



## Decision of the European Ombudsman on complaint 737/99/ME against the European Commission

Decision

**Case 737/99/ME - Opened on 29/07/1999 - Decision on 27/11/2000**

Strasbourg, 27 November 2000 Dear Mr C., On 23 June 1999, you made a complaint to the European Ombudsman on behalf of the company P. (hereinafter "P.") concerning alleged unfair and unjust treatment of P. by the European Commission in relation to a project. On 7 July 1999, I informed you that I could not deal with your complaint because the object of your complaint could not be identified as required by Article 2 (3) of the Statute of the European Ombudsman. On 9 July 1999, you renewed your complaint to the Ombudsman thereby identifying the object of your complaint. On 29 July 1999, I forwarded the complaint to the Acting President of the European Commission. The Commission sent its opinion on 4 November 1999. I forwarded it to you with an invitation to make observations, which you sent on 6 December 1999. On 19 July 2000, I asked the Commission to submit a copy of the contract between the Commission and P. as well as copies of the correspondence between the Commission and P. during the time of the contract. On 3 October 2000, the Commission sent me the requested information. I am writing now to let you know the results of the inquiries that have been made. To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. The Ombudsman's inquiries into your complaint have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission. **THE COMPLAINT** The complainant's company P. was involved in a project with the European Commission. A contract was signed with the company ASH and P. was appointed partner (ASH also owned part of P.). In the complaint, P. made the following allegations: 1 The Commission refused to accept P.'s costs for the project manager; 2 P. never saw the contract before it was signed by ASH. There was only an English version of the contract although most of P.'s staff were Portuguese; 3 The Commission accepted P. as a partner in the project although it was insolvent. The Commission also accepted that an employee of the ASH signed the contract on behalf of P.; 4 Funding which should have been sent directly to P. by the Commission was instead sent to ASH; 5 The Commission did not respond to correspondence from the complainant or to a request to meet with the Commission. **THE INQUIRY** **The Commission's opinion** In its opinion, the Commission explained the background to the complaint. In March 1992, in the framework of the specific research and technological development programme in the field of communications technologies (RACE II Programme), the Commission concluded a cost sharing contract No R2054 for the execution of the project "VIRMAS" ("Visual Verification in Remote Monitoring and Surveillance"). Among the



contractors were the Portuguese company P. and a British company ASH. ASH was the co-ordinator of the project. At the end of 1996, the Commission initiated a financial audit of P.. Since it had appeared in the meantime that P. was a subsidiary of ASH at the time of the signature of the contract, the Commission decided that the financial audit would cover the costs statements submitted both by ASH and P. for their work in the project. The audit was performed by the Commission services on the premises of both companies in January and March 1997. The Commission also pointed out that P. had not explained the link existing between it and ASH both in the proposal and later on. As regards the allegations put forward by the complainant, the Commission stated in summary the following:

- 1 Regarding the rejection to accept P.'s costs for the project manager, the Commission stated that it had not found satisfactory proof of payment and further no evidence of records in the company accounting books could be provided by P. as required under the contract. Under these circumstances, the Commission had rejected the costs linked to the salary of the project manager. It had also resulted from the audit that ASH had managed, on P.'s behalf, the financial aspects of the "VIRMAS" project for the year 1992. Therefore, the Commission had addressed to ASH and not to P., a recovery order for the amount overpaid in relation to P.'s cost statements for 1992.
- 2 The Commission claimed that the amendments to the contract were signed by P. and it continued to carry out its work for the "VIRMAS" project under the contractual obligations from 1992 to 1994. It had therefore difficulties in understanding the complainant's allegations that it was not aware of the contract. As to the language of the contract, the Commission referred to Article 11 (1) of the General Conditions (Annex II of the contract), which states - as for all contracts involving contractors from different Member States - that the contract must be signed by the contracting parties in one of the official languages of the European Communities. Each contractor can upon request and for information purposes be provided with a version of the contract and its General Conditions in the language of the Member State in which the contractor is situated. If P. had wanted a Portuguese version, they could have obtained one at any time on simple request.
- 3 Regarding the insolvency of the company, the Commission stated that there had been no trace of insolvency concerning P. in the proposal for the project neither in 1991 nor at the time of the signature of the contract in 1992. The Commission considered that if P. was insolvent, P. or ASH should have made it aware of this fact. As to the signature of the contract by an employee of ASH, the Commission stated that Mr H signing on behalf of P. had been presented as the authorised representative of the company both in the negotiation form submitted by P. and in the preamble of the contract. The fact that Mr H was an employee at ASH and at the same time seconded to P. as managing director was unknown to the Commission. In any case it was not an unusual situation under company law. The circumstance itself could not change anything to the contractual link created between the Commission and P.
- 4 As to allegation number four, the Commission referred to Article 4 (3) of the contract according to which all the payments by the Commission had to be made through the co-ordinator, i.e. ASH, who was responsible for immediately transferring the appropriate amount to each contractor.
- 5 The Commission stated that P. had had ample opportunity to present its point of view to the Commission. It clearly appeared from the correspondence between the Commission and P. that it had promptly replied to P.'s letters, in particular discussing all the issues raised by P. with regard to the financial audit. In a letter to P. dated 31 August 1998, the Commission stated that the audit had to be regarded as concluded as all the questions raised by P. had been fully addressed by the Commission. No



