



Central & Eastern European Moot Competition

CEEMC 2021 (Online) Moot Court Case

Facts and legislation

1. The Connecting Europe Facility (CEF), which is based on Regulation No 1316/2013,¹ was introduced by the European Commission (the Commission) under the Multiannual Financial Framework (MFF) 2014-2020 with the aim of co-financing transport, energy and telecommunications projects.
2. CEF defines the funding elements which seek to accelerate investment in the field of trans-European networks and freight services, promoting the implementation, construction and retrofitting of infrastructure and rolling stock, and supporting projects with a European added value and significant social benefits, which do not receive adequate financing from the market.
3. On 1 April 2015, the Commission published a call for proposals for the development of a new transmission standard for telecommunication, which was to be used by producers of mobile telephones and networks to develop equipment covering an extended frequency range. The standard was to include specifications for equipment using frequencies previously reserved for military use, but currently abandoned in accordance with a resolution adopted by the Secretary General of NATO on 29 January 2015.
4. The call for proposals was based on a work programme adopted under Article 17 of the Regulation No 1316/2013. In accordance with Article 6(1) thereof, financial assistance was to be provided to a company that undertook to develop the transmission standard. The company would become the beneficiary of a grant that would be awarded under Article 121 of Regulation No 966/2012,² which provides that grants may be awarded by the Commission either by means of a decision or by entering into a contract with the beneficiary. In both cases, the award of the grant will be supplemented by General and Special Conditions.
5. In the call for proposals, the Commission specified that the grant would cover eligible costs of 1,500,000 Euro, to be implemented within a 12 month period from 1 January 2016, and that the grant would be awarded to the applicant that submitted a project proposal which fulfilled the defined technical specifications and which provided best value for money.
6. Several companies, including AlphaTech, BetaTech, DeltaTech and GammaTech, expressed an interest in the project, but by the deadline of 18 June 2015 set in the call for proposals, only the company SysTech had submitted an application. SysTech is a telecommunications company registered in Slorania, a Member State of the European Union (EU), where it also has its headquarters.

¹ Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, OJ 2013 L 348, p. 129.

² Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ 2012 L 298, p. 1.

7. The Commission found that sufficient competition had been achieved through the expressions of interest, and under Article 18 of Regulation No. 1316/2013 proposed to the CEF Coordination Committee that the grant be awarded to SysTech. On 15 October 2015, the chairperson of the CEF Coordination Committee, acting under Regulation No. 182/2011,³ approved the proposed award.
8. The grant was awarded to SysTech by Commission Decision C(2015)18490 of 2 December 2015 (the Award Decision). The approved project was referred to as project PPTS4390. In an annex to the Award Decision (the Annex), the Commission included General Conditions and Special Conditions for the implementation of the grant. The General Conditions are not relevant for the present case, whereas the Special Conditions provided that:

Article III(6)(1) of the Special Conditions attached to the Award Decision

- (a) By accepting the Grant to which the present Special Conditions are attached, the beneficiary SysTech agrees to be bound by the provisions contained in these Special Conditions.
- (b) Any question concerning the interpretation of the Special Conditions may be submitted to court proceedings only in the event that the Commission and SysTech have failed to reach a common understanding of the issues concerned.

9. On 1 January 2016, SysTech initiated project PPTS4390 and received the full amount of the grant (1,500,000 Euro) as pre-financing, for which the Commission did not require SysTech to lodge a guarantee, despite this being a possibility under Article 134 of Regulation No. 966/2012.
10. By 10 June 2016, it became clear that development of the new transmission standard would require substantial computer simulation facilities that were beyond the scope of SysTech's in-house capacities. On 1 September 2016, the Commission therefore agreed to an addendum (the Addendum), which specified that the implementation of project PPTS4390 was extended to 31 December 2017, thus having the duration of 24 months as opposed to the previously stipulated 12 months.
11. The Addendum of 1 September 2016 further inserted a new Article III(2)(5) into the Special Conditions:

