

Decision of the European Ombudsman on complaint 506/99/GG against the European Commission

Decision

Case 506/99/GG - Opened on 20/05/1999 - Decision on 27/04/2000

Strasbourg, 27 April 2000 Dear Mr B., On 5 May 1999 your father, Dr B., addressed, on behalf of Informations-Industrie Consulting GmbH, a complaint to the European Ombudsman concerning the participation of this company in several research projects financed by the Commission and the obligations and entitlements arising therefrom. On 20 May 1999, I forwarded the complaint to the Commission. Two further letters concerning procedural matters were sent to me by your father on 28 May 1999. Inter alia your father offered to provide me with a complete set of documents relating to the complaint. A further submission was made by your father in a letter sent to me on 9 June 1999. On 21 September 1999, you informed me that your father had died. You also forwarded to me a document in relation to your complaint. The Commission sent its opinion on 21 October 1999, and I forwarded it to you on 27 October 1999, with an invitation to make observations. On 29 November 1999, you sent me your observations on the Commission's opinion. On 1 December 1999, I sent a request for further information to the Commission. I informed you accordingly in a letter sent the same day in which I also asked you to submit the documents your father had previously offered to provide. On 16 December 1999, you sent me a set of documents in relation to your complaint and asked me to treat these documents confidentially. The Commission sent its reply to my request for information on 7 February 2000, and I forwarded it to you on 10 February 2000, with an invitation to make comments. On 29 March 2000, you sent me your observations on the Commission's letter. You also agreed that the Ombudsman's decision could be sent to you in English in order to save time. I am now writing to let you know the results of the inquiries that have been made.

THE COMPLAINT

In December 1996, the Commission concluded two contracts concerning the projects "DCC - Digital Content for Culture" and "Donna - Art, Design & Fashion Online" with two German companies, CSC Ploenzke AG ("CSC", the co-ordinator of both projects) and the complainant. The "DCC" project moreover foresaw that CSC would be assisted by two associated partners, the Koninklijk Museum voor Midden-Africa (Royal Africa Museum) in Tervuren (Belgium) and the Deutsche Forschungsanstalt für Luft- und Raumfahrt e.V. On the side of the Commission, these contracts were dealt with by its Directorate-General XIII (DG XIII) (1). The "DCC" project lasted from January 1997 to December 1997 and the "Donna" project from January 1997 to September 1997. In October 1997, the Commission carried out a technical review of the "DCC" project which came to the conclusion that full technical and financial audits of the project should



be carried out. The in-depth technical review was carried out in December 1997. The complainant claimed that no critical remarks whatsoever had been made with regard to itself and its contribution to the "DCC" project on that occasion but that the Commission had spirited away the relevant minutes which would confirm this. The report on the in-depth review recommended that the contract should be terminated. This report was sent to CSC (with a copy to the complainant) on 17 December 1997. In a letter of 23 December 1997 addressed to CSC (with a copy to the complainant), the Commission terminated the contract. In April 1998, the Commission informed CSC that a technical review of the "Donna" project was to be carried out. This review which took place in June 1998 led to the conclusion that the project should be terminated. The complainant claimed that no critical remarks whatsoever had been made with regard to itself and its contribution to the "Donna" project on the occasion of this review but that the Commission had spirited away the minutes which would confirm this and had delayed the release of the minutes which had been falsified. The complainant also claimed that the technical review which had taken place nine months after the official end of the project had been in breach of the contract. According to the complainant, the Commission had acknowledged in writing receipt of all the items to be delivered pursuant to the contract (including the final report) already on 9 December 1997. The complainant relied on a provision in the contract that provided, according to the complainant, that in the absence of observations from the Commission the final report was deemed to have been approved within two months of its receipt by the Commission. The financial audit of the "DCC" project and the "Donna" project was carried out in March 1998. The complainant claimed that the auditors had confirmed that its book-keeping and administration had been in order. According to the complainant the Commission had, however, suppressed the minutes which would confirm this. On 28 April 1998 and 25 May 1998 respectively, the Commission sent the draft audit reports for the "DCC" and "Donna" projects to the complainant. On 30 June 1998, the complainant's lawyers sent comments on these draft reports to the Commission. On 29 July 1998, the Commission sent the final audit reports and the Commission's assessments of the comments submitted on the draft audit reports to the complainant. In the report relating to the "DCC" project, the Commission concluded that out of the total costs claimed by CSC and the complainant of ECU 3,164,102 only ECU 26,290 were allowable. In the report relating to the "Donna" project, the amount allowed was ECU 42,601 out of the ECU 980,733 that had been claimed. In late August/early September 1998, the Commission's Directorate-General XIX (2) issued recovery orders against CSC and the complainant in which it claimed the reimbursement of amounts overpaid in the framework of the "DCC" and "Donna" contracts. The claim against the complainant was for an amount of ECU 179,337. In a letter of 10 September 1998, the complainant's lawyers requested the Commission to state the reasons for the recovery order issued against the complainant. On 30 November 1998, the complainant sent two invoices to the Commission in which it demanded to be paid ECU 352,800 for its work in relation to the "DCC" project and ECU 110,781 in relation to work performed on the "Donna" project. The complainant had furthermore participated in the "VR-Learners" project. The contract for this project had been signed in December 1997. The complainant claimed that the Commission had forced it to leave this project. In February 1999, the complainant sent an invoice to the Commission in which it demanded to be paid ECU 121,857 for its work in relation to that project. The complainant made the following claims: 1. DG XIII had manipulated the minutes relating to the audits carried out with regard to the "DCC" and "Donna" projects. 2. DG XIII had been trying, for more than two years, systematically to



