

Decision of the European Ombudsman on complaint 43/2000/PB against the European Commission

Decision

Case 43/2000/IJH(PB) - Opened on 08/02/2000 - Decision on 30/11/2001

Strasbourg, 30 November 2001

Dear Mr A.,

On 10 January 2000, you made a complaint to the European Ombudsman on behalf of the Brettonwood Partnership Ltd, concerning TACIS Contract No. 96-0564.

On 8 February 2000, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 17 May 2000. I forwarded it to you with an invitation to make observations, which you sent on 29 June 2000.

On 10 July 2000, I wrote to the Commission to request further information. I also inquired whether there was any progress in the Commission's indicated attempts to settle the dispute with you. I informed you about my request on the same date.

On 10 October you sent me a fax, enclosing copies of Commission letters which indicated that the Commission's anti-fraud office (OLAF) had commenced investigations into your affairs relating to the TACIS contract referred to above. On 24 October 2000, the Commission replied to my request for information of 10 July 2000. On 26 October 2001, I sent the Commission's reply to the lawyers representing you (Humblet & Partners) for observations. On 30 November 2000, the lawyers representing you submitted observations.

On 5 March 2001, Mr Louis from Humblet & Partners called my legal officer responsible for the handling of the complaint. Mr Louis informed the legal officer that he had been in contact with OLAF, and that he had problems finding out whether OLAF had actually commenced investigations, and on what basis. On 27 March 2001, I wrote to the Director of OLAF, requesting information about the nature and extent of any investigation that OLAF may have initiated.

On 27 April 2001, OLAF replied that it had initiated an investigation following a submission from the SCR-service in the Commission. On 16 May 2001, I invited you to submit your observations on OLAF's reply. The lawyers representing you submitted observations on 6 July 2001. On 21 August 2001, I requested OLAF to provide further information. On 8 October 2001, OLAF



replied to my request, which I informed you about in my letter of 23 October 2001.

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

THE COMPLAINT

The complaint was submitted on 10 January 2000. It concerned alleged maladministration by the European Commission in regard to the latter's supervision and control of TACIS Contract No. 96-0564.

The background to the complaint was, in summary, the following:

The Contract was signed in 1996, for work in Tajikistan. In 1997, Tajikistan became unsafe, causing the Commission to call off the project. The complainant subsequently submitted his invoices to the Commission. In November 1998, the Commission informed the complainants that two invoices would not be paid because the Commission had decided to conduct an audit of the project.

In March 1999, the Commission auditor issued his report, which contained an overall negative conclusion for the complainant. In mid-December 1999, the Commission services responsible for the supervision of the project attempted to settle the matter in a meeting with the complainant. The services considered that the amount of ineligible costs could be reduced to such an extent that the complainant would in fact be entitled to some payment. The complainant refused the proposed settlement. In late December 1999, the responsible Commission services proposed a regularisation of the accounts to their Director General.

The complainant considered that the Commission's financial position, based on the Audit Report, was wrong in substance and tainted by procedural irregularities. The complainant stated that if the invoices were not paid soon, he would have no option but to contact his legal representatives to bring the matter to court.

In summary, the complainant alleged that the Tacis Finance Unit of the Commission was wrongfully withholding payment of final invoices for ₸ 86 283.49, dated 30 July 1998, for contractual work which his company had performed. The complainant also alleged that officers of the Tacis Finance Unit had been discourteous, unhelpful and rude, that they had refused to answer his questions or to communicate with him, and that he had suffered racial discrimination (the complainant was of Asian origin).

THE INQUIRY

The Commission's opinion

The complaint was sent to the European Commission, which submitted its opinion in May 2000. The Commission first made the general comment that



"Payments under this contract have admittedly been delayed in some instances because of disputes with the Commission's payment services. This in turn has led to an extensive and sometimes strongly worded exchange of correspondence, as the core of the disputes has been due to the Commission's refusal to accept the [complainant's] efforts at imaginative accounting and its insistence that [the complainant] present correct invoices and accounts in the prescribed format, like any other contractor."

1. The contract specifically provided for a total of 10 separate invoices and payments in line with the progress of the project, but the complainant has arbitrarily presented 27 separate invoices at irregular intervals. Overall, the incorrect invoicing by the complainant goes beyond any normal rate of errors which could be expected in a contract of this sort.

2. The complainant's billing practices showed an inhabitual number of cases of double invoicing, of billing experts which were not foreseen in the contract, for which no time-sheet were presented at all, or for which time-sheets were submitted but which were quite obviously not signed by the person concerned. Other "errors" of the complainant concerned an invoicing for work not included in the contract and charging different fee rates from those agreed. Payment of reimbursable expenses suffered from a similar lack of correct calculations and correct supporting documentation and evidence. Not surprisingly, these practices led to queries for verification and corrections as well as to an extensive correspondence and delays in handling the invoices, in the course of which the complainant admitted to errors of double invoicing.

