

Decision of the European Ombudsman on complaint 511/99/GG against the European Commission

Decision

Case 511/99/GG - Opened on 20/05/1999 - Recommendation on 26/10/2000 - Decision on 26/04/2001

Strasbourg, 26 April 2001

Dear Mr S.,

On 10 May 1999, Mrs K. addressed, on behalf of the Alfons Goppel Stiftung, a complaint to the European Ombudsman concerning the way in which the European Commission had handled an application for funds for a development project in Chile.

On 20 May 1999, I forwarded the complaint to the Commission. The Commission sent its opinion on 13 October 1999, and I forwarded it to the complainant on 18 October 1999, with an invitation to make observations. On 29 November 1999, the complainant sent me its observations on the Commission's opinion.

On 3 December 1999, I asked the Commission to provide an opinion on the new claims which the complainant had made in its observations. The Commission sent its supplementary opinion on 3 February 2000, and I forwarded it to the complainant on 8 February 2000, with an invitation to make comments. On 10 March 2000, the complainant sent me its observations on the Commission's supplementary opinion.

On 31 March 2000, you wrote to me to inform me that you were now representing the complainant. In your letter, you also made further comments on the Commission's supplementary opinion.

On 30 June 2000, you forwarded a letter from the Verein Sternenkinder e.V. of 8 June 2000 to me.

On 5 July 2000, I wrote to the Commission in order to propose a friendly solution. The Commission sent me its opinion on this proposal on 10 October 2000, and I forwarded it to you on 12 October 2000.

On 26 October 2000, I addressed a draft recommendation to the Commission. A copy of this letter was forwarded to you the same day.



On 31 October 2000, you sent me comments on the Commission's opinion of 10 October 2000 which I forwarded to the Commission on 9 November 2000.

On 19 January 2001, the Commission sent me its detailed opinion regarding my draft recommendation, and I forwarded it to you for your observations on 29 January 2001.

On 28 February 2001, you sent me your observations on the Commission's detailed opinion.

I am now writing to let you know the results of the inquiries that have been made.

THE COMPLAINT

On 10 May 1999, the Alfons Goppel Stiftung, a German foundation, lodged a complaint with the European Ombudsman concerning the way in which the European Commission had handled an application for funds for a development project in Chile.

In 1995, Mrs G. approached, on behalf of Sternenkind e.V., a charitable association from Germany ("the association"), the European Commission with a view to obtaining co-funding for a development project in Chile (a centre for mentally handicapped children). In a hand-written note on that letter, the official in charge at the Commission pointed out that the association (which had been in existence for only a year) was not yet eligible for aid. He suggested, however, that the association might obtain a grant via another NGO that fulfilled the relevant criteria. The complainant subsequently accepted to step in and to submit the application in its own name. This application was sent to the Commission in July 1996. In June 1997, a contract was concluded between the Commission and the complainant in which the Commission agreed to contribute \approx 70 443 towards the costs of the project. On the basis of this contract, the association began to implement its project.

However, no payment was made by the Commission despite several reminders. The complainant subsequently turned to a Member of the European Parliament for help who wrote to the Commission. In its reply to the MEP of 17 June 1998, the Commission took the view that the relevant sum could not be released before the complainant had paid back various sums that the Commission had granted to the Verein der Freunde und Förderer der Alfons Goppel Stiftung (the "Friends"). After having learnt of the Commission's attitude, the complainant contacted the Commission on several occasions in order to obtain the release of the funds. However, in a letter dated 15 December 1998, the Commission informed the complainant that it would not make the requested payment. The Commission confirmed that it did not have any objections against the project as such. It took the view, however, that it had itself claims against the complainant which could be set off against the relevant sum. According to the Commission, these claims resulted from contracts for other development projects which it had entered into with the Friends. The Commission considered that the complainant was liable for these debts of the Friends which appeared to be in liquidation or had already been wound up.



In these circumstances, the complainant turned to the European Ombudsman for help.

