

Decision of the European Ombudsman on complaint 568/98/PD against the European Commission

Decision

Case 568/98/PD - Opened on 22/06/1998 - Decision on 29/06/1999

Strasbourg, 29 June 1999 Dear Mr T., On 3 June 1998, you made a complaint against the European Commission, on behalf of two companies. You put forward that actions undertaken by the European Commission towards the two companies, were unfair and thus not in accordance with principles of good administration. On 22 June 1998 I forwarded the complaint to the President of the European Commission. Since officials of the Court of Auditors were also named in the complaint, it was also sent to the President of that institution for information. On 20 August 1998, you forwarded to me a copy of a report established by the Commission's anti fraud unit, UCLAF, together with your observations on it. The Court of Auditors replied on 31 August 1998 and the reply was forwarded to you. The Commission sent its opinion on your complaint on 30 September 1998 and I forwarded the opinion to you with an invitation to make observations, if you so wished. On 30 November 1998 I received your observations. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

The background to the complaint is in brief the following: Since 1992, the two complaining companies had been involved in a variety of Community funded research projects. The involvement did not give rise to any problems. In October 1996, the Court of Auditors performed an audit of the two companies. In February 1997, the Court of Auditors informed DG XIII of the Commission that the audit had revealed problems. The Commission thereafter reviewed the scope of its contractual commitments with the two companies. It appeared that there were in total 17 contracts, managed by different services and on different legal bases. Within the Commission, the Unit for Fight against Fraud, UCLAF took over the file concerning the two companies. In July 1997 the companies were informed that all payments to them from the Commission would be suspended. From 7 to 10 October 1997, the Commission undertook an on-the-spot inspection at the premises of the companies. Representatives of the companies participated in the inspection. Also in October 1997, other Commission services refused to enter into project contracts, in which the two companies would be involved. On 10 March 1998 the Commission asked the companies to supply evidence additional to the one supplied at the inspection. By letter of 24 March 1998, the complainant replied to this letter. According to the complainant, the Commission had received all necessary information and the Commission's behaviour was harming the two companies. This is the background against which the complainant lodged the complaint with the Ombudsman. According to the complainant, the



Commission behaved in an unfair manner towards the companies. The complainant in particular put forward that - although the two companies had regularly informed the Commission over a period of more than six years of their execution of contracts, the Commission had not reacted to that information; the Commission had thus unfairly left the companies with the impression that things were in order; - the Commission had unfairly suspended payments to the two companies, without first hearing them; - the Commission had unfairly excluded the companies from participating in projects, and - the Commission had acted with undue delay since the inspection.

THE INQUIRY

The Commission's opinion The Commission stated that the audit carried out by the Court of Auditors showed that important irregularities had taken place in the two companies' way of handling Community funding. Therefore, precautions were immediately taken at the Commission, i.e. payments to the companies were suspended. According to the Commission, the on-site inspection made by the Commission services confirmed the findings of the Court of Auditors, in particular: - expenditure statements were not based on real expenditure but systematically and substantially overcharged, especially as regards staff expenses and general expenses; - supporting documents and bank statements were missing, and - a co-financing obligation imposed on the companies by the contracts in question had not been complied with. The report on the on-site inspection containing these findings had finally been established on 15 May 1998 and had been communicated to the two companies which had been given, both at the on-site inspection and afterwards, the possibility to put forward their viewpoints. Following the establishment of the report, the Commission was proceeding with the recovery of sums unduly paid. As concerns the complainant's first individual grievance, the Commission stated in summary that the reports supplied over the years by the companies did not reveal any problems with regard to the conformity to the facts. The Commission thus did not have any reason to start inquiring further into the use of funds by the companies. It was only after the audit of the Court of Auditors that the Commission was prompted to carry out an in-depth inspection, which involved examination of supporting documents. These supporting documents had not been attached to the reports supplied over the years. As concerns the second grievance, the Commission stated that it was under an obligation to protect the Community's finances, when, as in this case, it was confronted with serious irregularities against those finances. It was therefore justified that the Commission withheld payments to the companies, until it had inquired further into the matter. Furthermore, the on-site inspection showed this to be justified, as there were even important amounts, already paid out, which now needed to be recovered. As concerns the third grievance, the Commission stated that it was entitled to decide that it did not want to enter into more contracts with the two companies concerned. Furthermore, the Commission stated that the companies themselves had accepted to withdraw from two future projects. As concerns the fourth grievance, the Commission found that, given the complexity of the legal situation and the failure on the part of the companies to provide additional information, it had dealt with the matter timely and without undue delay. It stated that in the time between the inspection and the establishing of the report, several meetings had taken place inside the Commission to ensure coordination. **The complainant's observations** In the observations, the complainant maintained the complaint. In particular, the complainant stressed that all relevant rules of Greek law had been complied with by the companies.



