



Case M-530/17

BrickUp SRL v The Ministry of Defence

- 1 Slorania and Danubia have been Member States of the European Union since 2004. They both ratified the Schengen Convention in 2006 and were admitted to the third stage of Economic and Monetary Union—that is, adopted the euro as their currency—in 2010. Elbia is a neighbouring state of Slorania and a non-Member State of the Union. Elbia is extremely poor, but has since February 2015 been engaged in association negotiations with the Union.
- 2 Some Elbians have grown frustrated waiting upon the outcome of the association negotiations, and large numbers have opted instead to illegally emigrate to Slorania. To stem the tide the Sloranian government has decided to build a tall and impenetrable wall (the 'border wall') between Slorania and Elbia along their common frontier, which covers a stretch of 2 kilometres in open terrain.
- 3 Several EU Member States have expressed concerns over the building of the border wall, and have asked the EU Council Secretariat to consider whether its construction might constitute a violation of any EU obligations of Slorania, and, if so, whether the Union might take appropriate action. The issue was discussed during preparations for a meeting of the European Council and several calls were made for action to be taken.
- 4 The original intention of Slorania was that Elbia should bear the cost of the wall, but following bilateral negotiations between the two it was agreed that construction and financing of the wall would be for Slorania, the Elbian contribution being surrender of a 200 metre wide strip of land of Elbian territory upon which it would be constructed. The strip of land would subsequently be categorised as a demilitarised zone, to which the authorities of neither country would have access, instead border controls would be carried out by each country only on their own side of the zone.
- 5 In February 2017 the Sloranian government directed that a market survey be carried out by the Ministry of Housing and Construction. The market survey report was



completed and presented on 10 March. On 13 March the government decided that the contract for construction of the border wall be awarded to ScreenIt Kft. A limited liability company, ScreenIt is registered and domiciled in Slorania, owned by a group of private investors all of whom are members of the Sloranian Parliament.

- 6 The Sloranian Ministry of Defence (MoD) was designated the contracting authority. On 15 March the MoD decided that it itself should undertake the construction of the foundations of the wall, so as to ensure it could be made 'tunnel-proof' by means of installation of seismic and fibre optic surveillance equipment. This followed a recommendation from the Chiefs of Staff that, for reasons of national security, this should not be a task contracted out to a private firm. The estimated cost of building the foundations was €2 million.
- 7 The contract awarded to ScreenIt would therefore cover only the construction of the border wall upon the MoD foundations. The estimated cost was €5 million in addition to the cost of building the foundations. However, on 17 March concern was raised by the MoD as to whether the contract could be the subject of a direct award.
- 8 By way of response the Sloranian Minister of Trade, whose portfolio includes responsibility for public procurement legislation, used powers provided in Article 219 of the Law on Public Procurement (a statute of the Sloranian Parliament). This allows the Minister of Trade to supplement the Law by means of a Decree, and in a Decree adopted on 21 March the Minister specified that any public contract awarded for reasons of national security was to be exempt from the Law.
- 9 In addition, on 22 March the Minister sought a legal opinion from the law firm Forthcoming & Partners LLP, established in the capital of Slorania. In an opinion dated 27 March, Forthcoming & Partners concluded that the construction of the border wall would not fall subject to EU public procurement legislation. It recommended nonetheless that a voluntary prior notice be published.