eliminate the complainant and its partners as competitors and critics, using defamation, bullying tactics and blackmail. DG XIX took part in these efforts. 3. DG XIX had not given any explanations as to the reasons for the demand made by the Commission and had not reacted to the complainant's financial claims against the Commission. 4. DG XIII and DG XIX had caused serious damage to the complainant.

THE INQUIRY

The Commission's opinion In its opinion, the Commission made the following comments: The Commission had entered into two contracts concerning the "DCC" and "Donna" projects. During the execution of the projects, the Commission services had considered that the progress of the work and the intermediary results of the projects had not been satisfactory. An in-depth technical review had therefore been carried out regarding the "DCC" project in December 1997. In their final report, the external experts used by the Commission to carry out this review had concluded that the original objectives of the project had not been achieved and had recommended the termination of the project. The Commission had followed this recommendation. In June 1998, a technical review of the "Donna" project had also been initiated by the Commission services with the assistance of external experts that had led essentially to the same conclusions, i.e. the termination of the contract. In October 1997, a financial audit had been initiated by the Commission services in order to check whether the financial contributions of the EC towards the "DCC" and "Donna" projects were justified. After several postponements requested by the companies concerned, this review had finally been carried out in March 1998. As a result of the audit, the Commission had had to reject almost all the costs claimed by CSC and the complainant because of serious inconsistencies with the contracts and a lack of substantiation of the costs concerned. Recovery notes had therefore been issued against CSC and the complainant in August 1998. Whilst CSC had since reimbursed the amount due to the Commission, the complainant had not paid but instead started spreading defamatory allegations against the Commission officials involved in the audits. The complainant had participated as an associated contractor in the "VR-Learners" project. In the course of a re-negotiation of the contract, the Commission services had made it clear that the complainant could no longer be accepted as a participant in view of the serious financial irregularities established during the audits of the "DCC" and "Donna" projects and in view of the fact that the complainant refused to reimburse the amounts claimed in the recovery orders. The Commission services had based their position on the principles of sound financial management and the necessity to protect the financial interests of the Community. As a result of an audit, the "VR-Learners" project had been terminated since. The Commission informed the Ombudsman that the officials targeted by the allegations of the complainant that it regarded as defamatory were envisaging taking legal action. **The complainant's observations** In its observations, the complainant maintained its complaint. The complainant claimed that it had sent a final report on the "DCC" project that had never been replied to. According to the complainant, the external experts who had carried out the technical review in 1997 were the same as those who carried out the in-depth review in December 1997. The independence of these experts was questionable. The complainant further stressed that these experts had not rejected all the work carried out but had accepted 49.5 of 130 man-months. The Commission therefore ought to have paid the complainant at least a further amount of € 40,723. The complainant also claimed that CSC had received the letter in which the Commission terminated the contract six days after the



project had officially ended. With regard to the "Donna" project, the complainant reiterated its view that the technical review had taken place after the project had already been officially approved by the Commission. The complainant further claims that after the departure of one of the partners in the "VR-Learners" project, the Commission had accepted that a new partner should join and that the budget envisaged for the complainant should be increased. It was only afterwards that the Commission had spread the incorrect allegation that the complainant owed money to the Commission, thereby putting pressure on the other partners in this project to exclude the complainant therefrom.