Article III(2)(5) of the Special Conditions attached to the Award Decision

- (a) The Commission authorises SysTech to subcontract computer simulations to a third party, the Subcontractor, for the purposes of implementing the awarded Grant.
- (b) Selection of the Subcontractor must be performed in accordance with the provisions of Council Directive 2004/17 on public procurement procedures.⁴

12. On 15 September 2016, SysTech contacted the European trade association for computer service providers (ITRADE), located in Brussels. ITRADE is empowered to represent the common interests of its member companies, both by providing information about the computer service market, and by promoting policy interests of the members. When asked by SysTech to recommend a suitable provider of the computer simulation facilities it required, ITRADE indicated that the company CompMax, established in Slorania, provides the most extensive computer simulation services in Europe. ITRADE added that four other companies (AlphaTech, BetaTech, DeltaTech and GammaTech from other EU Member States), provide similar computer

³ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55, p. 13.

⁴ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134, p. 1

simulation services. However, each of the four would need to form a consortium with another of the four to handle the computer simulation required by SysTech.

13. Against this background, SysTech selected CompMax as the most suitable subcontractor. The companies negotiated an agreement on 1 October 2016, whereby CompMax would supply computer simulation facilities to SysTech for the purpose of project PPTS4390, in exchange for a fee of 415,000 Euro. However, prior to the scheduled date for formally signing the contract (1 October 2016), the director of CompMax advised SysTech to postpone the signing and to first publish a voluntary notice in the Official Journal of the EU under Article 2d(4) of Directive 2007/66.⁵
14. On 13 October 2016, SysTech had a voluntary notice published in the Official Journal of the EU, which provided:

For the purpose of project PPTS4390, SysTech will award a 415,000 Euro contract for computer simulation services to CompMax. For reasons of technical necessity, the contract will be awarded without any public procurement procedure.
15. On 23 October 2016, CompMax and SysTech signed the previously agreed contract, but on 28 October 2016 the four companies AlphaTech, BetaTech, DeltaTech and GammaTech complained to ITRADE about the procedure for selection of CompMax as the subcontractor of SysTech. ITRADE called for a mediation meeting on 15 November 2016, to take place between CompMax and those four companies.
16. During that meeting, an agreement was mediated and protocolled by ITRADE, whereby CompMax undertook to pay 25,000 Euro to each of the four companies in exchange for an undertaking by those four companies not to pursue any further complaints about the selection of CompMax as the subcontractor for SysTech. It was furthermore agreed that the protocol should be held confidential by ITRADE as pertaining to business secrets, so as to avoid any misunderstanding concerning bid-rigging.
17. On 22 December 2017, SysTech completed project PPTS4390 and submitted the new transmission standard for telecommunication to the Commission. A press conference was held on 10 January 2018 during which the Commission presented the new standard as an important achievement that would allow for an effective expansion of mobile phone networks and their capacities within the EU by use of the additional frequencies released from previous military use. The new standard also received positive reviews from the international scientific community. Later in 2018, SysTech was shortlisted for the Trans European Business Award, which was funded *inter alia* by the World Trade Organisation.
18. On 1 March 2018, SysTech finalised all accounts for project PPTS4390 in accordance with Article III(3)(8) of the Annex to the Award Decision, which reads as follows:

⁵ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts OJ 2007 L 335, p. 31.

Article III(3)(8) of the Special Conditions attached to the Award Decision

Prior to submission of the project accounts for the formal closing of the Grant procedure, SysTech must ensure that an audit certificate has been issued by an audit company that is authorised to operate within the Member States of the EU. SysTech may select the audit company without any formal selection procedure.