- 10 Having secured a copy of the legal opinion, and a letter from the Minister of Trade in which she agreed with the conclusions expressed in it, the MoD drew up a voluntary notice and submitted it to the *Official Journal of the European Union* on 29 March. The voluntary notice contained a statement of reasons citing national security concerns, explaining that, in the view of the Sloranian Government, the project was exempt from procurement rules under the relevant EU directives for it was a project performed on the territory of a third country for reasons of national security and defence, and constituted an urgent response to an unprecedented immigration crisis.
- 11 At a press conference called to announce the particulars of the contract, the Minister of Defence further emphasised the importance of a national construction project being entrusted to Sloranian companies.
- 12 The voluntary notice was published in the 'S' series of the *Official Journal of the European Union* on 4 April 2017. In order to ensure prompt conclusion of the contract, on 6 April the Minister of Defence cancelled the Easter vacation of 13 and 14 April for all staff. As no complaint was then received by the Sloranian Public Procurement Review Board, the MoD signed the contract with ScreenIt on 14 April. The staff of the MoD enjoyed the final day of their regular Easter vacation on 17 April.
- 13 However, following the Easter vacation, the Review Board received a complaint from BrickUp SRL, a limited liability company registered and domiciled in Danubia. The complaint had been posted to the Board by surface mail on 12 April and arrived on 18 April. BrickUp claimed that the contract between the MoD and ScreenIt violated EU procurement law and requested that the Review Board issue interim measures suspending the contract.
- 14 The Review Board met on Thursday 20 April to review the case and decided to reject the request for interim measures, as the contract had been signed more than 10 days after the date of submission of the voluntary notice to the *Official Journal of the European Union*, and as the complaint too had been received more than 10 days after that date. At the same time, the Board contacted the MoD and received from it a copy



of the legal opinion Forthcoming & Partners had drawn up at the request of the Minister of Trade.

- 15 Having duly considered the legal opinion, the Review Board reconvened on Monday 24 April and decided to rely on a provision in its procedural rules, whereby it may reject a complaint as manifestly unfounded without hearing the parties. The Board found the construction of the border wall to constitute an issue of manifest urgency upon which the MoD had been entitled to rely.
- 16 Under the procedural rules of the Review Board, which set a time limit of 2 months for appeals, BrickUp submitted an appeal of the Board's determination to the Administrative Court of Slorania on 24 June 2017. In accordance with the procedural rules, the appeal was directed against the MoD. In the appeal, BrickUp claimed that the completed contract constituted a violation of EU public procurement law, and so should be set aside as ineffective.
- 17 In its defence, the MoD argued that the contract was exempt from EU public procurement rules for the reasons set out in the voluntary notice, and that in any case the MoD had been entitled to rely on the advice it had obtained in good faith from its legal advisers. The MoD further objected to the legal standing of BrickUp before the Sloranian courts, and noted that as the decision on interim measures had not been appealed in time, there was no legal basis for requesting the contract to be set aside.
- 18 As for the question of legal standing, the Sloranian Code of Civil Procedure provides that a company has standing before the Sloranian courts only if it can demonstrate sufficient legal interest in bringing a claim. The *travaux préparatoires* of the Code suggest that the legal interest must be real and not of a marginal character in order to be sufficient, which in cases of public procurement may include a requirement of a real and effective possibility of being awarded a contract.
- 19 The MoD argued that BrickUp had failed procedurally to demonstrate any legal interest, as it had merely submitted its claim against the validity of the contract



awarded to ScreenIt. It further argued that BrickUp could not be considered to have sufficient legal interest as BrickUp would in any case have been ineligible for the award of the contract, since its managing director was the subject of EU sanctions for grave professional misconduct.

- 20 The sanctions referred to by the MoD concerned Elif Kurskov. Mr Kurskov had previously been a minister in the Elbian government, which in May 2014 had been ousted by a peaceful revolution.
- 21 Mr Kurskov had moved to Danubia in April 2015, where he was granted a residence permit. In July of that year he was appointed managing director of BrickUp. BrickUp is owned by institutional investors in Danubia and, under its shareholders agreement, the general meeting elects a board of five members. The board meets monthly and appoints a managing director, who exercises control of the company on a day-to-day basis on behalf of the board.
- 22 Following the revolution in Elbia, the Elbian Procurator-General N. Poklonska had initiated criminal investigations against selected members of the ousted government. She was considering extending the investigation to include Mr Kurskov, who was suspected of embezzling €50,000 of state funds. Ms Poklonska was also aware that a sanctions regime relating to members of the former Elbian government had been adopted by the EU.
- 23 The sanctions regime comprised Council Decision (CFSP) 2015/6498, adopted by authority of Article 29 TEU, and Council Regulation (EU) 7122/2015, by authority of Article 215 TFEU. Both were adopted on 24 May 2015 and provided a framework for imposing sanctions upon members of the former government of Elbia. Each contains an identical provision (Article 4) whereby:
1. All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Elbian State funds and persons responsible for human rights violations in Elbia shall be frozen.



