

Decision of the European Ombudsman on complaint 530/98/JMA against the European Commission

Decision

Case 530/98/JMA - Opened on 02/07/1998 - Decision on 26/10/2000

Strasbourg, 26 October 2000 Dear Mrs F., On 20 May 1998, you lodged a complaint with the European Ombudsman against the European Commission concerning its handling of a project funded by the European Development Fund. The project concerned three national parks in Southern Ethiopia (project ET7017). You claimed that the development of the project, as regards resettlement issues, had not respected legal obligations derived from EU development policy, the IV Lomé Convention [hereinafter, the Convention], the OECD guidelines on resettlement and international human rights agreements. On 2 July 1998, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 30 October 1998 and I forwarded it to you with an invitation to make observations, if you so wished. On 11 December 1998, you requested an extension of the deadline to send your observations. On 29 January 1999, I received your observations. You forwarded some additional information on 28 September 1999. In order to complete the information of the file, I asked the Commission to send me a copy of the terms of reference of the project by letter of 11 July 2000. On 18 July 2000, the Commission faxed to me several documents, which I forwarded to you on 25 July 2000, with an invitation for comments before 30 September 2000. I did not receive any reply from you. I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

According to the complainant the relevant facts were as follows: The complainant pointed out the importance of EU Aid for Ethiopia, and the goals that in her view should underline that assistance. She explained that the Commission's Programme Framework paper for the 8th European Development Fund (EDF) for Ethiopia (1) established the bases for EU cooperation with that country, in line with the provisions of the Convention. The complainant underlined the goals to be accomplished by this type of Community assistance such as food security, human development, democratization, internal stability, support for the civil society and respect for human rights. The complainant referred to the subject matter of her complaint: the National Parks Rehabilitation Project in Southern Ethiopia (project ET 7017) financed by the Community. The main purpose of the proposed Community intervention was to assist the Ethiopian Ministry of Natural Resources, Development and Environmental Protection and the Ethiopian Wildlife Conservation Organization to establish a sustainable and efficient level of operation and maintenance of three undeveloped protected areas: Nechisar, Mago and Omo National Parks.



The complainant quoted the 1994 Financing Agreement of the project which set as its goals to help *"establish an appropriate legal framework within which the conservation and management of natural resources is executed and on the level of the project areas, the strengthening of conservation efforts and the rational exploitation of their natural resources"*. Given that background, the complainant assessed a number of flaws in the way the Commission had implemented the project:

1. No sufficient attention was given to cultural and social issues: The responsible consultants did not seem to have either the capacity or time to produce socio-economic surveys of sufficient quality and to inform the local population in culturally appropriate ways about the project. Nor did it appear that the Commission took all reasonable steps to ensure compliance with Articles 36, 142 and 143 of Lomé IV Convention, which advocate that the design, appraisal, execution and evaluation of each project shall be based on regard for the cultural and social milieu.
2. Respect for international rules on resettlement: In the complainant's opinion, neither the Commission staff nor the project consultants had a thorough grasp of international standards on involuntary resettlement, such as those produced by the World Bank or the OECD.
3. Lack of consultation with affected people: In the complainant's view, a single meeting with representatives of the communities who were to be affected by the development of the parks, was no substitute for a genuine participatory approach as required by the Convention.
4. Vague information: The Financing Agreement vaguely referred to the need to remove some "1680 squatters" from the National Parks but failed to provide any further information on who they were, where they were located and why they should all have been regarded indiscriminately as squatters with no formal rights.
5. Sufficient funding: The complainant also called into question whether the amount of money earmarked for the resettlement of certain communities (some £500,000) was adequate. It was supposed to cover the construction of new houses for each family, transport, food aid for eight months, the construction of access roads and schools, water supplies and a health clinic.

