

Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/10/2010/JF concerning the European Commission

Recommendation

Case OI/10/2010/JF - **Opened on** 29/11/2010 - **Recommendation on** 26/07/2012 - **Decision on** 13/02/2013 - **Institution concerned** European Commission (Critical remark) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the inquiry

1. The inquiry concerns a grant agreement between the Commission and a University in Lebanon for the implementation of a project designed to strengthen the environmental legislation in that country (reference: Life 02/TCY/RL/032-SELDAS - " *Strengthening the environmental legislation development and application system in Lebanon* " - the 'SELDAS project'). The Commission entered into the agreement with the University in September 2002.
2. The Vice-President of the University, who acted as the project co-ordinator complained to the European Ombudsman that, although the SELDAS project had been successfully completed, the Commission refused to pay for the costs incurred by the complainant, since he had not submitted time sheets or any other evidence in support of the time he claimed he had devoted to the project. The complainant argued that the costs he claimed should have been acceptable on the basis of either the documentation he had already submitted, or on the basis of " *retroactive time-sheets* " (time sheets being an unfamiliar concept in Lebanon's tradition).
3. The Ombudsman declared the complaint inadmissible since the complainant was not an EU citizen or resident. Nevertheless, the Ombudsman decided to open an own-initiative inquiry on the basis of the complainant's arguments outlined above (OI/1/2008/(VIK)JMA).
4. Having reviewed all evidence, including the relevant contractual clauses, the Ombudsman considered that the Commission was legally entitled to request that the University justify costs claimed concerning work undertaken by the project's part-time employees (such as the complainant) by means of time sheets, which could be regarded as supporting evidence for such expenditure. Indeed, the University never drew up any such time sheets when replying to the Commission's specific demands in that respect. The Ombudsman nevertheless found that



the complainant's argument that time sheets as a means to justify costs seemed like a foreign notion in the context of the local legal culture (which is based on trust), was reasonable. Similarly, the argument that time sheets were not a part of either the University or its partners' verification procedures was also reasonable.

5. In the course of the Ombudsman's above-mentioned own-initiative inquiry, the Commission accepted that it could still consider supporting evidence, which could prove that the disputed costs corresponded to work effectively devoted to the SELDAS project. The Commission referred specifically to staff personal agendas. However, up to the date of the Commission's position outlined above, the complainant had not yet been able to submit any documents that showed the actual time he had devoted to the SELDAS project or that allowed the Commission to accept that time with an adequate degree of certainty. The Ombudsman therefore closed own-initiative inquiry OI/1/2008/(VIK)JMA, drawing the Commission's attention to the fact that, in the interest of fairness and equitable contractual relations, it might consider instructing the other parties to a contract, who are not familiar with the European legal culture, on the meaning of some potentially contentious legal terms included in the contract (such as the requirement of time sheets). Such a practice would help to avoid similar problems in future.

6. On 23 July 2009, the complainant expressed his appreciation for the Ombudsman's inquiry. He also requested the Ombudsman's support to have the Commission settle the matter on the basis of new evidence which he enclosed with his letter; namely his personal agenda for 2004 and the recordings made therein. In that agenda, the complainant recorded the hours he worked on the SELDAS project.

7. Since the above agenda had never been previously disclosed, the Ombudsman forwarded it to the Commission, so that the latter could review its contents and establish whether or not it could accept it as evidence of the complainant's work on the SELDAS project, and, ultimately, pay him. When so doing, the Ombudsman also explained to the complainant that, were he to consider the Commission's future reply inadequate, he could submit a new complaint to the Ombudsman.

8. On 3 November 2009, the Commission responded to the complainant, explaining that, after examining the personal agenda, it concluded that that agenda did not provide any reliable information that would allow it to reconsider its previous assessment. First, there was no indication as to who owned the agenda. Second, the numbers of hours dedicated to the SELDAS project each day had been added in pencil, which, in the Commission's view, " *meant that the additions were clearly not contemporary with the rest of the information in the agenda* " and there was no way to directly link them to the lists of activities described in the agenda. Finally, the agenda did not always include information on the timing of each of the activities listed and, in the very few cases it did, that information did not coincide with the number of hours declared. Therefore, the Commission concluded that the entries made in the agenda could not be accepted as a replacement for time sheets, or as evidence of the time dedicated to the SELDAS project.

