

Decision of the European Ombudsman on complaint 860/99/(IJH)MM against the European Commission

Decision

Case 860/99/MM - Opened on 27/07/1999 - Decision on 11/05/2001

Strasbourg, 11 May 2001

Dear Mr C.,

On 25 June 1999, you lodged a complaint with the European Ombudsman on behalf of the *Asociación Española de Industriales de Plásticos* concerning a delayed payment from the Commission and your resulting claim for interest, as you were forced to take a bank loan.

On 27 July 1999, I forwarded the complaint to the President of the European Commission.

On 9 September 1999, you submitted some further information to me in relation to your complaint.

The Commission sent its opinion on 8 November 1999. I forwarded it to you with an invitation to make observations, which you sent on 28 December 1999.

On 7 December 2000, I wrote to the Commission in order to propose a friendly solution. The Commission sent me its reply to this proposal on 20 February 2001, and I forwarded to you on 13 March 2001. On 3 April 2001, you sent me your observations on the Commission's reply.

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

THE COMPLAINT

According to the complainant firm, in November 1995 it took part in the programme European Community Investment Partners (ECIP) and was awarded a grant from Community funds. The first part of the grant was paid by the Commission in due time. However, the complainant alleged that the final payment was only made two years later on 15 June 1998 and that the Commission had provided no explanation for the delay. Due to the delayed payment, the complainant was forced to take a bank loan in order to cover the costs.

In its complaint to the Ombudsman, the complainant claimed compensation for the delay in



receiving the final payment from the Commission. The amount claimed was ECU 13 132,-, corresponding to the interest on the bank loan.

THE INQUIRY

The Commission's opinion

In the framework of the ECIP-Programme, a grant was awarded to the complainant for organising an investment promotion meeting between Chilean and Argentinean business representations. Based on the complainant's budgetary estimates, the Commission agreed to pay " *50% of the actual costs or ECU 92 080,-, of both amounts whichever is inferior* ".

As the complainant's final accounts differed substantially from the specified estimates, the Commission restricted payment to a total of ECU 78 541,-, thus applying the customary payment formula to each item of expenditure. Nonetheless, the complainant claimed the total amount of ECU 92 080,-, as the formula in question was in its view - only applicable to the total project costs, which exceeded the initial budget.

The Commission considered that it did not owe any further payment. After a lengthy dispute about the interpretation of the contract, especially as the Commission made exceptions to the rule in the past, the Commission paid the difference of ECU 13 438,- in order to settle the dispute, whilst underlining the exceptional character of the payment.

As a result, the Commission refused to pay the complainant the amount of ECU 13 132,- as a compensation for the alleged late payment of the contested ECU 13 348,-. The Commission considered the claim for further compensation to be unfounded.

The complainant's observations

In its observations, the complainant elaborated further the allegation of undue delay and submitted additional information which may be summarised as follows:

(i) The complainant stressed that in a prior action subsidised by the ECIP programme, the Commission agreed to the formula " *35% of actual costs or ECU 59 366,- of both amounts whichever is inferior* " and paid ECU 59 366,- within a period of six months. The second action was based on the same contract with the Commission except for the clause " *50% of the actual cost or ECU 92 080,- of both amounts whichever is inferior* ". As 50% of the real costs amounted to ECU 95 392,- the Commission would therefore be liable to pay ECU 92 080,-. In the present case however, the Commission agreed to pay only ECU 78 541,-. The complainant deduced that the Commission had changed the procedures without informing him and considered the fact that the Commission paid less than ECU 92 080,- as a breach of contract. The complainant criticised the justification given by the Commission to have made exceptions in applying its procedures in the past.

(ii) The complainant developed further the claim of undue delay by the Commission and the lack of explanations for the delay. The complainant specified that it sent the report to the Commission by courier service on 22 February 1996. The Commission did not reply until December 1996 when it asked again for the documents, that apparently had been lost. On 22



October 1997, the Commission informed the complainant about its disagreement concerning the invoices submitted. It was only then that the dispute started, which ended on 3 March 1998 with a first incomplete payment by the Commission. On 18 June 1998, the complainant received the remaining payment. According to the complainant, the Commission did not react during 20 months before the actual dispute started and it took a further eight months until the Commission paid the whole amount due.