19. For this purpose, on 21 February 2018, SysTech's auditors, Grey Brown and Partners (GBP), issued a certificate which confirmed that no irregularities existed in the spending of the project funds of 1,500,000 Euro.
20. On 25 June 2018, the Commission replied that after reviewing the documentation submitted by SysTech, it had decided to require SysTech to undergo an additional audit, pursuant to Article III(4)(2) of the Special Conditions of the Award Decision, which states as follows:

Article III(4)(2) of the Special Conditions attached to the Award Decision

The Commission may decide at any time during the Grant period, including the formal closing procedure, to call for an audit to be performed either by the Commission services, by OLAF or by an audit company that is authorised to operate within the Member States of the EU.

21. The Commission selected the external auditors Sincere & Fresh (S&F), who on 13 November 2018 delivered an audit report to the Commission (the Audit Report), which stated that the selection of CompMax as a subcontractor had been made in violation of Article III(2)(5) of the Special Conditions, since proper procurement procedures had not been followed. Accordingly, the Audit Report concluded that the expenditure of 415,000 Euro for the subcontracting of CompMax was ineligible and could not be financed using the project funds.
22. In this regard, Article III(5)(9) of the Special Conditions provides:

Article III(5)(9) of the Special Conditions attached to the Award Decision

- (a) Based on the outcome of an audit performed under Article III(4)(2), the Commission may require SysTech to repay the Grant in part or in full on the grounds that the obligations stipulated in these Special Conditions have not been fulfilled.
- (b) In case of a breach of obligations that concern essential elements of the grant implementation, without which the implementation cannot be completed, the Commission may also require SysTech to pay liquidated damages, calculated as 100 % of the amount to be repaid under paragraph (a).
- (c) For the application of repayment and liquidated damages under paragraphs (a) and (b), the Commission shall stipulate a reasonable time period within which SysTech shall be required to make the relevant payment[s].
- (d) In the event that any payment is not made by SysTech by the date fixed under paragraph (c), the Commission shall add default interest to the payment due, which shall be calculated at 2 % per month on the due amount, including previously calculated interest, but subtracting any partial payments made.
- (e) The Commission shall issue a debit note for the amount due no more than 7 days after the expiry of the date fixed under paragraph (c) and shall thereafter update the debit note every 3 months until final payment is made or the matter is otherwise settled.

23. Against that background, on 18 November 2018 the Commission sent a letter (the Repayment Letter) to SysTech in which it explained that, since the Commission was of the opinion that the subcontracting of CompMax constituted an essential element of the implementation of project PPTS4390, the Audit Report had implications for the entire project. Accordingly, SysTech would therefore be required to repay the entire amount of 1,500,000 Euro provided under the grant and might also become liable to pay liquidated damages.