These concerns had been brought to the attention of the Commission's services and its consultants, both in Addis Ababa and Brussels, from as early as 1994. Representations had also been made via the British Government's EU Department of the Overseas Development Administration/Department for International Development. Although during 1996 and 1997 NGOs and other interested parties were given to understand that some modifications were being made, serious misgivings remained about the issue of resettlement. Against this background, the complainant wrote to the European Ombudsman, alleging that,

1. the Commission had failed to carry out the project in accordance with the legal obligations incumbent upon it; in particular: (i) in the implementation of the project the Commission has not respected the objectives of EU's development policy as stated in the IV Lomé Convention, namely articles 4, 36, 142 and 143; (ii) in the preparation of the project, especially as regards the resettlement of communities living near the park, the Commission has failed to ensure compliance with the OECD Guidelines on Involuntary Displacement and Resettlement (OECD/GD 201) as well as with art. 13 of the IV Lomé Convention;
2. the Commission's officials involved in the process of involuntary resettlement had not taken proper account of human rights violations caused by their actions, in breach of certain international agreements subscribed by all Member States such as the UN International Covenant on Economic, Social and Cultural Rights.

THE INQUIRY



The Commission's opinion The Commission stated that as set out in Articles 2 and 3 of the Convention, ACP signatories keep their sovereignty in determining their political, social, cultural and economic policy options, and thus, those policies are implemented under their own responsibility. The implementation of Technical Assistance contracts is governed by General Conditions, laid down in Decision N° 3/90 of the ACP-EEC Council. The Commission explained that the Contractor's role is that of an expert adviser, subject to the terms of his contract as well as the legal, political, cultural and religious norms prevailing in the ACP country in question. The Contractor is bound to the Contracting Authority to correctly execute his commitment but cannot be held liable where the Contracting Authority does not follow his advice or recommendations. Therefore, in granting this assistance, the Commission believed it did not assume any responsibility for the formulation of national policies and projects. In this case, the Commission had contributed to the funding of an identification and feasibility study, which demonstrated the need for the establishment of a comprehensive legal, institutional and social framework for the protection and management of national parks in Ethiopia. Accordingly, a limited pilot project was launched focusing on the elaboration of viable policy and management parameters as well as the necessary legal and institutional framework. The Commission explained that the main achievements of the assistance consisted in drafting a comprehensive wildlife law as well as complementary regulations on wildlife conservation, and development. These drafts introduced the concept of "gazetting" into the wildlife protection policies and the associated legislation in Ethiopia, whereby a legal and procedural system had to be established for the creation and management of national parks. This scheme should define the rights and obligations of all parties concerned. The Commission affirmed that the documents were presented to the Ethiopian Government for adoption in April 1997, but that, until now, the institution had not been informed of the Government's legislative intentions. However, none of the three parks in question had been gazetted or would be before the new legislation be in force. Furthermore, the Commission underlined that no resettlement of local populations had taken place, and that no involuntary settlement had been contemplated.

The complainant's observations In her observations on the Commission's opinion, the complainant contested the role of the Commission in this process. In her view, the Convention enshrines the principle of shared responsibilities between the different actors. Therefore, the fact that the EU development policies are implemented by the ACP countries under their own responsibility, should not be taken as if Commission officials administering EDF funds under the Convention, were to be relieved of all responsibility. For the complainant, these officials should ensure that there is compatibility between the ACP countries' development principles, strategies and models, and the obligations set out in the Convention, so as to guarantee that development co-operation is aimed to alleviate poverty and promote respect for human rights (2). In the complainant's view, the Commission -or the EC Delegate- ought to play an important role in the tendering processes and in approving contracts. Thus, the Commission and/or its Delegate must ensure that the principles binding upon the EU and ACP State as well as relevant international standards are known in any tender procedure. Similarly, the Commission should have a clear responsibility for ensuring the quality and proper implementation of national projects. According to the complainant, resettlement was a clear objective of the initial phase of the Commission's "limited pilot project". She referred to the existence of worrying signs which showed that the Government of Ethiopia and the regional authorities were ready to press ahead with resettlement before any legal safeguards had been put in place, in particular as regards the



Nechisar park area. Supplementary information sent by the complainant On 28 September 1999 the complainant sent additional information to the Ombudsman. In her letter, the complainant maintained her previous claims. In summary, the complainant stated that the Commission and its agents cannot be held responsible for all the problems associated with the project. However, the institution should be criticised since it failed to ensure, through the tendering process and the approval of the consultants, that all parties were properly informed of relevant Community directives, laws and policies, in particular the OECD Guidelines on Involuntary Displacement. Such failure, in view of the complainant, might have rendered the Commission liable to damages under Article 288 of the EC Treaty.

