting payments from the EDF. The complainant did not dispute the Commission's explanations. The Commission's role with regard to the supply contracts concluded between the ACP Secretariat and the complainant can thus indeed be described as that of a 'paying authority'.

15. The Special Conditions of the supply contracts provided that payments were to be *authorised* and *made* by the Contracting Authority. [8] Thus, only the ACP Secretariat, as Contracting Authority, could take the *decision* to make payments or recover money under the supply contracts with the complainant, although these decisions would have to be financially implemented by the Commission. The Commission had no authority to intervene in any *decision* taken by the ACP Secretariat as Contracting Authority.

16. The fact that the sole role of the Commission is as a 'paying authority', as regards third-party contracts which implement Financing Agreements concluded between the Commission and third countries in the framework of EU cooperation agreements, has been acknowledged by case-law of the General Court of the EU. In its order in Case T-335/09 *Groupeement Adriano, Jaime Ribeiro, Conduril v Commission* , which concerned debit notes



issues by the Commission in the context of its contractual relations with the Kingdom of Morocco in order to claim contractual penalties for late performance by Morocco's contractor, the General Court held that " *the exercise of contractual rights by an institution, if the Union has received authority to act in the name of and on behalf of one of the contractual parties, does not constitute exercise of its own powers* " [9] . The General Court thus concluded that " *both the debit note and the reminder letter were adopted in exercising the authority which the Kingdom of Morocco gave to the Union to recover the debts which were owed to it by the applicant under the General Conditions and the Special Conditions of the Contract. Accordingly, those instruments do not constitute the exercise of public law prerogatives by the Commission which it has under EU law* " [10] . [11]

17. It thus follows from the contractual relations between the Commission and the ACP Secretariat, as well as from the case-law of the General Court, that the Commission, in issuing debit notes to the complainant, did not exercise its own powers as a public authority but acted on behalf of the ACP Secretariat. The Commission did not have any power over the ACP Secretariat's decision to claim damages from the complainant for the delayed performance of its contractual obligations. Its sole role was to implement the ACP Secretariat's decision to claim damages by issuing debit notes to recover money that had been paid from the EDF. **The Commission did not, therefore, have any discretion to take into account the arguments put forward by the complainant as to why it did not consider itself to be responsible for the delays .**

18. On the basis of all of the above, the Ombudsman does not consider the Commission to have acted incorrectly or unfairly when issuing the debit notes. The steps taken by the complainant to try to resolve the dispute with the ACP Secretariat is a matter that falls outside her remit, given that the ACP Secretariat is not an EU institution, body, office or agency.

19. However, in order to avoid possible future misunderstandings as regards the Commission's responsibilities under a Financing Agreement concluded with third countries in the framework of an EU cooperation agreement, the Commission should, when issuing debit notes in its role as 'paying authority', clearly inform the third-party contractor that it is acting on behalf of the third-party's Contracting Authority and explain what that means.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Ombudsman finds no maladministration by the Commission.

The complainant and the Commission will be informed of this decision.

Further remark



When issuing debit notes in its role as 'paying authority' under a Financing Agreement concluded with third countries in the framework of an EU cooperation agreement, the Commission should clearly inform the third-party contractor that it is acting on behalf of the third-party's Contracting Authority and explain what that means.

Emily O'Reilly Strasbourg, 06/11/2015

[1] The ACP Secretariat is an institution of the ACP Group of States, an organisation composed of 79 African, Caribbean and Pacific states.

[2] In accordance with Article 21 of the General Conditions of the supply contracts.

[3] See Articles 1(2) and 54(3) of 9th EDF Financial Regulation. Article 54(3) provides that the Commission shall be under an obligation to effect payment from EDF resources whenever the EU endorses contracts in accordance with the relevant provisions of the ACP-EU cooperation agreement.

[4] Agreement amending the Fourth ACP-EC Convention of Lomé, signed in Mauritius on 4 November 1995, OJ 1998 L 156, p. 3 and Council Decision of 27 April 1998 concerning the conclusion of the Agreement amending the fourth ACP-EC Convention of Lomé, signed in Mauritius on 4 November 1995, OJ 1998 L 156, p. 1.

[5] Financing Agreement no. 8 ACP TPS 137 (2001/015-709).

[6] Financial Regulation of 27 March 2003 applicable to the 9th European Development Fund ('9th EDF Financial Regulation'), OJ 2003 L 83, p. 1. In accordance with Article 133(2) of the 9th EDF Financial Regulation, the provisions of the 9th EDF Financial Regulation became applicable, with its entry into force, to payments and recoveries related to commitments with the ACP States funded from previous EDFs.

[7] See Article 10(1) Internal Agreement between the representatives of the Governments of the Member States, meeting within the Council, on the financing and administration of the Community aid under the Second Financial Protocol to the fourth ACP-EC Convention, OJ 1998 L 156, p. 108.

[8] See Article 27.1 of the Special Conditions of the supply contracts.

[9] Order in *Groupement Adriano, Jaime Ribeiro, Conduril v Commission*, cited above, ECLI:EU:T:2011:614, paragraph 33.



[10] Order in *Groupeement Adriano, Jaime Ribeiro, Conduril v Commission* , cited above, ECLI:EU:T:2011:614, paragraph 34.

[11] See also the order of the General Court of 1 October 2013, *Evropaiki Dynamiki v Commission* , T-554/11, ECLI:EU:T:2013:548, paragraphs 40-41, and the order of the General Court of 10 May 2004, *Musée Grévin v Commission* , T-314/03 and T-378/03, ECLI:EU:T:2004:139, paragraphs 63 and 64 and the case-law cited therein.