24. The Repayment Letter set a deadline of 1 January 2019 for SysTech to repay the 1,500,000 Euro, and stipulated that if full repayment had not been completed by that time, the Commission would proceed to issue a debit note for the repayment of the project financing (1,500,000 Euro) plus liquidated damages (another 1,500,000 Euro) and default interest.
25. The Commission underlined that, if SysTech continued to withhold payment, Article 79 of Regulation No 966/2012 would entitle the Commission to issue a recovery order to enforce the debit notes. Such a recovery order would be an enforceable act within the meaning of Article 299 TFEU.
26. In December 2018, several letters were exchanged between SysTech and the Commission. During that exchange, SysTech argued that:
 - (a) Whether an act of an EU institution constitutes a challengeable act under Article 263 TFEU depends only on whether the institution intended to impose legal obligations on a private party, and not on whether the Commission had competence to issue the act, as established in *Les Verts* (294/83).
 - (b) As a private company in the field of telecommunications, SysTech was not subject to public procurement obligations, contrary to *Portugás* (C-425/12).
 - (b) Public procurement obligations do not apply where only one supplier has the capacity to complete the subcontracted tasks, especially in case of contracts that have a limited value, as held in *Terna v Commission* (T-387/16).
27. The Commission denied SysTech's arguments and added that:
 - (a) The Award Decision was invalid, as the award had been approved only by the chairman of CEF, which violated the principle of legality, and that SysTech would therefore in any case be obliged to repay the grant, as the funds had not been properly authorised, since the conditions of *Commission v Germany* (C-272/97) were not fulfilled.
 - (b) The Addendum was invalid, as the extension of the implementation period was adopted without applying a new award procedure, which violated the principle of equal treatment (*vis-à-vis* other companies that might have been interested in bidding for the project), as held in relation to public procurement in *Frogne* (C-549/14).
 - (c) The Special Conditions constituted a contract between SysTech and the Commission, which did not contain a choice of EU law as the governing law, and which therefore was not subject to EU law principles such as proportionality.
 - (d) In any case, the Repayment Letter respected the principle of proportionality, as it imposed sanctions that did correspond to the alleged breach of public procurement obligations, thus complying with *Ceva v Commission* (T-428/07 and T-455/07).
 - (e) Finally, SysTech could not, in order to escape its public procurement obligations, rely on the agreement between CompMax, AlphaTech, BetaTech, DeltaTech and GammaTech, since this agreement constituted bid-rigging, as established in *Verhuizingen Coppens* (T-210/08).
28. The exchange of letters between SysTech and the Commission did not lead to any agreement concerning the repayment claim. However, on 1 January 2019, SysTech made a payment of the 1,500,000 Euro. It informed the Commission that this payment was strictly 'subject to reservation', in the sense that:
 - (a) Payment was made only to avoid the imposition of liquidated damages and default interest, but SysTech continued to deny the validity and legality of the Repayment Letter, as in *Commission v Netherlands* (C-96/89).
 - (b) Even if any errors had been made during the adoption and amendment of the Award Decision and Addendum, such errors would have been entirely the fault of the Commission and so the Commission could not seek to rely on its own errors in a way that would adversely affect the interests of another person, such as SysTech, since the principle of *Courage* (C-453/99) could not be applied by analogy.

(c) In any case, the Repayment Letter had made no mention of the reasons that the Commission later included in the exchange of letters in December 2018, and it was not permissible for the Commission to seek to introduce new reasoning at this later stage, as held in *Alliance One International and Standard Commercial Tobacco v. Commission* (C-628/10 P and C-14/11 P).

29. On 13 March 2019, SysTech submitted an application to the Sloranian High Court. It claimed that the court should oblige the Commission to recognise the validity of the reservation made by SysTech, as the Commission had no right to seek repayment of the grant financing, nor to impose any liquidated damages or default interest. Accordingly, the Commission should be obliged to return the 1,500,000 Euro repayment that SysTech made under the reservation. SysTech based its claim on Article 112 of the Sloranian Administrative Code, which states as follows:

Article 112 of the Sloranian Administrative Code

- (1) A private party may initiate proceedings against any public authority, whether national, foreign or international, for the purpose of obtaining a ruling from the Sloranian High Court on the validity of a legal position asserted by the private party, which the public authority has failed or refused to recognise.
- (2) If the Court finds in favour of the private party, the Court shall impose on the public authority an obligation to uphold the legal position asserted by the private party.

30. On 5 May 2019, the Commission submitted its defence, in which it challenged the admissibility of the case on the grounds that:

- (a) Under the EU Protocol on Privileges and Immunities, the Commission was immune from judicial proceedings in any Member State of the EU, and *Zwartveld* (C-2/88-IMM) could not be applied to such proceedings.
- (b) The Repayment Letter of 18 November 2018 did not constitute a challengeable act within the meaning of Article 263 TFEU, as held in *Slovakia v Commission* (C-593/15-P and C-594/15-P).
- (c) The Commission had accepted a payment made on a voluntary basis by SysTech, and in the view of the Commission, the voluntary payment entailed that SysTech could no longer challenge whether payment had been due, since it had lost legal interest, as established in *TWD Textilwerke Deggendorf* (C-188/92).
- (d) Finally, the Commission could not be ordered to take any specific action, as confirmed in *GMPO v Commission* (T-733/17).