FURTHER INQUIRIES

In order to complete the information of the file, the Ombudsman asked the Commission to send a copy of the terms of reference of the project by letter of 11 July 2000. The Commission faxed on 18 July 2000 copies of the Summary information of the project (DGVIII/766/94-EN; July 1994) and of the Final Report on the project (May 1995/April 1998). The Ombudsman forwarded this information to the complainant on 25 July 2000, with an invitation for comments before 30 September 2000. There has been no reply from the complainant.

THE DECISION

Preliminary remarks To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. On the basis of these provisions, the Ombudsman's inquiries have only been directed towards examining whether there has been maladministration by the European Commission. The complainant's allegation that the Ethiopian authorities could be considering the resettlement of some local population will therefore not be dealt with by the Ombudsman.

1 Responsibility of the Commission in carrying out EDF projects

1.1. The complainant set out her first claim, namely that the Commission had failed to carry out the project in accordance with certain binding legal obligations, assuming that the Commission had a responsibility to ensure a proper preparation and implementation of any EDF funded project.

1.2. In its opinion, the Commission has put aside any responsibility for potential faults related to the implementation of EDF assistance. The institution has argued that ACP countries bear all responsibility for the formulation of national policies and projects, as well as for the implementation of their development policies.

1.3. The Ombudsman notes that the scope of the Commission's responsibility in EDF funded projects appears thus as a relevant legal question for the assessment of the complainant's claims. It is therefore necessary to clarify this aspect of the case prior to the evaluation of the substantive claims made by the complainant.

1.4. The object of the complaint involves a project of technical assistance financed by the Commission out of the resources of the 7th EDF, and hence pursuant to the IVth ACP-EC Convention of 15 December 1989 [Lomé IV Convention] (3). Article 222 of the Convention establishes the criteria for the division of responsibilities between the different actors involved in the ACP-EC co-operation process. It underlines, however, the overarching principle whereby action financed through the EDF is to be implemented by the ACP States and the Community in close co-operation. That obligation of co-operation places,



(i) on the ACP States the responsibility, *inter alia*, for preparing and presenting dossiers for projects and programmes; (ii) on the Community, the responsibility of taking financing decisions for the projects and programmes; and (iii) on the ACP States and the Community, the joint responsibility of ensuring that such projects and programmes are implemented properly, promptly and efficiently. In order to ensure that the Commission, as the Community institution in charge of implementing the Convention, complies with these criteria, Article 316 provides that a Commission delegate should be established in each ACP State, or group of States. This representative has to facilitate and expedite the preparation, appraisal and execution of projects and programmes. 1.5. The Ombudsman therefore concludes that in the preparation and implementation of programmes and projects funded through the EDF, the Commission plays an important role and has to follow a number of obligations, set out in the Convention. Moreover, as the Community courts have held, the Commission is required to discharge these obligations in accordance with the requirements of sound administration (4) . It is thus reasonable to assess whether or not the Commission has acted in accordance with these obligations in carrying out the project. **2 Failure of the Commission to comply with certain legal obligations in carrying out the project**