The complainant claimed that the Commission should release the funds concerned. In its view, the Commission had, in June 1997, given a binding promise to release the relevant amount of money. It also claimed that the Commission had known that it was only acting as a trustee for the association. The complainant took the view that claims against a third party could not therefore be set off against the sum at stake. In this context, the complainant claimed that it was not the legal successor of the Friends which in its view were a separate legal entity. The complainant further claimed that the refusal of the Commission to pay out the amount agreed on had brought the association to the brink of bankruptcy and, as a consequence, threatened the continuation of the project in Chile.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The Commission had claims for repayment amounting to a total of ≈ 210 000 against the Friends due to the fact that two projects had not been properly accounted for by the latter. Both projects had originally been submitted to the Commission by the complainant itself acting on its own behalf, on the understanding however, that the yet to be established Friends would then be responsible for the implementation of these projects. Accordingly, the grant agreements had later been concluded with the Friends, the same person acting for both the complainant and the Friends. Recovery orders for the sums to be retrieved which had been issued against the Friends in 1995 had been unsuccessful. It appeared that the Friends did not have any assets. The complainant itself refused to accept responsibility for the financial commitments of the Friends despite the fact that in accordance with its statutes, the proceeds of the activities of the Friends had been regularly transferred to the complainant. The complainant had established the Friends in order to assist it in its activities. Staff and members of both were interlinked, the Friends using the same business address as the complainant, including telephone number and logo.

The complainant's observations

In its observations, the complainant maintained its complaint. It also submitted two new claims which may be summarised as follows:

- The Commission should not have made a grant to the complainant (which was only acting for the association) in 1997 if it believed that it had a claim for the repayment of certain sums against the complainant.
- The Commission should not have waited for 18 months before informing the complainant of the reasons for not releasing the funds which it had agreed to pay to the complainant.

The complainant argued that it was the association which was faced with bankruptcy that now had to suffer for the claims which the Commission alleged to have against the complainant. It claimed that the Commission had knowingly let the association go towards its doom.

Further inquiries

Having received the complainant's observations on the opinion of the Commission, the



Ombudsman considered that it was appropriate to examine the new allegations put forward by the complainant in the context of the present investigation. The Ombudsman therefore wrote to the Commission on 3 December 1999 in order to ask the latter to submit an opinion on the complainant's new allegations.

In its opinion of 3 February 2000, the Commission made the following comments:

The Commission did not know the association and had neither negotiated the project with nor awarded the grant to it. All negotiations had been conducted with the complainant. In its relations with the complainant, the Commission had been guided by the principle that, by itself, the fact that the parties were in dispute over one project did not exclude continuing the ongoing business relationship in other cases, as long as the Commission could assume to deal with an honest business partner, with whom an acceptable understanding could be reached. The Commission had only hardened its stand once it had become clear that this trust had been misplaced in the case of the complainant.

The Commission had refused from the start, in numerous contacts, to release the Chile grant, exactly because there had been an obvious link with the other projects. In fact, the parties had been discussing the litigious accounts since the fall of 1997. A joint meeting had been held on 1 July 1998. A subsequent request for information addressed to the complainant had been answered unsatisfactorily in November 1998. The Commission regretted that the association had fallen prey to the business morale of the complainant. However, the Commission had neither established nor favoured the association's contacts with the complainant.

In its observations on this opinion, the complainant claimed that the Commission had had knowledge of the fact that the application had been lodged in the interest of the association. The complainant continued to believe that the Commission should either not have entered into the relevant obligation or release the funds since the claims against the Friends had nothing to do with the project concerned and had also been known when the Commission had agreed to make the grant for the project in Chile. It also insisted that it had only been 18 months after the contract had been signed that the Commission had explained its position to the complainant in writing.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The Ombudsman's analysis of the issues in dispute

After careful consideration of the opinion and observations and the results of the further inquiries, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims.