31. On 18 June 2019, SysTech submitted its reply and argued that:

- (a) Immunity against national judicial proceedings can apply for the Commission only in cases where the Court of Justice of the EU has exclusive competence, which does not include contractual matters or claims that may not be submitted by private parties, and the issue of the validity of EU acts may always be raised by a national court at its own motion, as held in *Cassa di Risparmio di Firenze* (C-222/04).
- (b) Where the Commission receives payments made under reservation (as in the case of SysTech's repayment of 1,500,000 Euro on 1 January 2019), the Commission cannot just passively receive the payment, but under the principle of loyalty in Article 4(3) TFEU, the Commission must take steps to challenge the reservation, as opposed to the discretion that is reserved for the Commission in other administrative matters according to *Swedish Match* (C-210/03).
- (c) If the Commission were entitled to retain the payment made under reservation, this would constitute a windfall profit, which is not protected by EU law, as held in *Iberdrola* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11).

32. Finally, on 18 July 2019, the Commission submitted its rejoinder and argued that:
 - (a) A statement of reasons, such as in the Repayment Letter, is not required to include all aspects of the reasoning applied by the Commission, since mandatory rules and principles of EU law will apply in any case, as held in *Swedish Match* (C-210/03).
 - (b) By entering into a contract with CompMax, without undertaking proper procurement procedures, SysTech had forfeited all rights to the grant that had been awarded under EU law, as it follows from *Terna v Commission* (T-387/16).
 - (c) Since SysTech had been in bad faith when publishing a voluntary notice in the Official Journal of the EU, it was barred from relying on *Fastweb* (C-19/13).
33. The Sloranian High Court considered the case over the summer. On 15 September 2019, it submitted a request for a preliminary ruling to the CJEU, in which it asked the following questions.
34. The CJEU decided that answering the questions submitted the Sloranian High Court should best be undertaken after judgment was rendered in the appeal case *Czech Republic v Commission* (C-575/18-P), which at the time was pending. Accordingly, an informal suspension was applied to the request from the Sloranian High Court.
35. On 9 July 2020, the Court gave judgement in *Czech Republic v Commission*, but due to the restrictions imposed by the Corona virus pandemic, the suspension was only recently lifted, so as to allow for the written procedure to commence.

Questions:

In circumstances such as those described in the case file:

1. When the Commission requires the beneficiary of an EU grant (the Beneficiary) to repay the funds received in a letter (the Repayment Letter):
 - (a) Does the Repayment Letter constitute a challengeable act under Article 263 TFEU?
 - (b) May the Repayment Letter be challenged in a case that the Beneficiary brings against the Commission in the courts of a Member State of the EU?
2. When subcontracting with a private party (the Subcontractor) for the provision of computer simulation services, must the Beneficiary:
 - (a) Either, comply with the EU public procurement provisions specified in the Special Conditions of the grants?
 - (b) Or, comply with the currently applicable EU public procurement provisions?
3. If question 2 (a) or (b) is answered in the affirmative, may the question of whether the Beneficiary has breached public procurement law depend on:
 - (a) Whether a voluntary notice has been published by the Beneficiary in the Official Journal of the EU under Article 2d(4) of Directive 2007/66?
 - (b) Whether a settlement is concluded between the Subcontractor and its competitors, who might otherwise have pursued the alleged breach of public procurement procedures?
4. When deciding whether the Beneficiary is obliged to repay the grant:
 - (a) Must the justification, for seeking the repayment, be assessed solely on the basis of reasons mentioned in the Repayment Letter, or may account also be taken of new reasons mentioned in subsequent correspondence between the Commission and beneficiary?
 - (b) May the justification, for seeking the repayment, include administrative errors that are the fault of the Commission itself?
5. When the Beneficiary makes a voluntary repayment of funds, but does so under a reservation, in which it challenges the repayment demand made by the Commission:
 - (a) Must the Commission take steps to ensure that the reservation is removed?
 - (b) If the Commission does not take such steps to have the reservation removed, or such steps are unsuccessful, is the Commission obliged to return the payment?