9. On 3 March 2010, the complainant replied to the Commission that it had accepted copies of



personal agendas in another project in Lebanon, namely the project listed under the reference Life00 TCY/INT/021 SEA - " *Strategic Environmental Assessment & Land Use Planning in Lebanon* " (the 'SEA project'). The complainant enclosed copies of the personal agendas relating to the SEA project [2] . According to the complainant, those agendas provided no indication as to: (i) their owners; (ii) numbers of hours spent; (iii) the activities listed; or (iv) information on timings. Yet, the Commission accepted that documentation relating to the SEA project as it was, while at the same time refusing the complainant's agenda relating to the SELDAS project. The complainant asked the Commission to explain what it meant when it stated that the entries made in his agenda were not in line with the rest of the information contained in that agenda. He wanted the Commission to provide guidance as to how to resolve the matter fairly. He also emphasised in his letter that, according to the Commission's own assessment, he had successfully completed the SELDAS project. During the past four years, the complainant spent a lot of time and effort ensuring the proper completion of the SELDAS project. He trusted that the Commission would help him with the related expenses and losses he was experiencing.

10. On 30 June 2010, the Commission replied, referring to a previous letter it had sent to the complainant on 24 April 2007. At this stage, the SELDAS project was already completed. In that letter, the Commission had stated that the SELDAS project could no longer be subject to a re-evaluation because it was considered finalised in its accounting system (" *decommitted* "). However, unlike the SELDAS project, the SEA project was not yet completed and could be subject to re-evaluation. Consequently, the complainant could not compare the SELDAS project and the SEA project. Nevertheless, the Commission accepted the complainant's personal agenda for evaluation. However, for the reasons already explained to the complainant on 3 November 2009, the Commission confirmed that the complainant's personnel costs were ineligible.

11. On 1 October 2010, the complainant turned again to the Ombudsman (complaint 2219/2010/JF). In light of the fact that the complainant is not an EU citizen or resident, the Ombudsman declared that complaint inadmissible, in accordance with Article 228 of the Treaty on the Functioning of the European Union. Nevertheless, the Ombudsman also found that the information provided by the complainant required his careful consideration and, on 29 November 2010, he opened the present own-initiative inquiry into the Commission's above-mentioned refusal to accept the complainant's personal agenda as evidence of the time he had spent working on the SELDAS project.

The subject matter of the inquiry

12. The Ombudsman's inquiry concerned the complainant's allegation that the Commission's refusal to accept his personal agenda as evidence of time spent on the SELDAS project is unfair and inconsistent.

13. The inquiry also examined the complainant's claim that the Commission should accept his agenda and reconsider his personnel costs accrued under the SELDAS project.



The inquiry

14. On 29 November 2010, the Ombudsman asked the President of the Commission for an opinion on the allegation and claim set out above.

15. On 10 February 2011, the Ombudsman received the Commission's opinion, which he forwarded to the complainant with an invitation to make observations. The Ombudsman received the complainant's observations on 21 March 2011.

16. On 31 October 2011, the Ombudsman addressed to the Commission a proposal for a friendly solution. The Commission replied on 2 February 2012. The complainant sent his observations on that reply on 1 March 2012.

The Ombudsman's analysis and conclusions

A. Allegation of unfairness and inconsistency

Arguments presented to the Ombudsman

17. The complainant alleged that the Commission's refusal to accept his personal agenda as evidence of time spent on the SELDAS project was unfair and inconsistent.

18. In support of this allegation, the complainant argued that: (a) the information provided in his agenda was more detailed than that provided in the SEA agenda, which was accepted by the Commission as evidence of time devoted to that project; and (b) the Commission has helped beneficiaries of similar projects in Lebanon.

19. The complainant claimed that the Commission should accept his agenda and reconsider his personnel costs under the SELDAS project.

20. Additionally, the complainant argued that according to the applicable LIFE Standard Administrative Provisions (the 'LIFE Provisions') the Commission can perform checks and visits up to five years after the completion of a project or a final payment [3] . Therefore the SELDAS project could not yet be considered as fully completed.