2. For the purpose of this measure, persons identified as responsible for the misappropriation of Elbian State funds include persons considered eligible for investigation by the Elbian authorities:

- a) for the misappropriation of Elbian public funds or assets, or being an accomplice thereto; or
- b) for abuse of office as a public office-holder in order to procure an unjustified advantage for themselves or for a third party, and thereby causing a loss to Elbian public funds or assets, or being an accomplice thereto.

24 Against this background, on 11 August 2016 Procurator-General Poklonska submitted to the EU Delegation in Elbia a request that sanctions be adopted against Elif Kurskov. In it she explained that, irrespective of whether or not Mr Kurskov had any funds that could be frozen within the European Union, it would facilitate the opening of an investigation against Mr Kurskov under the Elbian Code of Criminal Procedure if he was made the subject of EU sanctions.

25 In an annex to the request, she submitted an inconclusive police report concerning interviews held with staff members of the Elbian State Audit Authority in relation to the alleged embezzlement of state funds, as well as the personal file on Mr Kurskov held by the Elbian Central Registry. The personal file contained his criminal and employment records, as well as information on his political and religious affiliations. It was on this basis that Ms Poklonska was considering opening an investigation against Mr Kurskov.

26 A week later, on 18 August the Head of the EU Delegation in Elbia had an agreeable lunch with his colleague, the Sloranian Ambassador to Elbia. The Ambassador indicated that it was very important that the EU meet the sanctions request from the Procurator-General, as there was otherwise a grave risk that Elbia would renege on the border wall project. The Head of the Delegation agreed that wall would constitute an important tool for the effective implementation of EU common external border policies, despite the protests from various EU Member States. However, he did



express some concern about respect for EU public procurement law, although he did accept that preventing illegal immigration might be considered an overriding concern.

- 27 So, on 21 August the EU Delegation in Elbia submitted the request to the European External Action Service in Brussels, with a recommendation that action be taken against Elif Kurskov. On 25 August, the recommendation from the EU Delegation was forwarded to COREPER, which approved drafts for a CFSP implementing decision and an EU implementing regulation. Both were adopted by the Council on 2 September, as, respectively, Implementing Decision 2016/8892 and Implementing Regulation 9355/2016, and both implementing acts had their legal basis in the sanctions measures of 24 May 2015.
- 28 Under the implementing acts, all funds possessed by Elif Kurskov within the EU were frozen. The annex of each provided the following statement of reason for the sanctions adopted against Mr Kurskov:
- Person considered eligible for criminal proceedings by the Elbian authorities for the misappropriation of public funds or assets.
- 29 In parallel with the publication of the implementing acts imposing sanctions on Mr Kurskov, the Council consulted its Data Protection Officer, who recommended that a notice on data protection should be drawn up for publication in the *Official Journal*. However owing to a server error in the Commission network, the submission of the notice to the *Official Journal* failed. This went unnoticed by the Council Secretariat as the draft notice had correctly been placed in the case file.
- 30 Mr Kurskov considered taking legal action against the sanctions in late January 2017, but as his funds were located mainly outside the EU, he decided to wait and see whether the sanctions would be upheld at the mandatory review, which according to the final provisions of the implementing acts would take place in June 2017.
- 31 On 26 June 2017 the Council notified Mr Kurskov of its intention to extend the validity of the sanctions imposed upon him for a further year. The Council indicated



no new facts in support of the extension, but indicated that it had received information from Elbia that Mr Kurskov was still eligible for investigation. Mr Kurskov decided not to reply, considering the procedure a charade in violation of his fundamental human rights. On 1 September the Council adopted the extension acts comprising CFSP Implementing Decision 2017/9489 and EU Implementing Regulation 9723/2017, which are due for review in June 2018, and which contained the same statement of reasons in relation to Mr Kurskov as the 2016 implementing acts.

