

Decision of the European Ombudsman on complaint 620/98/IJH against the European Commission

Decision

Case 620/98/IJH - Opened on 13/07/1998 - Decision on 25/05/1999

Strasbourg, 25 May 1999 Dear Mr B., On 10 June 1998 you made a complaint to the Ombudsman against the European Commission, alleging mismanagement by the Commission of the Tacis programme in Russia, as a result of which you suffered personal financial loss. On 17 June 1998, you sent further material relating to your complaint. On 13 July 1998, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 22 October 1998. I forwarded the opinion to you with an invitation to make observations, which you sent on 16 November 1998. I am writing now to let you know the result of the inquiries that have been made.

THE COMPLAINT

The complainant worked in Russia from February 1995 to February 1997 as project manager for a firm of consultants which had won a contract with the Commission under the Tacis (1) programme. According to the contract between the Commission and the firm, expatriate staff from Member States were to be exempt from income tax in Russia. The complainant accepted the post of project manager on this basis. In 1996, the Russian authorities agreed that the complainant should not pay tax on his 1995 earnings. However, in 1997 they required him to pay tax on his 1996 earnings. They based the tax demand on the fact that the Protocol signed by the Commission and the government of the former USSR on 2 August 1991, which provides that taxes are not to be financed out of European Community funds, was never ratified by the former USSR or by Russia. The complainant claims that the Commission wrongly advised that the Protocol could be relied on. He also claimed that the Commission failed to answer his correspondence on this matter and abandoned both himself and other Tacis consultants in Russia. The complainant claimed compensation for his financial losses as a result of the Commission's negligence: i.e. 25.000 US Dollars taxes paid for 1996 and a similar amount which he risked having to pay retrospectively for 1995. The complainant also pointed out that Tacis aid money is allocated by the European Parliament for specific purposes and is already the product of taxation. To permit taxation of this money indirectly funds the policies of the Russian government, over which the European Parliament has no control.

THE INQUIRY



The Commission's opinion In its opinion, the Commission confirmed that the 1991 Protocol and the "General Rules applicable to the Technical Assistance of the European Communities" (signed with Russia in July 1997), exempt individuals working on Tacis contracts from Russian income tax. The Commission also stated that, despite its intensive efforts, neither the Protocol nor the General Rules have been ratified by the Duma or by presidential decree. According to the Commission, until the present case, pragmatic solutions had been found in practice through the issuing by the Commission's Moscow delegation of certificates attesting exemption from tax. *"Although the legal situation may have been precarious and still is far from satisfactory, the presentation of these certificates to the respective tax offices together with a refusal to pay has generally solved the problem"*. As regards the complainant's personal loss, the Commission pointed out that its standard Tacis contract informs contractors about the tax privileges provided for in the Protocol but also warns them that it does not accept financial responsibility *"in the event that the authorities should refuse to apply in favour of the contractor the above-mentioned exemptions and privileges"*. The contract requires the Commission to *"exert its best efforts to support the contractor in dealing with the competent authorities"*. The Commission claimed that it informed Tacis contractors about the status of the Protocol and General Rules at briefing meetings in 1996/7, two of which the complainant personally attended. The Commission also claimed that it provided the complainant with every assistance which he could reasonably expect. In particular, when it became clear late in 1997 that the Russian tax administration had tightened its practices, *"the Head of Delegation immediately and repeatedly intervened on the complainant's behalf, but unfortunately without any tangible result."* Copies of four letters from the Commission to the Russian authorities (dated in November 1997) were annexed to the Commission's opinion. The Delegation discussed the situation with the complainant in April 1998 when the Russian tax authorities made their final demand for payment. In order not to undermine the Commission's continuing efforts to reach an overall solution by sending the wrong signal to the Russian tax authorities, the complainant was strongly advised to invoke the Protocol again and refuse payment.

The complainant's observations In his observations, the complainant maintained and restated the complaint. As regards the claim of failure to answer correspondence and abandonment of himself and other Tacis consultants, the complainant pointed out that the Commission had not previously made him aware of the letters from its Head of Delegation to the Russian authorities. The observations accept that the complainant has no contractual remedy. However they argue that the Commission has a duty of care, which arises because of the proximity of the parties. The observations claim that the Commission has been consistently negligent by failing to make further assistance to Russia conditional on ratification of the Protocol and by failing properly to explain the status of the Protocol to Tacis contractors and consultants. Furthermore, the complainant claims that his losses were foreseeable and that the Commission is responsible for those losses. The Commission's suggested course of action of invoking the Protocol and refusing to pay tax was wrong because, in the absence of ratification of the Protocol, there was no legal defence to the Russian tax demands. The certificates of exemption issued by the Commission misrepresented the position both to consultants and to the Russian tax authorities. The observations also repeat the claim that the Commission has been negligent towards European taxpayers, since money allocated for aid programmes is taxed by the Russians and put to uses over which the European Parliament has no control.