21. In its opinion, the Commission contested the complainant's arguments. It, first, referred to the explanations provided in its letters to the complainant of 24 April 2007 and 3 November 2009. Second, it emphasised that there was no name on the complainant's agenda. It also pointed out once more that the information relating to the hours spent on the SELDAS project had been added in pencil. These entries, which were added in pencil, were not consistent with



the rest of the information in the agenda (the Commission provided some examples). It was, therefore, in the Commission's view, impossible to associate those entries with the activities described in the agenda.

22. The Commission acknowledged that the beneficiary of the SEA project provided it with a personal agenda, in which he noted the time he had worked on the different projects. The Commission then analysed that agenda. The beneficiary's recordings matched the time declared in the final report and the results of the SEA project. For that reason, the Commission accepted some of that beneficiary's personnel costs.

23. Finally, the Commission emphasised that it had used the same criteria to evaluate two other projects in Lebanon. "[P]ersonal agendas have to give sufficient proof that the hours worked by part-time staff were real, incurred and verifiable and were not based on estimates." The Commission supported all Lebanese LIFE projects, treated the various projects equally, and carefully identified and evaluated interim and final reports. According to the LIFE Provisions, the time spent working on the projects must be registered in time sheets [4] .

24. In his observations, the complainant again emphasised that, similarly to his agenda, the agenda relating to the SEA project did not contain any indication as to its owner.

25. The complainant then went on to explain that the hours he had written in pencil in his agenda were a summary of what was written in pen. While the complainant listed the detailed activities of each day in pen, he summarised the total hours of these activities relating to each project in pencil. The complainant referred to the examples the Commission had pointed out in its opinion and explained how many hours corresponded to each activity.

26. The complainant contested the Commission's opinion that his entries in pencil were "additions". In this respect, he took the view that it would have been easier for him to print out Outlook calendars similar to those used in the SEA project, insert the relevant information, and send the sheets to the Commission. By submitting the original agenda as it was, the complainant acted in a totally transparent manner.

27. Finally, the complainant emphasised that the Commission had considered the SELDAS project as a "technical success [and a] flagship for environmental legislation". He claimed treatment equal to that which the Commission gave to the SEA project, emphasised his significant financial loss, and asked that his personnel costs be reviewed.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

28. At the outset, the Ombudsman was satisfied that the Commission had given due regard to the legal and social contexts of the geographic area in question and had agreed to consider local beneficiaries' personal agendas, and thus the personal recordings made therein, as a possible means of providing evidence of the time those beneficiaries devoted to



Commission-sponsored projects. In this respect, the Ombudsman noted that the Commission had examined both the complainant's and other beneficiaries' agendas. This was consistent with the Commission's opinion of 22 April 2008 expressed within the Ombudsman's own-initiative inquiry OI/1/2008/(VIK)JMA and noted in his decision on that inquiry that:

" [t] he Commission has declared its willingness to consider other supportive evidence, instead of time sheets, which might prove that the costs in question corresponded in fact to work effectively devoted to the project. In this connection, it has referred in particular to probative means such as staff personal agendas , project/personal diaries, and/or performance records..." [5]

29. The Ombudsman thus understood that, ultimately, the analysis and the possible acceptance of the beneficiaries' recordings contained in their personal agendas did not depend on whether the projects in question were or were not already closed. The Ombudsman found the above encouraging.

30. The Ombudsman also noted the arguments provided in the Commission's opinion justifying why it could not accept the complainant's agenda as evidence of the time he devoted to the SELDAS project. When so doing, the Commission also provided reasons explaining why it accepted the personal costs relating to the SEA project, after analysing that project beneficiary's personal agenda. The Ombudsman assessed these reasons in detail, as described below.