The Ombudsman acknowledged that the complainant's first claim according to which the Commission should have released the money it had agreed to provide raised the difficult issue as to whether the complainant was liable for the debts of the Friends. Since this issue ultimately had to be determined by a court that had jurisdiction in the matter, the Ombudsman came to the



provisional conclusion that no maladministration appeared to exist in that regard.

However, the Ombudsman took a different view with regard to the second allegation of the complainant according to which the Commission should not have entered into the relevant contract if it believed that it had a claim for the repayment of certain sums against the complainant. The Ombudsman noted that all the facts on which the Commission relied in order to justify its position according to which the complainant was liable to pay the debts that the Friends had incurred against the Commission appeared to have been known at the time when the contract was signed in June 1997. The Commission also knew at the time that the complainant refused to accept liability for these debts. Finally, the Commission knew or must have known that the financial assistance promised in the contract was to benefit not the complainant, but the association and its project in Chile.

The Ombudsman's provisional conclusion, therefore, was that in view of the circumstances, the decision of the Commission to enter into the contract could constitute an instance of maladministration.

With regard to the complainant's claim that the Commission should not have waited for 18 months before informing it of the reasons for not releasing the funds which it had agreed to pay, the Ombudsman noted that it appeared that the complainant was only informed in writing of these reasons in December 1998. The Ombudsman's provisional conclusion, therefore, was that the fact that the Commission only explained the reasons why it did not fulfil an obligation it had taken upon itself nearly a year (or even more) after the relevant contract had been concluded could constitute a further instance of maladministration.

The possibility of a friendly solution

On 8 June 2000, Sternenkind e.V. sent a letter to the Ombudsman in which it tried to describe and quantify the damage that it had suffered due to the Commission's behaviour.

On 5 July 2000, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman invited the Commission to consider indemnifying the association for the damages that the latter has suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997.

In its reply of 3 October 2000, the Commission took the view that the association had turned to the complainant as an intermediary on its own initiative, and without any instigation on the part of the Commission. The Commission claimed that at the time of the signature of the contract, it had still assumed that it would come to an honourable understanding with the complainant and had learnt only one year later that it had fallen prey to the complainant's dishonest business practices. According to the Commission, the real problem stemmed from the fact that the complainant had not transferred to the association "the funds received under the compensation". The Commission added that it could not accept to favour through taxpayer's money irregularities of the complainant and even increase the damage that it had suffered from the latter. In the view of the Commission, the result of the Ombudsman's proposal "to fully indemnify" the association would oblige the Commission to pay the subsidy a second time. This



the Commission considered to be unacceptable.

In its observations, the complainant maintained its complaint and denied having engaged in dishonest business practices.

THE DRAFT RECOMMENDATION

The Ombudsman's letter of 26 October 2000

In these circumstances, the Ombudsman addressed a draft recommendation to the Commission on 26 October 2000 which was worded as follows:

The European Commission should consider indemnifying the association Sternenkind e.V. for the damages that the latter has suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997.

The Commission's detailed opinion

In its detailed opinion of 19 January 2001, the Commission refused to accept the Ombudsman's draft recommendation. It made the following additional comments, some of which are important enough to be quoted literally:

"The complainant criticises as maladministration that the Commission withholds payment of funds allocated to one of his projects in Chile, as long as he has not accounted for the use of other EC funds, which have disappeared from one of his other projects in Brazil. For its part, the [complainant] refuses to pay its sub-contractor, the Verein Sternenkind, for its work on the Chile project. The European Ombudsman recognises in principle that the Commission has a valid claim against the [complainant], but refers its enforcement to the proper courts of law."

Over the years, the complainant had received EC funding for several development projects, amongst them a project in Brazil which was never implemented. The Commission's advance payment of ≈ 120 000 had been misappropriated, and the Commission had repeatedly asked the complainant to account for the use of this money. The complainant had refused to provide any information in this respect, declaring itself incapable of doing so because the grant contract, negotiated by its own representatives, had been signed by the "Friends". When the Commission had insisted nevertheless, the complainant had denied any responsibility and advised the Commission to sue the "Friends", now bankrupt, after the complainant had emptied its accounts of DM 120 000 and DM 170 000 in 1990 and 1991.

