



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber)

29 June 2022*

(Pre-Accession Assistance Instrument – OLAF investigation – Commission decision imposing an administrative sanction – Exclusion from procurement and grant award procedures covered by the general budget of the European Union for a period of four years – Registration in the early detection and exclusion system database – Financial regulation – Unlimited jurisdiction – Proportionality of the sanction)

In Case T-609/20,

LA International Cooperation Srl, established in Milan (Italy), represented by B. O'Connor and M. Hommé, lawyers,

applicant,

v

European Commission, represented by R. Pethke, acting as Agent,

defendant,

THE GENERAL COURT (Tenth Chamber),

composed of A. Kornezov, President, E. Buttigieg and G. Hesse (Rapporteur), Judges,

Registrar: E. Coulon,

having regard to the written part of the procedure,

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

* Language of the case: English.

Judgment¹

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Law

...

The appropriateness of the sanction

- 151 The applicant claims that its good cooperation during the OLAF investigation should have been taken into account by the Panel for the purposes of determining the appropriate sanction to be applied in the present case. It adds that, in accordance with Italian law, in April 2016 it adopted a model of organisation, management and control with a code of ethics and a related disciplinary system. It also dismissed A and B from their posts in 2019.
- 152 The Commission submits that, under its contractual obligations and Article 5 of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292, p. 2), the applicant was required to cooperate and to grant access to its premises in order to facilitate checks and inspections carried out by OLAF on its behalf. The applicant's argument that its good cooperation should have affected the assessment made by the Panel of the appropriate sanction must, in its view, be rejected. The Commission points out that the Panel had access to the reports on the on-the-spot checks, in which it was mentioned that the applicant and its representatives had cooperated with OLAF.
- 153 As a preliminary point, it should be recalled that, in respect of acts occurring prior to 1 January 2016, the Commission noted, in the contested decision, that Article 133a(2)(b) of its Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1), as amended, and Article 145(1) of its Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 (OJ 2012 L 362, p. 1), before its amendment by its Delegated Regulation (EU) 2015/2462 of 30 October 2015 (OJ 2015 L 342, p. 7), provided that the maximum period for which an entity could be excluded was five years.
- 154 For acts committed after 1 January 2016, the Commission noted that Article 106(14)(c) of Regulation No 966/2012, as amended by Regulation 2015/1929, provided that the duration of exclusion could not exceed three years in the cases of grave professional misconduct referred to in Article 106(1)(c) of that regulation and five years in the cases of corruption referred to in Article 106(1)(d) of the same regulation.
- 155 In that context, the Commission excluded the applicant on the basis of a preliminary classification in law of its conduct, having regard to the facts established and the findings set out in the recommendation issued by the Panel, in accordance with Article 106(2) of Regulation

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

No 966/2012, as amended by Regulation 2015/1929. It considered that the seriousness of the misconduct, the intentional nature of that misconduct, its duration and the high amounts involved justified exclusion for a period of four years.

- 156 In that regard, the Court notes that Article 133a(1) of Regulation No 2342/2002, as amended by Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13), and Article 106(3) of Regulation No 966/2012, as amended by Regulation 2015/1929, require a contracting authority which excludes an economic operator to comply with the principle of proportionality. In particular, the said Article 106(3) provides that the contracting authority's decision must take into account, inter alia, the seriousness of the situation, including the impact on the European Union's financial interests and image, the time which has elapsed since the relevant conduct, its duration and its recurrence, the intention or degree of negligence, or any other mitigating circumstances, such as the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation as recognised by the contracting authority.
- 157 In accordance with Article 108(11) of Regulation No 966/2012, as amended by Regulation 2015/1929, the General Court 'shall have unlimited jurisdiction to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed'. Beyond the mere review of legality, which allows only for the dismissal of the action for annulment or for the annulment of the contested act, that unlimited jurisdiction empowers the Court to vary the contested act, even without annulling it, by taking into account all the factual circumstances, so as to amend, for example, the duration of the exclusion. In those circumstances, the Court may, if necessary, make different findings from those made by the Commission in the contested decision with regard to the duration of the exclusion.
- 158 In the present case, the argument by which the applicant claims that the good cooperation it showed during the investigation and the reorganisation measures it adopted should have had an impact on the assessment of the appropriate sanction to be imposed on it must be interpreted as inviting the Court to assess, in the exercise of its unlimited jurisdiction, the duration of the exclusion taking into account the mitigating circumstances invoked.
- 159 In the exercise of its unlimited jurisdiction, the Court finds that the applicant committed the acts of corruption and grave professional misconduct set out in paragraphs 121 to 123, 126, 127 and 129 to 134 above. Those acts are very serious by their very nature, since the purpose of the applicant's conduct was to bribe officials in the public administration of the Republic of North Macedonia in order to obtain a competitive advantage over other bidders. It must be held that the applicant intentionally sought to corrupt officials in the public administration of the Republic of North Macedonia. That conduct lasted slightly over four years, during which time several persons within the applicant and external to it were involved.
- 160 Account must also be taken of the seriousness of the impact of those acts on the European Union's financial interests, in so far as they concern a sum exceeding EUR 1.7 million.
- 161 Next, as regards the elements relied on by the applicant, it is true that the reports on the on-the-spot checks note its 'very good' and 'full' cooperation during those checks. However, it is equally true that, as the Commission maintains, the applicant had been under a legal obligation

to cooperate with OLAF. In any event, it must be held that, in the present case, the applicant's conduct at the time of the investigation can have only a slight impact on the degree of severity of the sanction given the seriousness of the acts at issue.

- 162 As for the organisational model adopted by the applicant in 2016, the Court endorses the assessments made by the Commission in that regard in the contested decision. First, that model was adopted in April 2016 but did not, however, put an end to the applicant's misconduct, which continued until January 2017. Second, while that new model may possibly have an effect on the applicant's conduct in the future, it had no effect at all during the relevant period. Likewise, the dismissal of A and B in 2019 can have an effect only on the applicant's future conduct. The Court therefore considers that there is no need to take those factors into account.
- 163 Finally, it may be emphasised that the maximum period of exclusion laid down by the legislature was, before 1 January 2016, five years for grave professional misconduct and, after 1 January 2016, three years for grave professional misconduct and five years for acts of corruption. In the present case, however, the Court has found, in paragraphs 121 to 123, 126, 127 and 129 to 134 above, that the applicant's conduct entailed both acts of grave professional misconduct and acts of corruption.
- 164 In the light of all the foregoing findings and circumstances set out above, it must be held that an exclusion of four years is appropriate and proportionate in this case.

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On those grounds,

THE GENERAL COURT (Tenth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders LA International Cooperation Srl to pay the costs.**

Kornezov

Buttigieg

Hesse

Delivered in open court in Luxembourg on 29 June 2022.

[Signatures]