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, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims.

The Ombudsman considered regarding the first claim regarding the Commission's failure to react and to give explanations, that the delay was rather based on the Institution's lack of reaction than on the dispute between the two parties.

The Ombudsman's provisional conclusion, therefore, was that in view of the circumstances, the Commission's failure to react and to give explanations during 20 months might establish an instance of maladministration.

Thus, the second allegation with regard to a compensation for the late payment of the grant, raised the difficult issue to determine whether there has been a breach of contract by either party. Since this issue ultimately had to be determined by a court that had jurisdiction in the matter, the Ombudsman limited his inquiry to examine whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions. Although the Commission accepted the complainant's claim and paid the difference of ECU 13 438,-, there was a delay of 28 months in the payment of this amount without any explanations provided by the Commission.

The Ombudsman's provisional conclusion, therefore, was that in view of the circumstances, the decision of the Commission to refuse to pay interests in a case of late payment might establish an instance of maladministration.

The possibility of a friendly solution

On 7 December 2000, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman invited the Commission to consider to pay due interest for late payment to the complainant.

In its reply of 20 February 2001, the Commission did not dispute the delay as such, but gave the following reasons for it:

- (i) the Commission lost the financial report, probably as a result of the removal;
- (ii) the technical assistance office was late in processing the payment request.



Even if in the contract no provision in the event of late payment was foreseen, the Commission took notice of its Communication of 10 June 1997 (SEC(97)1205), which was extended to standard grant contracts for external assistance (1) which feature standard provisions applicable to contract coming under the ECIP rule. According to the Commission's calculations the interests to be paid amounted to \approx 3 541,45. On 3 April 2001, the complainant accepted the Commission's proposal.

THE DECISION

1 Compensation for the late payment of the grant

1.1 The complainant claims in its observations that during 20 months the Commission did not react to the report of the ECIP action forwarded by the complainant and did not provide any explanation for the delay. The complainant requires compensation for the delay in receiving the final payment of the grant from the Commission. Due to the delayed payment, the complainant was forced to take a bank loan in order to cover the costs. Therefore, it claimed the amount of ECU 13 132,- corresponding to the interests accumulated on the bank loan.

1.2 In its opinion, the Commission did only allude to this allegation with the term "*lengthy dispute*". The Commission considered that it did not owe any further payment. The Commission put forward that, as a substantial difference existed between the estimates and the final accounts indicated by the complainant, the Commission applied the customary formula to each item of expenditure. Thus, the sum the Commission would agree to reimburse would amount to ECU 78 541,-. It followed a lengthy dispute with the complainant about the interpretation of the contract, especially as the Commission had made exceptions to the rule in the past. In order to settle this dispute, the Commission exceptionally conceded to pay further ECU 13 438,- to the complainant, whilst underlining the exceptional character of the payment.

1.3 It appears that the Commission did not react till December 1996 when it claimed the documents again, which were already delivered by the complainant on 22 February 1996. Merely on 22 October 1997, the Commission expressed its disapproval with the invoice. The real "dispute" only started then and ended eight months later with the payment of the final amount. Therefore, the delay seems to be based rather on the Institution's lack of reaction than on the dispute between the two parties. The complainant further claims the failure of the Commission to explain its behaviour.

1.4 In his proposal for a friendly solution, in accordance with Article 3(5) of his Statute, the Ombudsman suggested that the Commission should consider to pay due interest for late payment to the association. In its reply, the Commission accepted the Ombudsman's proposal and offered to pay as compensation for the late payment of the ECIP grant \approx 3 541,45. On 3 April 2001 the complainant accepted the Commission's proposal.

2 Conclusion

On the basis of the Ombudsman's inquiries into the complaint, a friendly solution has been agreed between the Commission and the complainant. The Ombudsman therefore closes the case.



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

Yours sincerely,

Jacob SÖDERMAN

(1) Annex 2: *Annex II to the General conditions applicable to grant contracts awarded by the European Community in the case of external aid, pp. 8-9.*