Neither the Commission nor the complainant had made the grant regarding the project in Chile dependent upon a settlement of the dispute regarding the Brazil project, "but the link was inevitably made when the [complainant] later urged the release of the grant without offering any concession with respect to the Brazil project".

The Commission had not entered into any administrative or commercial relationship with the association nor had it made any representations from which any duty to protect the association's financial interest could be deduced as the source of eventual maladministration.



The Ombudsman had taken the view that the Commission should nevertheless pay compensation to the association since it had known that the all or part of the grant money was ultimately destined for the latter. However, it was common practice for projects of this kind to use sub-contractors. Since the Commission had no direct relationship with these sub-contractors, it did not have to pay them directly if their contractor and debtor should fail to honour his commitments.

In the present case, the association had been the complainant's sub-contractor, and the complainant should be held to what it had said it would do: take full responsibility of the project as its own, committing itself to pay the sub-contractors.

To the Commission's knowledge, the association had taken no steps whatsoever to enforce its claims against the complainant in court.

The complainant's observations

In its observations, the complainant maintained its complaint and made inter alia the following further comments:

The Commission had misrepresented the facts in its detailed opinion. The association had not been the complainant's sub-contractor. In so far as the Brazil project was concerned, a prosecutor in Germany had started an inquiry against the manager responsible. This inquiry had however been closed. The Federal Republic of Germany had further brought an action against the manager. However, this action had been rejected by the German courts. The complainant had not taken money out of the accounts of the "Friends". The relevant sums stemmed from charity events and had been collected by the "Friends" for the complainant.

THE DECISION

1 Refusal to release the funds

1.1 The complainant, a German foundation, claims that the Commission ought to release the sum of € 70 443 it had agreed to provide, in a contract concluded in June 1997, for a development project in Chile.

1.2 The Commission replies that it was entitled to withhold this payment since it had claims amounting to € 210 000 against the Verein der Freunde und Förderer der Alfons Goppel Stiftung (the "Friends") arising from a project in Brazil for which the complainant was liable and against which the amount claimed by the complainant could be set off.

1.3 In order to support its view that the complainant may be held liable for the debts of the Friends, the Commission refers to several factors indicating a close relationship between the complainant and the Friends, for example the fact that staff and members of both were interlinked and that the Friends used the same business address as the complainant, including telephone number and logo.

1.4 The Ombudsman is not in a position to determine whether the complainant should indeed be regarded as liable for the claims of the Commission against the Friends. This issue can



ultimately only be decided by a court that has jurisdiction in this matter. However, the arguments put forward by the Commission do not appear to be without merit at first sight. No instance of maladministration can thus be found with regard to this aspect of the complaint.

2 Entering into contract despite the existence of claims against the complainant

2.1 The complainant claims that it was only acting for Sternenkinder e.V. (the "association"), a small German charity that had originally proposed the relevant project to the Commission and had been informed by the latter that it was not yet eligible for aid. The Commission had however suggested that the association might obtain a grant via another NGO that fulfilled the relevant criteria. The complainant had subsequently accepted to step in and to submit the application in its own name. The complainant claims that in view of these circumstances the Commission should not have entered into the relevant contract with the complainant in 1997 if it believed that it had a claim for the repayment of certain sums against the complainant.

2.2 The Commission replies that it did not know the association and had neither negotiated the project with nor awarded the grant to it. All negotiations had been conducted with the complainant. In its relations with the complainant, the Commission had been guided by the principle that, by itself, the fact that the parties were in dispute over one project did not exclude continuing the ongoing business relationship in other cases, as long as the Commission could assume to deal with an honest business partner, with whom an acceptable understanding could be reached. The Commission had only hardened its stand once it had become clear that this trust had been misplaced in the case of the complainant.

2.3 The Ombudsman notes that all the facts on which the Commission relied in order to justify its position according to which the complainant was liable to pay the debts that the Friends had incurred against the Commission appear to have been known at the time when the contract was signed in June 1997.