THE DECISION

1 Scope of the inquiry 1.1 The complaining companies were involved in 17 contracts with the Commission, funded by Community resources. After approximately six years, an audit of the companies was carried out by the Court of Auditors. Further to the audit, the Commission suspended the payments to the companies under the contracts. The Commission's anti fraud unit proceeded to an on-site inspection of the companies' premises which, according to the Commission, established serious irregularities. Therefore the Commission did not want to enter into any further contracts with the companies and issued recovery orders for sums paid under existing contracts. The complainant considers that the Commission's behaviour is unfair and that it has acted with undue delay. Thus, the framework of the case are contractual relationships between the Commission and the two companies concerned and basically, the complainant questions the Commission's powers when it is not satisfied with the performance of the other party to a contract. 1.2 Therefore it shall be recalled that the European Ombudsman does not seek to establish whether either party has acted in conformity with the contract. That question can only be dealt with effectively by a court of competent jurisdiction which would have the possibility to hear arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on the disputed issues of fact. However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes its view of its position to be justified. **2 Unfair treatment by the Commission** 2.1 In the first grievance, the complainant reproaches the Commission for not having reacted to the companies' reports for years. According to the Commission, the irregularities committed were of such a nature that the Commission would not have been able to detect them on the basis of the companies' periodic reports to the Commission and could not lead the complainant to believe that things were in order. The Ombudsman finds that the Commission's explanation for its failure to act is reasonable and cannot amount to maladministration in relation to the two companies concerned. 2.2 As concerns the second and third grievances that the Commission was not entitled to suspend payments and to avoid future contracts with the companies, it appears that the Commission did so in order to protect the financial interest of the Community, faced with what the Court of Auditors and itself considered to be serious irregularities over several years. It shall also be observed that as the case stands at present, the prudence of this measure seems confirmed by the recovery orders issued subsequently by the Commission against the companies. The sums to be recovered are important. It does not appear unreasonable that the Commission, confronted with what the Court of Auditors and itself consider to be serious irregularities, seeks to limit the extent of the financial damage that it considers itself exposed to. The Ombudsman therefore finds that there is no maladministration in these aspects of the complaint. 2.3 As concerns the complainant's fourth grievance that the Commission acted with undue delay, it shall be observed that from the Commission inspection (October 1997) until the establishment of the report containing the findings of the inspection (May 1998), approximately seven months passed. According to the Commission, this lapse of time was caused by the complexity of the legal situation and the companies' failure to provide additional information. Furthermore, several meetings were held inside the Commission to ensure coordination. Principles of good administration require that the administration acts within reasonable time to solve matters before it. What is reasonable time



has to be determined in relation to the particular circumstances of the matter, as for instance the complexity of the case to be dealt with, the importance, for the parties involved, of the actions to be taken and the context. In this case, the examination by the Commission concerned a large number of contracts, which had run over several years and which required the involvement of several Commission services. To this has to be added the Commission's dispute with the complainants about additional information. In those circumstances, the time spent by the Commission in establishing the report does not appear unreasonable and does not therefore constitute maladministration. **3 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 President of the European Commission will also be informed of this decision. Yours sincerely Jacob SÖDERMAN