- 32 In the public procurement case raised before the Administrative Court of Slorania by BrickUp against the MoD, counsel for BrickUp argued that the legal standing of the company cannot be made dependent on the legal standing of its managing director and that, in any case, the sanctions adopted against Mr Kurskov were invalid, as they had been adopted as part of judicial cooperation with the public prosecuting authority of a third country.
- 33 It followed that the sanctions could not be regarded as forming part of the common foreign and security policy of the EU, and therefore their adoption had upset the institutional balance of the EU Treaties. Finally, BrickUp argued that there was no indication that data protection measures had been applied to the transfer of the investigation files from Elbia to the EU authorities. Accordingly, the information therein could not be relied on as a basis for adopting the sanctions acts.
- 34 The MoD argued that irrespective of the origin of the information contained in the request submitted by Elbian authorities, the information formed a valid basis for the Council to take action according to the sanctions regime. The MoD stressed that as the sole managing director of BrickUp, the legal standing of Mr Kurskov has a direct impact on the legal standing of the company.
- 35 Furthermore, the MoD argued that any irregularity which might have occurred in relation to the procedural norms for the transfer of personal data could have a bearing only upon the potential liability of the EU as an international organisation, or the



personal liability of its officials. It could have no relevance for the MoD's reliance upon the implementing acts as a confirmation of the unsuitability of BrickUp for award of the border wall contract.

36 Finally, the MoD argued that had BrickUp wished to contest the validity of the sanctions adopted against its managing director, it should have done so before the Court of Justice of the European Union. As BrickUp had failed to do so, the Administrative Court of Slorania could not be the relevant forum for contesting the validity of the sanctions.

37 To this, BrickUp argued that it would have lacked title and interest before the Court of Justice, and it then followed from the principles established by the Court of Justice that the Sloranian legal system bore an obligation to afford BrickUp legal standing.

38 Against this background, the Administrative Court decided to refer a number of questions to the Court of Justice of the European Union under Article 267 TFEU. However, the Administrative Court appended a note to the case file that in a recent judgment concerning social security benefits, the Supreme Court of Slorania had ruled that whilst national law must always be interpreted in the light of applicable EU law, it is as a matter of constitutional law not possible to accord it an interpretation that is directly *contra legem* of legislation adopted by the Sovereign Parliament of Slorania.

39 The Administrative Court of Slorania accordingly referred the following questions to the Court of Justice of the European Union:

1. Under the EU legal framework for public procurement, and in circumstances such as those in the main proceedings, may a public contract be awarded directly for reasons of national security after publication of a voluntary notice in the *Official Journal of the European Union*?



2. Under the EU legal framework for procurement review, taking into consideration especially the EU Charter of Fundamental Rights, may a company incorporated and domiciled in an EU member state be denied access to public procurement review proceedings on the sole basis that its managing director is the subject of EU sanctions?

3. Under the EU legal framework for data protection, and in circumstances such as those in the main proceedings, may EU sanctions be regarded as valid when they are adopted on the basis of personal data received from a public authority in a third country together with a request that sanctions be adopted?

40 The order for reference was received by the Registrar of the Court on 1 September 2017, who assigned it case number M-530/17. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified BrickUp SRL (as applicant) and the Sloranian Ministry of Defence (as defendant) and has invited them to submit written observations to the Court. The parties are requested to lodge their observations by November, 25th 2017.