2.4 In the view of the Ombudsman, the Commission could not, at the time when the relevant contract was concluded in June 1997, be under any doubt that the complainant did not accept the Commission's view that it was liable for the debts of the Friends. The Commission itself pointed out that recovery orders against the Friends had been issued already in October 1995 (i.e. long before the contract was concluded) but that it had not been possible to retrieve the amounts concerned. In addition to that, the complainant had clarified, in a letter to the Commission dated 28 February 1997, that the application for a grant had been submitted by itself and not by the Friends. In this letter, the complainant had also stressed that the Friends were in the process of being wound up and were "completely separate" from the complainant. It had furthermore urged the Commission clearly to distinguish between these two bodies. The Commission could thus hardly assume that the complainant would be ready to cover the debts incurred by the Friends.

2.5 In its opinion on the Ombudsman's draft recommendation in this case, the Commission acknowledges that neither itself nor the complainant had made the grant for the project in Chile dependent upon a settlement of the dispute regarding the project in Brazil but claims that "the link was inevitably made when the [complainant] later urged the release of the grant without offering any concession with respect to the Brazil project". The Ombudsman is unable to accept



this claim that was first raised at a very late stage in the procedure and that is not supported by any evidence.

2.6 Even more importantly, the documents submitted by the complainant show that the Commission, contrary to what it claims in the present proceedings, knew or must have known that the funds should ultimately benefit not the complainant but the association and its work. The latter had written to the Commission on 15 September 1995 in order to inquire whether it could submit an application for a grant for the project concerned. The Commission had replied that this was not possible but that the association might turn to another NGO that could submit the application. The complainant had then agreed to step in and submit the application in its name. The documents submitted by the complainant show that this had been discussed with the Commission. Indeed, the name of the association is mentioned in both the application itself and the short cover letter sent by the complainant to the Commission on 17 July 1996.

2.7 The Ombudsman considers that the Commission thus knew or must have known that any decision on its part not to release the funds it had agreed to provide would affect the interests of the association. The Commission also knew or must have known that the complainant was not ready to pay the debts of the Friends. The Commission should therefore not have entered into the relevant contract if it did not have the intention of releasing the funds concerned. Besides, the same conclusion would have to be drawn if the Commission had entered into the contract without ascertaining the legal position beforehand. The Commission should in any event have avoided that its dispute with the complainant over the debts of the Friends could cause damage to the association and the project in Chile against which the Commission does not seem to have had any objections.

2.8 In its opinion on the Ombudsman's draft recommendation in this case, the Commission claims that the association acted as the complainant's sub-contractor and that it was therefore the complainant's responsibility to pay the association. The Ombudsman considers that this view (that had not been raised by the Commission before) fails to do justice to the particular circumstances of the present case. The complainant had not submitted its own project to the Commission but had only stepped in since the association itself was not yet eligible for aid.

2.9 The Ombudsman concludes from these considerations that in view of the circumstances of the present case the decision of the Commission to enter into the contract was not compatible with good administrative practice and thus constituted an instance of maladministration.

3 Delay in informing the complainant

3.1 The complainant claims that the Commission should not have waited for 18 months before informing it of the reasons for not releasing the funds which it had agreed to pay.

3.2 The Commission replies that it refused from the start, in numerous contacts, to release the Chile grant, and that the parties had been discussing the litigious accounts since the fall of 1997.

3.3 The Ombudsman notes that according to the evidence submitted to him it was only in its letter of 17 June 1998 to the MEP that the Commission first explained in writing that it did not



intend to release the grant before the debts of the Friends had been paid. Moreover, the first document in which the complainant itself was informed of the Commission's position appeared to be the letter of 15 December 1998. The Commission has not produced any evidence that would have shown that the complainant had been informed of this position prior to those dates. In the Ombudsman's view, it cannot be considered to be good administrative practice for the Commission to explain the reasons why it did not fulfil an obligation it had taken upon itself nearly a year after the relevant contract had been concluded. This fact therefore constitutes a further instance of maladministration.