FURTHER INQUIRIES

Having received the complainant's observations on the opinion of the Commission, the Ombudsman considered that he needed further information in order to be able to deal with the complaint. He therefore asked the Commission (1) to provide the Ombudsman with a copy of the relevant documents on which it had based its opinion with regard to the "DCC" and the "Donna" projects, (2) to comment on the complainant's claim that due to the fact that the Commission allegedly had not commented within two months on the final report submitted by the complainant in the "Donna" project, the latter had to be considered as having been approved according to the general conditions applicable to that project, and (3) to comment on the complainant's claim that the legality of the termination of the "DCC" project by the Commission was questionable in view of the fact that the relevant letter of the Commission allegedly had been sent after the project had ended. In its reply, the Commission pointed out that it disagreed with the complainant's interpretation of the relevant contracts underlying the arguments mentioned in the second and third question. The Commission took the view that both points did not affect the results of the financial audit carried out and the conclusions drawn from the audit findings. Since the Commission was in the process of pursuing its claim against the complainant in court and since these proceedings were likely to cover the issues mentioned under 2) and 3), the Commission considered that it would not be appropriate to elaborate on these points at this stage. The Commission also provided the documents requested by the Ombudsman. In its observations on this reply, the complainant deplored that the Commission did not give any reasons why it did not accept the complainant's arguments. It disagreed with the Commission's view that these arguments were without relevance for the results of the financial audits. The complainant considered that the Commission's behaviour had the purpose of intimidating it.

THE DECISION

1 Introductory remark 1.1 In its opinion, the Commission informed the Ombudsman that the officials targeted by the allegations of the complainant that it regarded as defamatory were envisaging taking legal action. In its reply to the Ombudsman's request for further information, the Commission pointed out that it was in the process of pursuing its claim against the complainant in court. 1.2 To date, however, the Ombudsman has not been informed of the commencement of legal proceedings before a court in this matter. The Ombudsman is thus not prevented from proceeding to a decision in the present case. **2 Manipulation of minutes in relation to the audits carried out** 2.1 The complainant claims that the Commission has manipulated the minutes relating to the audits carried out with regard to the "DCC" and "Donna" projects. 2.2 The Commission has not made any specific comment on this allegation. However,



it is clear that this allegation belongs to the allegations that the Commission considers to be incorrect and defamatory. 2.3 It appears that the complainant essentially claims that the minutes that were produced by the Commission did not correctly reflect what had been said or transacted on the occasion of the reviews concerned. To take one example, in a letter dated 22 September 1998 the complainant's lawyers made detailed comments on the minutes relating to the technical review of the "Donna" project in which they criticised and corrected those passages of the minutes that they considered to be incorrect or incomplete. In the absence of further evidence on what was actually said or transacted on the occasion of the reviews, the Ombudsman is not in a position to ascertain whether the minutes concerned are correct or whether the comments of the complainant are justified. In these circumstances, the Ombudsman is unable to establish an instance of maladministration in so far as this allegation is concerned. **3 Causing serious damage to complainant** 3.1 The complainant claims that the Commission has caused it serious damage. In this context, the complainant refers to the fact that the Commission terminated the "DCC" and "Donna" projects, refused to accept most of the costs that the complainant had asked the Commission to cover in respect of these projects, declined to pay the amounts that the complainant considered to be due to it on account of its work on the "DCC" and "Donna" projects and excluded the complainant from the "VR-Learners" project. 3.2 The present allegation essentially concerns the obligations arising under contracts concluded between the Commission and the complainant or contracts in which the complainant had participated. 3.3 According to Article 195 of the EC Treaty, the European Ombudsman is empowered to receive complaints "concerning instances of maladministration in the activities of the Community institutions or bodies". The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle binding upon it (3) . Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned. 3.4 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. In particular, the Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact. 3.5 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration. This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction. 3.6 In the present proceedings, the complainant has put forward various arguments to support its case that do not appear to be without merit. The complainant has queried whether the termination of the "DCC" was lawful in view of the fact that the relevant letter appears to have been received only after the official end of the project. It has also invoked a contractual provision according to which its final report on the results of its work in the "Donna" project had been deemed to have been accepted before the Commission decided to carry out a technical review. Finally, the complainant objected to the results of the financial audits carried out in relation to these two projects. 3.7 The Commission relied on the result of