2.1. The complainant claims that the Commission failed to carry out the project in accordance with legal obligations incumbent upon it; in particular that the preparation and implementation of the project had not respected: (i) certain objectives of EU development policy regarding the respect of cultural and social issues (Arts. 4, 36, 142 and 143 of the Convention), and (ii) other obligations concerning the resettlement of communities living near the park (OECD Guidelines on Involuntary Displacement and Resettlement (OECD/GD 201); Art. 13 of the Convention). 2.2. The Commission has contested the violation of any such obligation in view of the nature and limited scope of the project. It explained that the assistance's objective was merely to draft a comprehensive wildlife law as well as complementary wildlife conservation, development and utilisation regulations. The institution has indicated that no resettlement of population had taken place, and it underlined that no involuntary resettlement was being contemplated. 2.3. The Ombudsman notes that environmental, cultural and social values have become essential values in the EU development co-operation policy. Thus, one of the major innovations of the Convention has been to give paramount importance to socio-cultural and environmental considerations. Art. 4 of the Convention set as a general principle that ACP-EEC co-operation should be aimed at supporting the development of ACP "*based on their cultural and social values, their human capacities, their natural resources and their economic potential*". The Convention has placed social issues in the design, appraisal, execution and evaluation of any project a priority. Accordingly, the implementation of any project has to take due account of the existing cultural and social milieu, by means of community participation at a grass root level (5) . 2.4. It is also important to underline that EU development co-operation, as in any other EU policy, has to be consistent with existing international law obligations (6) . The Convention itself has outlined the importance of this principle in the context of respect for human rights (7) . 2.5. In order for the Ombudsman to assess whether or not the previous principles -which ought to inform EU development co-operation policy- have been properly applied by the Commission to the present case, it is necessary to look at the nature of the project and its effects. From the information provided in this case, it can be established that Community assistance only covered a limited pilot project to elaborate a legal and institutional framework for the protection and management of three national parks in Ethiopia. Its main achievement has been the drafting of some



legislative proposals which suggested that a legal and procedural system be established for the creation and management of national parks. On the basis of this scheme, the definition of the boundaries of any new park would have to be defined through negotiation with any potentially affected local community. This legal scheme has not yet been implemented since the Ethiopian government has not yet adopted these legislative drafts since their submission in April 1997.

2.6. The project's potential social disruption could only come from an eventual resettlement of local communities. In these situations, the draft legislative proposal favoured the dialogue with all communities involved. However, no involuntary resettlements appear to have been contemplated. These aspects of the project seem to be in line with the socio-cultural and environmental considerations set out in the Convention. Furthermore, as it appears from the information included in the Project's Final Report, no involuntary resettlement of local population has taken place. Although the complainant, on the basis of information from the local press, has expressed her concerns especially as regards local population in the area of Nechisar, the Ombudsman has not received convincing evidence in support of that information. Thus, it cannot be inferred that the Commission disregarded binding international obligations or some provisions of the Convention when implementing the project. The Ombudsman has therefore concluded that there appears to be no maladministration as regards this aspect of the case. **3**

Failure of Commission's officials to avoid human rights violations 3.1. The complainant claims that Commission officials involved in the process of involuntary resettlement had not taken proper account of human rights violations caused by their actions, in breach of certain international agreements subscribed by all Member States such as the UN International Covenant on Economic, Social and Cultural Rights. 3.2. As stated previously in section 2, the Ombudsman has not received evidence of a nature to prove that involuntary resettlement of local population has taken place, or that the Commission services could have been involved in any such practice. The information contained in the Project's Final Report seems to lead to an opposite conclusion. The press reports mentioned by the complainant only referred to the possibility that the Ethiopian government, or the local authorities, might carry out some initiative for the resettlement of local population living near the park of Nechisar. In the design of this action, however, no Community official has apparently been involved. The Ombudsman has therefore concluded that there appears to be no maladministration as regards this aspect of the case. **4 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case. The President of the European Commission will also be informed of this decision. Yours sincerely Jacob Söderman

(1) Brussels, March 1996 VII/330/96

(2) Art 5 of the Convention

(3) The Convention was approved by the Council and by the Commission through Decision 91/400/ECSC, EEC of 25 February 1991 [OJ 1991 L 229, p.1]

(4) Case T-7/96, *Francesco Perillo v Commission* [1997] REC II-1061, par.38. Arts. 36, 142 and 144 of the Convention

(5) Arts. 36, 142 and 144 of the Convention



(6) Case C-286/90, *Poulsen and Diva Navigations* [1992] ECR I-6, par.9; see also, C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655, par. 45

(7) Art. 5, par. 2 of the Convention.