answers had been given to two letters from P. dated 21 September and 8 October 1998, since the Commission found that they contained no new factual elements. In addition, the Commission found the letter of 21 September 1998 to be openly offensive and defamatory towards the Commission. As to a request for a meeting, the Commission stated it had no trace of such a precise request. Further, such a meeting aiming, as stated in the complaint, to present the company accounts would have served no purpose since these accounts were already the object of an in-depth examination during the audit at P.'s premises. The Commission concluded that to a large extent the elements mentioned by P. related to aspects that lied within the company's own responsibility. Moreover, the complaint had not put forward any arguments that could lead to a modification of the conclusions of the financial audit, and the recovery order addressed to P. for the amount of 88 276 Euro was the result of the audit of the costs statements for the years 1993 and 1994 during which P. had personally managed the "VIRMAS" project. Nevertheless, taking into account the financial difficulties of the company, the Commission declared itself ready to examine a request from P. for a reimbursement plan. **The complainant's observations** In its observations, the complainant maintained its complaint. The complainant held ASH responsible for not having informed the Commission of the link between it and P., the employee of the ASH signing the contract on behalf of P. and for the failure to notify the Commission of any change in ownership. Moreover, ASH had not forwarded all the money to P. and it questioned the fact that the Commission allowed ASH to operate on P.'s behalf. The reasons for requesting a Portuguese version at the completion of the contract was to enable P.'s solicitor to understand it. As regards the refusal to pay the project manager, the complainant stated that the project manager had himself visited the Commission. Most of the monthly reports had been prepared by him and he also attended monthly meetings around Europe. His payment was legal and the complainant believed that P. had provided proof of the managers remuneration in the form of a letter from the project manager himself. The complainant could not find anything offensive or defamatory to the Commission in any of its correspondence. **FURTHER INQUIRIES** After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman considered it necessary to ask the Commission to submit a copy of the contract between the Commission and P. and its General Conditions (Annex II of the contract) as well as a copy of all the correspondence between the Commission and P. during the time of the contract, including the letters of 21 September and 8 October 1998 from P. Following this request, the Commission forwarded the copies as requested by the Ombudsman. **THE DECISION 1 Introduction** 1.1 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. Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Community is concerned. 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



issues of fact. The Ombudsman therefore takes the view that in the 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 responsible 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 this 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.

1.2 The Ombudsman's inquiries into the first, second, third and fourth allegations concerning contractual aspects of this complaints, has therefore been examined against this background. **2 The Commission's refusal to accept the costs for the project manager**

2.1 The complainant claims that the Commission refused to accept P.'s costs for the project manager. Proof had been supplied in the form of a letter from the project manager. 2.2 The Commission stated that it had not found satisfactory proof of payment and further no evidence of records in the company's accounting books could be provided by P. as required under the contract. 2.3 According to Article 5 of the contract for project R2054, cost statements shall be submitted to the Commission by each contractor. Article 5 also refers to the fact that the statements have to comply with the requirements of Article 36 and 37 of the General Conditions (Annex II of the contract). The General Conditions contain part F on "Justification of Costs" comprising Articles 36 to 38. Article 36 refers to the fact that costs statements shall be submitted to the Commission and also that each of the contractors shall provide any details reasonably required by the Commission. Article 37 requires each of the contractors to submit a consolidated cost statement after expiration of the Contract. Article 38 states that each of the contractors shall maintain on a regular basis books of account, and appropriate supporting documentation, such as for example time sheets. Moreover, Article 23 of the General Conditions states that allowable costs shall include only actual costs borne by each of the contractors. 2.4 The Ombudsman notes that this part of the complaint relates to what kind of proof of expenditure the complainant should supply. The complainant submitted proof in the form of a letter written by the project manager. This was not accepted by the Commission. On the basis of the Contract and of Articles 23 and 36 to 38 of the General Conditions, the Commission's refusal to accept the complainant's costs for the project manager does not appear unreasonable. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **3**

