

MICHEL BARNIER

Membre de la Commission européenne

05. 03. 2014

Brussels,
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Dear Ms. Gomes,

Thank you for your letter of 2 December 2013 to President Barroso, to which I am replying as Commissioner in charge of the Internal Market and Services. This letter concerns your complaint submitted on 20 December 2010 registered in the EU Pilot system under n° 1712/11/MARK concerning the award by the Portuguese authorities of a public contract for the supply of two submarines to the Portuguese navy and an ancillary “offset” contract aimed at compensating the Portuguese authorities for the acquisition of the submarines.

According to the information you provided to the Commission and additional information received from the Portuguese authorities, the Portuguese government took a decision to acquire new submarines in 1997 and an international tender was published in 1999 for this purpose. In November 2003, following an *Ad-hoc* award procedure (open tender with a negotiation stage), the German Submarine Consortium (GSC) was selected to supply the Portuguese State with two submarines and an option for a third one. The contract was signed in April 2004 for an amount of € 769.324.800.

At the same time an offset contract aimed at compensating the Portuguese authorities for the acquisition of the submarines, was concluded with GSC for an amount of € 1.210,43 million for a duration of 8 years. The contract consisted of direct offsets – linked to the subject-matter of the contract - such as submarine internal/external communication systems or the transfer of submarine specific software to PT companies and indirect or civil offsets – not linked to the subject-matter of the contract - such as new shipbuilding contracts, springs and batteries for trucks, the production of buses and other projects in the automobile sector, steel moulds, satellite navigation and repair and maintenance services for aircraft.

Ms. Ana GOMES MEP
Member of the European Parliament
EUROPEAN PARLIAMENT
Bât. Altiero Spinelli, ASP 14G354 60
Rue Wiertz
B-1047 Brussels
anamaria.gomes@europarl.europa.eu

Article 346 (1) (b) of the TFEU provides for an exemption from EU law if this is necessary for the protection of essential security interests. Even if this exemption applied to the purchase of the submarines, this does not imply permission to require offsets for the procurement covered by the exempted contract. On the contrary, the offset requirement would qualify as a measure affecting intra-EU trade and would thus have to be justified separately. Furthermore, and according to the Commission "Interpretative Communication on the application of Article 296 EC"¹ (now Article 346 TFEU), indirect non-military offsets are, in general, not covered by Article 346 (1) (b) TFEU. Hence, the award by the Portuguese authorities of an offset contract covering civil compensation cannot be considered as justified under Article 346 (1) (b) TFEU.

However, as my Directorate General has informed you in their letters of 10 of May and of 6 November of 2013, the Portuguese authorities have corrected this by transposing into national law Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (see Decree-law n° 104/2011 of 6 October) and by repealing Decree-law n° 154/2006 of 7 August, the «Offset law» (see Decree-law n° 105/2011 of 6 October 2011).

Moreover, the Portuguese authorities informed us that the main supply contract has already been fully executed (submarines have been delivered) and the ancillary "offset" contract was almost entirely concluded. The two remaining projects – investments in a luxury resort in Algarve and in the company Koch Portugal – are expected to be fully executed by 2015 at the latest.

Concerning your request for the Commission to launch an infringement procedure against Portugal in this case my Directorate General explained in its letter of 6 November of 2013 that the main purpose of the procedure under Article 258 of the Treaty on the Functioning of the European Union is not to bring infringement proceedings before the Court of Justice but to bring the Member State back into line with EU law (see Case C-191/05, Commission v/ Germany). Therefore, once the Member State under investigation implements the necessary measures to prevent a repetition of the illegal practice, the Commission, in principle, closes the case.

On your claim that the invalidity of the offsets should necessarily imply the invalidity of the contract for the acquisition of the submarines I would like to point out that a judgment of the Court of Justice of the EU condemning a Member State for failure to fulfil its obligations under Article 258 TFEU does not necessarily affect the validity of the public procurement contract under the national order. Although the Member State is obliged to take all measures necessary to comply with a judgment of the Court of Justice, the appropriate measures to be taken by the Member State are to be determined with regard to the circumstances of the case. On this point it is my understanding that the Portuguese Public Prosecutor brought two cases before national Courts, one of which concerned fraud in the award of the offsets contract. As you know a decision of the Portuguese Court on this case was delivered on 14 February acquitting all of the ten defendants from the crime of fraud and forgery.

Moreover the decision to launch an award procedure for the purchase of the submarines took place in 1997 (this is significant in determining the applicable law) at a time when the Commission had not yet provided guidance on compliance with Article 296 (1) (b) EC (new Article 346 TFEU) nor on offsets. At that time, this type of practice was common in many Member States.

¹ COM(2006) 779 final

On your allegation of corruption, while acknowledging the seriousness of your concerns, according to EU legislation, the Commission has no competence to intervene in individual cases. The Member States themselves are responsible for the maintenance and respect of criminal law at national level.

On state aid aspects the Directorate General for Competition was consulted but did not find any failure on the part of the Portuguese authorities to comply with EU law.

Finally, I would like to assure you that this case has been thoroughly and carefully assessed by the Commission departments and the decision to close it was taken on the aforementioned objective grounds under EU law.

Yours sincerely, 



Michel BARNIER

Cc: Ms. Cecilia Malmström, Commissioner for Home Affairs
Mr Joaquín Almunia, Commissioner for Competition
Mr Giovanni Kessler, Director General, OLAF
Mr Vítor Caldeira, President, European Court of Auditors
Ms. Emily O'Reilly, European Ombudsman