The owners of the agendas and the making of recordings

31. First, the Commission again emphasised that the agenda provided by the complainant made no reference to its ownership. It also pointed out that the hours dedicated to the SELDAS project on each day were written in pencil. The Commission found these writings to be "*additions*", inconsistent with the rest of the information contained in the agenda. It thus again referred to its letter of 3 November 2009 where it had taken the view that those "*additions* [were] *clearly not contemporary with the rest of the information in the agenda*", an assessment resulting from the fact that "*the indication of the number of hours dedicated to the [SELDAS] project in each day was added in pencil...*"

32. The Ombudsman emphasised that the complainant had made it clear that the agenda was his. Also the Commission's own opinion to the Ombudsman appeared to indicate that the Commission accepted that the agenda indeed belonged to the complainant [6] . Furthermore, the Ombudsman noted that the Commission had already co-operated with the complainant on a number of occasions in the past in his capacity as a Professor and a Vice-President of a well-known Lebanese University. In this context, the Ombudsman did not understand what additional evidentiary value the agenda would possess if the complainant wrote his name on it.

33. Moreover, the Ombudsman did not understand why the fact that the complainant entered the hours he had spent on the SELDAS project in pencil proved that such entries constituted a "*non-contemporary addition*" to the information written in the agenda in pen. In the Ombudsman's view, the only inference that could be drawn with any certainty from the fact that



the complainant wrote certain entries in pencil is that he wished to clearly differentiate such entries from those that he wrote in pen.

The time devoted to projects and the assessments of final reports and results

34. The Commission stated in the opinion that the beneficiary of the SEA project "[h] *ad noted the time he had worked for different projects*". For the reasons explained below, the Ombudsman was unable to see why the Commission thought that the complainant did not do so as well.

35. The Ombudsman analysed the copies of the parts of the complainant's agenda that the Commission enclosed with its opinion. There, the complainant mentioned a number of activities performed on 19, 23 and 29 January 2004 and indicated the number of hours spent on a number of projects, namely " *Oltero* ", " *LIBNOR* " and SELDAS. During the above three days, the complainant spent a total of 20 hours on the SELDAS project. In his observations, the complainant provided a reasonable and more detailed explanation as regards the correspondence between the hours he spent on, and the list of activities he performed for, the above different projects, including the SELDAS project, on each of those days. It follows that, similarly to the beneficiary of the SEA project, the complainant had also kept a record in his agenda of the time he spent working on different projects [7] .

36. In this respect, the Ombudsman noted that, according to the Commission's opinion in the present inquiry, the information provided by the beneficiary in the SEA project matched with: (i) the time declared in the SEA final report, and (ii) the results of the SEA project. Consequently, the Commission accepted that beneficiary's agenda as "[s] *ufficient proof that the hours worked by part-time staff were real, incurred and verifiable and were not based on estimates.*"

37. The Ombudsman noted that the Commission assessed the SEA project manager's agenda against that project's results and final report. This had the effect of the Commission accepting that agenda as sufficient evidence of the time the SEA beneficiary devoted to that project.

38. According to the Commission, two other projects in Lebanon were subject to a similar assessment [8] . However, the Commission did not state in its opinion that it applied that same procedure also to the SELDAS project or that, similarly to other projects, it had assessed also the complainant's SELDAS agenda against that project's (successful) results and final report [9] .

39. It followed from the above that the Commission had not demonstrated that it was impossible for it to accept the complainant's agenda as evidence to support his personnel costs, nor that, in this regard, it had treated the complainant in the same way as other beneficiaries of its projects in Lebanon. The Ombudsman therefore made a proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman. The proposal was as follows:

"[t] *aking into account the Ombudsman's findings, the Commission could reassess the*



evidentiary value of the complainant's agenda as regards the time he spent on the SELDAS project and, accordingly, reconsider his personnel costs. "

In making this proposal, the Ombudsman took into account the previous history of cooperation between the complainant and the Commission in projects successfully concluded in Lebanon, which ought surely to improve the possibility of achieving a mutually satisfactory solution in the present case.

The arguments presented to the Ombudsman after his friendly solution proposal

40. In its reply to the friendly solution proposal, the Commission regretted that it was unable to accept the Ombudsman's proposal. It emphasised that, although he had been given sufficient opportunities to do so, the complainant failed to submit alternative evidence of his personnel costs in due time. It was only after own-initiative inquiry OI/1/2008/(VIK)JMA was closed that the complainant forwarded his personal agenda to the Ombudsman. That agenda does not provide sufficiently reliable and detailed information to enable the Commission to assess it properly against the results and the final report of the SELDAS project. Consequently, it is not possible to conclude that the hours spent on that project were real, incurred and verifiable. The fact that the agenda was submitted four years after the completion of the project did not facilitate matters either.