**Signature and language of the Contract** 3.1 The complainant stated, that P. never saw the contract before it was signed by ASH and further, there was only an English version of the contract although most of P.'s staff are Portuguese. 3.2 In its opinion, the Commission stated that it had difficulties in understanding the complainant's allegations that it was not aware of the contract since the complainant had signed the amendments to the Contract and continued to carry out its work under the "VIRMAS" project. As to the language of the contract, the Commission referred to General Conditions stating that the contract must be signed in one of the official languages of the European Communities. Each contractor can upon request be provided with a version of the contract and its General Conditions in another official language. 3.3 Whether the complainant's company was aware of the contract before signature or not, is a matter for which the Commission cannot be held responsible but relates rather to the relationship between P. and the co-ordinator of the project, ASH. Regarding the language of the contract, Article 11 of the General Conditions to the contract states that the contract shall be signed by the contracting parties on only one of



the official languages of the European Communities and that shall be the authentic version of the contract. Further, the Commission shall upon request, provide each contractor, for information purposes only, with a version of the General Conditions in the official language of the European Communities for the Member State in which the contractor is situated. 3.4 Although, the Ombudsman notes that Article 11 of the General Conditions only refers to the General Conditions and not the contract itself, the Ombudsman also notes that the complainant did request by letter of 21 June 1999, to receive a copy of the contract in Portuguese. Following that request, the Commission sent on 28 June 1999, a model contract in the Portuguese language to the complainant. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **4 The insolvency of the complainant's company and signature of the contract** 4.1 The complainant claimed that the Commission accepted P. as a partner in the project although it was insolvent and further it also accepted that an employee of the ASH signed the contract on behalf of P. 4.2 According to the Commission, there was no trace of P. being insolvent and it considered that if P. was insolvent, P. or ASH should have made it aware of this fact. As to the signature of the contract, Mr H. signing on behalf of P. was presented as the authorised representative of the company both in the negotiation form submitted by P. and in the preamble of the contract. 4.3 The Ombudsman notes, that the Commission must ensure sound financial management of Community funds. Thus entering into contract with a company that is not solvent, cannot be seen as sound financial management. The Commission explained its position and pointed out that it was not aware of P.'s insolvency at the time the contract was signed. There appeared to be no reason for the Commission to suspect that P. was insolvent, a circumstance that could have obliged the Commission to verify further the economic state of the company. The Ombudsman also finds that the Commission cannot be held responsible for, who signs the contract on behalf of a contractor. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **5 The addressee of the payments** 5.1 The complainant claimed that funding which should have been sent directly to P. by the Commission were instead sent to ASH. 5.2 The Commission referred to Article 4 (3) of the contract according to which all the payments by the Commission have to be made through the co-ordinator, i.e. ASH, who transfers the amount to each contractor. 5.3 The Ombudsman notes, that Article 4 (3) of the contract states that all payments by the Commission shall be made to ASH who shall be responsible for immediately transferring the appropriate amount to each contractor. It thus appears that the Commission acted in accordance with the provisions of the contract when forwarding payments not directly to P. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **6 Correspondence between the Commission and P.** 6.1 The complainant stated, that the Commission had not responded to correspondence from the complainant or to a request to meet with the Commission. 6.2 The Commission stated, by referring to the correspondence between the Commission and P., that it had promptly replied to P.'s letters. No answers had been given to two letters from P. dated 21 September and 8 October 1998, since the Commission found that they contained no new factual elements. In addition, the Commission found the letter of 21 September 1998 to be openly offensive and defamatory towards the Commission. As to a request for a meeting, the Commission stated it had no trace of such a precise request. 6.3 The Ombudsman found, after a thorough examination of all the correspondence between the Commission and P., that the Commission had regularly replied to the complainant's queries



and on several occasions explained its standpoint concerning the questions raised by the complainant with regard to the financial audit. As regards the letters from P. dated 21 September and 8 October 1998, these letters followed a flow of correspondence where the Commission had repeatedly expressed its views. The Ombudsman finds that these letters contained no new factual elements. As to the complainant's request to meet with the Commission, the Ombudsman's examination of the correspondence revealed no such request. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **7 Conclusion** It appears from the European Commission's opinions and the complainant's observations that the Commission will take steps to settle the matter and thereby satisfy the complainant. 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