the financial audits that had been carried out and took the view that the two arguments put forward by the complainant did not affect the results of these audits. 3.8 The Ombudsman considers that the arguments submitted by the Commission do not appear to be unreasonable. In these circumstances, and bearing in mind that the scope of the Ombudsman's review is limited in such cases (see paragraphs 3.2 to 3.4 above), the Ombudsman concludes that his inquiry has not revealed an instance of maladministration with regard to the "DCC" and "Donna" projects in so far as this allegation of the complainant is concerned. 3.9 The same conclusion applies with regard to the "VR-Learners" project. As mentioned above, the Ombudsman has not established that the Commission had been wrong when it had taken the view that the complainant had failed properly to fulfil its obligations in relation to the "DCC" and "Donna" projects and thus had to repay certain amounts of money to the Commission. The Commission's explanation that in these circumstances it could no longer accept that the complainant took part in the "VR-Learners" project whilst it refused to reimburse the sums claimed back by the Commission does not appear to be unreasonable. In these circumstances, the Ombudsman is unable to establish an instance of maladministration in so far as this allegation is concerned. **4 Lack of explanations and of reaction** 4.1 The complainant claims that the Commission had not given any explanations as to the reasons for the demand made by the Commission and had not reacted to the complainant's financial claims against the Commission. 4.2 The Commission has not made any specific comment on this allegation. However, the Commission has explained that the recovery order had been issued in order to retrieve the costs that had to be disallowed as a result of the financial audits into the "DCC" and "Donna" projects. It is true that the recovery order itself does not state the reasons on which it is based. However, the Ombudsman considers that it follows from the documents submitted to him that the complainant could not be under any reasonable doubt as to the reasons for the recovery order. The financial audits had come to the conclusion that only a small part of the costs that had been claimed could be accepted. The Commission then proceeded to claim back the difference between the allowed costs and the sums that had already been paid out in advance. Furthermore, in a letter dated 21 January 1999 that was submitted to the Ombudsman by the complainant, the Commission informed the complainant that the basis of the claim and the way in which it had been calculated had been explained in detail in the reports on the financial audits. 4.3 In so far as the complainant's counter-claims are concerned, it appears that the Commission did not immediately react to the invoices sent by the complainant. However, since the claims were manifestly incompatible with the position the Commission had adopted in the matter, the complainant could not be under any doubt that the Commission would reject these claims. Furthermore, in a letter dated 30 March 1999 that was submitted to the Ombudsman by the complainant, the Commission informed the complainant that there was no basis for these counter-claims, and that this had already been explained to the complainant in a previous letter. 4.4 In these circumstances, there appears to be no maladministration in so far as this allegation is concerned. **5 Systematic elimination of complainant** 5.1 The complainant claims that the Commission has been trying, for more than two years, systematically to eliminate the complainant and its partners as competitors and critics, using defamation, bullying tactics and blackmail. The Commission denies these allegations. 5.2 In view of his conclusions regarding the other allegations submitted by the complainant, the Ombudsman considers that there is not enough evidence to support this allegation of the complainant. 5.3 In these circumstances, there appears to be no maladministration in so far as



this allegation is concerned. **6 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration on the part of the European Commission. The Ombudsman has therefore decided to close the case. The President of the European Commission will also be informed of this decision. Yours sincerely
Jacob Söderman

(1) Now called DG Information Society.

(2) Now called DG Budget.

(3) See Annual Report 1997, pages 22 sequ.