41. In his observations, the complainant emphasised, among other things, that no LIFE project beneficiary in Lebanon submitted any time sheets at the relevant time. It was only in early to mid-2007 that the Commission identified and accepted a suitable alternative to time sheets, for those projects' part-time staff. This was acknowledged by the Commission in the opinion it sent to the Ombudsman [10] .

42. The complainant again insisted that, by submitting his original agenda as it was, he acted in a fully transparent manner and that the evidence he so provided was more substantive than that submitted for the SEA project, which the Commission nevertheless accepted as appropriate alternative evidence. The complainant incurred significant financial loss and the Commission should compensate him, at least partially.

The Ombudsman's assessment after his friendly solution proposal

43. At the outset, the Ombudsman notes that, in its reply to his proposal for a friendly solution, the Commission stated that "[t] he fact that [the agenda] was submitted four years after the completion of the project d [id] not facilitate matters either " (emphasis added). The Ombudsman is surprised by this statement, as it would appear to contradict the Commission's previously expressed willingness to look into the probative value of the complainant's agenda, despite the fact that the agenda was submitted only after the Ombudsman closed his



own-initiative inquiry OI/1/2008/(VIK)JMA.

44. Moreover, the Commission failed to explain why the fact that the complainant submitted his agenda in 2009 should have any negative impact on its assessment of the **information** contained in that agenda. Nor did the Commission explain how submitting the agenda in 2007 [11] could have "*facilitate [d] matters*" in respect of its assessment of such **information**.

45. In addition, the Commission appears not to have taken into account its longstanding relationship of trust with the complainant, despite the Ombudsman's suggestion that it should do so. The Ombudsman emphasises in this regard that, once the Commission accepted (which is not contested) the principle that personal agendas could provide an alternative to time sheets as a source of evidence, it could not reasonably disregard the fact that, because of their personal nature, such agendas are likely to be drafted in an informal manner.

46. In light of the foregoing, the Ombudsman is not convinced that the Commission's view, expressed in reply to his proposal for a friendly solution that

" the complainant's personal agenda does not provide sufficiently reliable and detailed information to properly assess it against the [SELDAS] project's results and final report in order to conclude that hours worked were real, incurred and verifiable "

is based on a genuine assessment of the agenda's probative value as an alternative to time sheets.

47. The Ombudsman regrets that, in substance, the Commission's reply to the friendly solution proposal simply restates the position it had already expressed in its opinion, without advancing any new arguments. The Ombudsman has clearly pointed out to the Commission why that position cannot be considered satisfactory [12]. However, the Commission did not even comment on, let alone contest, the Ombudsman's analysis.

48. The Ombudsman, therefore, finds that, yet again, the Commission has failed to demonstrate that it cannot accept the complainant's agenda as evidence in support of his personnel cost claims. Nor has it demonstrated, in this regard, that it has treated the complainant in the same way as other beneficiaries of its projects in Lebanon. This constitutes an instance of maladministration. The Ombudsman therefore makes a draft recommendation below, in accordance with Article 3(6) of his Statute.

49. In making this draft recommendation, the Ombudsman again takes into account the previous history of cooperation between the complainant and the Commission in projects successfully concluded in Lebanon, and invites the Commission seriously to take that history into consideration with a view to improving the possibility of achieving a satisfactory solution in the present case.

50. The Ombudsman encourages the Commission, in preparing its detailed opinion of the draft recommendation, to adopt a balanced approach, which takes into account not only financial



risks, but also the reputational risks to the European Union of the Commission being perceived as acting unfairly. The Ombudsman emphasises in this regard that acceptance of the draft recommendation in the present case would demonstrate the Commission's willingness to listen, to act reasonably and to co-operate with the Ombudsman.

B. The draft recommendation

On the basis of his inquiries into this case, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should reassess the evidentiary value of the complainant's agenda as regards the time he spent on the SELDAS project and, accordingly, reconsider his personnel costs.