4 Conclusion

4.1 On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remarks:

The Ombudsman considers that the Commission knew or must have known that any decision on its part not to release the funds it had agreed to provide would affect the interests of the association. The Commission also knew or must have known that the complainant was not ready to pay the debts of the Friends. It is a rule of good administrative practice that the administration should act both consistently and fairly. The Commission should therefore not have entered into the relevant contract if it did not have the intention of releasing the funds concerned. It should in any event have avoided that its dispute with the complainant over the debts of the Friends could cause damage to the association and the project in Chile against which the Commission does not seem to have had any objections.

The Ombudsman notes that according to the evidence submitted to him it was only in its letter of 17 June 1998 to the MEP that the Commission first explained in writing that it did not intend to fulfil its obligations under the contract entered into in June 1997 before the debts of the Friends had been paid. Moreover, the first document in which the complainant itself was informed of the Commission's position appeared to be the letter of 15 December 1998. In the Ombudsman's view, it cannot be considered to be good administrative practice for the Commission to explain the reasons why it did not fulfil an obligation it had taken upon itself nearly a year after the relevant contract had been concluded. This fact therefore constitutes a further instance of maladministration.

4.2 In his proposal for a friendly solution, the Ombudsman suggested that the Commission should consider indemnifying the association for the damage it had suffered. In its reply, the Commission rejected this proposal, arguing inter alia that this would oblige it to pay the full subsidy a second time. The Ombudsman then repeated his suggestion in the form of a draft recommendation to the Commission. He pointed out that the Commission's interpretation of his proposal had been erroneous, since he had only suggested that the association should be compensated for the damage it had actually suffered. In its detailed opinion, the Commission confirmed that it continued to reject this proposal. This time, the Commission appeared to argue that it had done nothing that could be interpreted as constituting maladministration towards the association. Again, the Ombudsman considers that such an interpretation would be erroneous. Having found that there was maladministration in the present case, the Ombudsman had to consider how this maladministration could be remedied. In view of the dispute between the Commission and the complainant and given that the Commission had not raised any objections



to the way in which the project in Chile had been carried out, it appeared most appropriate to suggest that the Commission should consider indemnifying the party that stood to lose most in the present case, i.e. the association that had pre-financed the project.

4.3 The Ombudsman deplores that the Commission did not accept this proposal. This decision of the Commission harms the interests of a small charity and ultimately those of the beneficiaries of the project which the Commission itself agrees was worthy of the EU's assistance.

5 Report to the European Parliament

5.1 Article 3 (7) of the Statute of the European Ombudsman (1) provides that after having made a draft recommendation and after having received the detailed opinion of the institution or body concerned, the Ombudsman shall send a report to the European Parliament and to the institution or body concerned.

5.2 In his Annual Report for 1998, the Ombudsman pointed out that the possibility for him to present a special report to the European Parliament was of inestimable value for his work. He added that special reports should therefore not be presented too frequently, but only in relation to important matters where the Parliament was able to take action in order to assist the Ombudsman (2). The Annual Report for 1998 was submitted to and approved by the European Parliament.

5.3 The Ombudsman considers that the present case which concerns the duties of the European Commission in relation to a specific contract, important as it may be for the parties concerned, does not raise issues of principle. Neither is it apparent which action the European Parliament could take in order to assist the Ombudsman in the present case. Given these circumstances, the Ombudsman concludes that it is not appropriate to submit a special report to the European Parliament.

5.4 The Ombudsman will therefore send a copy of this decision to the Commission and include it in the annual report for 2001 that will be submitted to the European Parliament. The Ombudsman thus closes the case.

5.5 The complainant of course retains the right to submit his contractual claim against the Commission for the payment of the sum of ₣ 70 443 to a court that has jurisdiction in this matter.

5.6 The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113,



page 15.

(2) Annual Report for 1998, pages 27-28.