THE DECISION

1 The claims of misleading advice and lack of information 1.1 The complainant worked in Russia for a firm which had a contract with the Commission to provide technical assistance under the Tacis programme. The standard-form contract between the Commission and the firm contained the following provision (Annex F Art. 5 .4): *"Natural and legal persons, including expatriate staff, from the Member States of the European Community executing technical cooperation contracts financed out of EC grant shall be exempted from business and income tax in the NIS [Newly-Independent States]"*. 1.2 Provision for exemption from taxes was included in a Protocol (1991) and in General Rules (1997), agreed between the Commission and the USSR and Russian authorities respectively. However, neither the Protocol nor the General Rules were ever ratified by the USSR or by Russia. 1.3 The complainant received and paid a demand from the Russian tax authorities for income tax on his earnings. He claims that the Commission wrongly advised that the Protocol could be relied on. He also claimed that the Commission failed to answer his correspondence on this matter and abandoned both himself and other Tacis consultants in Russia. 1.4 Principles of good administrative behaviour require that the Commission should take care not to provide misleading information. In 1995, the Commission included in its contract with the firm for which the complainant worked as a Tacis consultant in Russia a provision concerning exemption from taxes, although it knew that the relevant international agreement had not been ratified by the Soviet or Russian authorities. It should have realised that this was likely to mislead potential consultants concerning their tax position. 1.5 Principles of good administrative behaviour also require the Commission to reply to a citizen's requests. On the basis of the Ombudsman's inquiries it appears that, although the Commission intervened with the Russian authorities on the complainant's behalf, it failed to inform him of its activity in due time. **2 The claim for compensation** 2.1 The Russian authorities required the complainant to pay 25.000 US Dollars in taxes on his Tacis earnings in 1996. The complainant accepts that he has no contractual remedy, but claims that his loss was foreseeable and that the Commission is responsible for it. The Commission contests liability. 2.2 The non-contractual liability of the Community is governed by Article 235 EC and the second paragraph of Article 288 EC (2) . According to established case-law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage (3) . 2.3 In the present case, successive Tacis Regulations all provide that taxes shall not be funded by the Community (4) . However, it is not obvious that failure to respect this provision results from an act or omission attributable to the Commission. Even if it does result from such an act or omission, it is not obvious that causation can be demonstrated, in view of the role of the Russian authorities. 2.4 As regards misleading information, the case-law of the Court of First Instance bases non-contractual liability on a legitimate expectation (5) . Although the Ombudsman has made a critical remark concerning the Commission's conduct (para 1.4 above), it is not obvious that the criticised conduct could justify a legitimate expectation on the part of the complainant. 2.5 In these circumstances, the Ombudsman does not consider that the complainant has demonstrated an entitlement to damages based on the existing case-law of the Community Courts concerning the general principles of non-contractual liability common to the laws of the Member States. The Ombudsman notes that the complainant has the possibility to pursue his claim before the Court of First Instance. **3 The allegation of failure to protect the interests of European taxpayers**



3.1 The complainant claims that the Commission has been negligent towards European taxpayers, since money allocated for aid programmes is taxed by the Russian authorities and put to uses over which the European Parliament has no control. In the complainant's view, at some point after 1991 when the Tacis programme began, the Commission should have made further aid to Russia conditional on ratification of the 1991 Protocol and later the General Rules signed in 1997. 3.2 As noted in 2.3 above, successive Council Regulations on which the Tacis programme is based provide that taxes shall not be funded by the Community. This aspect of the complaint primarily concerns the Commission's responsibility for the proper execution of the Community budget. It therefore appears to fall within the remit of the Court of Auditors to *"examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound"* (Art. 248 (2) EC). 3.3 In application of the principle that a supervisory body with a general remit gives way to a specialised body, the Ombudsman considers that it is not justified to pursue further his inquiry into this aspect of the complaint. He will inform the Court of Auditors of the case. **4 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remarks: 1 Principles of good administrative behaviour require that the Commission should take care not to provide misleading information. In 1995, the Commission included in its contract with the firm for which the complainant worked as a Tacis consultant in Russia a provision concerning exemption from taxes, although it knew that the relevant international agreement had not been ratified by the Soviet or Russian authorities. It should have realised that this was likely to mislead potential consultants concerning their tax position. 2 Principles of good administrative behaviour also require the Commission to reply to a citizen's requests. On the basis of the Ombudsman's inquiries it appears that, although the Commission intervened with the Russian authorities on the complainant's behalf, it failed to inform him of its activity in due time. As regards the maladministration identified in point 1 above, the Ombudsman does not consider that the complainant has demonstrated an entitlement to damages based on the existing case-law of the Community Courts. The complainant has the possibility to pursue his claim before the Court of First Instance. As regards the maladministration identified in point 2 above, given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case. The President of the European Commission and the President of the Court of Auditors will also be informed of this decision. Yours sincerely Jacob SÖDERMAN

(1) Technical Assistance to the Commonwealth of Independent States.

(2) Art. 235: "The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288". Art. 288, second paragraph: "In the case of non contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

(3) See e.g. Case T-113/96, Édouard Dubois v Council and Commission [1998] ECR-II 125.

(4) (1991-3) Reg. 2157/91, 1991 OJ L201/2, Art 6 (3); (1993-5) Reg. 2053/93, 1993 OJ L 187/1 Art 7 (3); (1996-9) Reg. 1279/96, 1996 OJ L165/1, Art 6 (3).



(5) Case T-203/96, Embassy Limousines v European Parliament, judgement of 17 December 1998.