The President of the Commission will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 October 2012. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

The Ombudsman will also inform the complainant of the draft recommendation.

P. Nikiforos Diamandouros

Done in Strasbourg on 26 July 2012

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The copy of the letter sent to the Ombudsman did not include any annexes.

[3] The Commission provided a copy of the LIFE Provisions with its opinion. Article 29(2) of the LIFE Provisions provides that "[c]ontrols may be initiated up to five years after the completion of the project or final payment..."

[4] Article 21(2) of the LIFE Provisions: "[p]ersonnel costs shall be charged in respect of the actual time devoted to the project... The project working time of each employee... shall be registered using time sheets established and certified by the beneficiary and its eventual partners."

[5] Point 31 of the Ombudsman's decision on OI/1/2008/(VIK)JMA, available on the Ombudsman's website (www.ombudsman.europa.eu).



[6] The Commission's opinion provides for the following statements: "[i]t was at this later stage that **[the complainant]** sent his *personal agenda* for 2004 to the Ombudsman... The **personal agenda** of [the complainant], sent to the European Ombudsman in 2009... For the reasons mentioned above the Commission had to refuse **the personal agenda** of [the complainant] ... The Commission showed its will to collaborate when accepting **the personal agenda** of [the complainant] in 2009 for evaluation... For the reasons given... the Commission cannot accept the complainant's **personal agenda** ... " (emphasis added)

[7] " 19.01.2004: 7h30 - 17h00 MoE [Ministry of Economy] (i.e. the total number of hours is about 9hrs)

- "Libnor, Libnor, Libnor, letters, water letters, Annual Report and telephone" are the detailed activities

- OLTERO (is OGERO) 3hrs, LIBNOR 3hrs and SELDAS 3hrs are the totals for each project; i.e. Libnor, Libnor, Libnor are summarized as LIBNOR (3 hrs); letters, water letters, Annual Report are summarized as SELDAS (3 hrs) and telephone as OGERO (the phone utility in Lebanon) (3 hrs) - totalling to 9 hrs as per the period shown next to MoE (7h30 - 17h00)

23.01.2004: MoE 7h30 - 16h00 (total of about 9 hours), the various activities (workplan, briefing, DEA, etc.) are all for SELDAS project, hence 9 hours are accounted for SELDAS

29.01.2004: MoE 7h30 - 15h20 (total of about 8 hours), the various activities (1st draft of pres., salary, e-mails, TVA issue, etc.) are all for the SELDAS project, hence 9 hours are accounted for SELDAS".

[8] " Two other Lebanese projects which presented their final reports after the SEA project (TARGET and SISPA) also presented personal agendas which were evaluated following the same criteria applied to the SEA project... "

[9] According to the Commission's opinion, "[e]nd of 2006, when evaluating the final report of the SEA project, the evaluation resulted, among others, in non eligible personnel costs due to the fact that no timesheets were filled in and retroactively filled in timesheets were not accepted by the Commission. It was basically the same problem and the same assessment as for the SELDAS project. However, following an exchange of correspondence the beneficiary informed the Commission that he disposed of a personal agenda in which he had noted the time he had worked for different projects. This personal agenda was verified by the Commission and resulted in partial recognition of the personnel costs of part-time staff as the recording matched with the time declared in the final report and the results of the project. Two other Lebanese projects which presented their final reports after the SEA project (TARGET and SISPA) also presented personal agendas which were evaluated following the same criteria applied to the SEA project... In all these evaluations the Commission applied the fundamental principle that personal agendas have to give sufficient proof that the hours worked by part-time staff were real, incurred and verifiable and were not based on estimates " (emphasis added).



[10] "[T]he existence of personal agendas was brought to the attention of the Commission only at the beginning of 2007, after evaluation of the final report of the SEA project and, consequently, the same approach has been applied to TARGET and the SISPAAM project. The Commission showed its will to collaborate when accepting the personal agenda of [the complainant] in 2009 for evaluation..."

[11] See footnote 10 above.

[12] See Paragraphs 31 to 39 of this draft recommendation.