3. The problems were of such magnitude that the responsible payments service ordered a special audit of these accounts before processing the final invoices, with the result that from a total of ₣ 922 955 claimed by the complainant, some ₣ 134 442 were found ineligible. As the previous advance and intermediate payments exceeded this amount, a total of ₣ 48 159 in overpayments remains to be recovered from the complainant's company. The last two invoices remain suspended, until these issues are settled. The complainant has been informed every time the amount paid by the Tacis Finance Team has differed from the amount invoiced and the complainant has also been informed of the suspension of the final invoices.

4. In October 1999, the Commission was ready to negotiate a settlement with the complainant. To this end, it met with him in December 1999, but no agreement has as yet been reached. The Commission is refusing to pay for the complainant's accounting "errors", but of course accepts all duly proven and documented items. It is even ready to propose a specific dispute settlement agreement in order to provide a proper contractual base for certain additional work, which was initially not foreseen. These discussions are led by the responsible operational service in SCR unit (unit A3) and a "Letter of Regularisation" is being prepared.

5. As regards the second set of allegations, it is gratuitous and unjustified to attribute the controversy, which is at the root of the present complaint, to incompetence, ill will and racial prejudice of the Commission's financial officers, without taking the complainant's own attitude into account.

In its conclusion, the Commission regretted the development of the case, and stated that it



preferred to look forward to settling the dispute once and for all. It invited the complainant to negotiate an amicable settlement on the basis of justified correct accounts.

Amongst the annexes enclosed to the Commission's opinion was a copy of the Audit Report.

The complainant's observations

The Commission's opinion was forwarded to the complainant for observations.

The complainant maintained his allegations. He also argued that his cost claims had had a contractual basis in an addendum (Addendum 2) which the auditor had failed to take into account in his report. Furthermore, he stated that the absence of certain side-letters (a problem identified in the Audit Report) was due to administrative problems in the Commission itself.

The complainant also submitted that the double-invoicing errors on his part, which the audit report had correctly identified, were too small to have a general influence on the assessment of his company's invoicing practices.

The complainant also questioned the Commission's method of assessment, for instance asking what 'any normal rate of errors' implies in this kind of contract.

The complainant furthermore expressed his grievance in regard to the wording of the Commission's opinion. He referred to the Commission opinion's remarks about his "efforts at imaginative accounting", calling this an "offensive connotation".

Further inquiries

On the basis of the complainant's observations, the Ombudsman concluded that two new allegations had been raised and should be included in this inquiry:

(i) that the Commission's opinion and the material on which it relies, in particular the Audit Report, do not take into account Addendum 2 (dated 14 May 1998) to the contract between the Commission and the complainant's company.

(ii) that the auditor failed to take into account the fact that the absence of certain side-letters is the result of administrative problems in the Commission and is therefore not the responsibility of the complainant.

On 10 July 2000, the Ombudsman therefore wrote to the Commission, pointing out the complainant's two new allegations identified above.

The Ombudsman also noted that the Commission's opinion had referred to potential efforts in reaching an agreement with the complainant's company. The Ombudsman requested information about any progress in this respect.

In its second opinion, submitted on 24 October 2000, the Commission confirmed its previous position, and submitted the following comments on the two new allegations:

1. In regard to the Addendum No 2, the complainant's allegation that this Addendum was not



taken into account in the audit report is factually incorrect.

Within the system of the Tacis programme, the incurred expenditures under the service contract and the incurred expenditures related to the revised budget in Addendum 2 have to be supported by original, duly signed documents providing evidence as to the costs effectively incurred. This has not been respected in the present case.

2. In regard to the side-letters, the Commission stressed that the audit report, of which the complainant has received a copy, did not fail to take into account the absence of certain side-letters, but that it simply pointed out the lack of contractual basis.

In this particular case, the Commission services were in principle ready to regularise certain amounts which could be considered eligible. However, as a result of a thorough re-examination of all aspects concerned, including allegations made by an expert working under the contract, they felt compelled to submit the file to the anti-fraud authority (OLAF) for a formal investigation of fraud, which is still under way.

It was apparent from the Commission's opinion that no agreement had been reached with the complainant.

The Commission's second opinion was sent to the complainant for observations. On 30 November 2000, the complainant's lawyers presented submissions on behalf of the complainant. The submissions essentially expanded on the complainant's allegations.

Following correspondence with the complainant and his lawyers, the extent to which OLAF was conducting investigations appeared unclear. The Ombudsman therefore decided to request OLAF to provide information on the nature and extent of any investigation that OLAF had initiated into the complainant's affairs.

On 27 April 2001, OLAF replied to the Ombudsman's request for information. OLAF confirmed that it had initiated inquiries to establish whether there were grounds to believe that fraud or serious irregularities had occurred during the implementation of the Tacis project here concerned.

OLAF's reply was forwarded to the complainant for observations.

On 6 July 2001, the complainant's lawyers submitted their observations. They considered it wrong that the reference to OLAF had been made without hearing the complainant first. Their observations also contained figures intended to demonstrate that the complainant's company had suffered losses due to the Commission's audit of the project.

On 21 August 2001, the Ombudsman decided to request OLAF to provide information on a) the date on which OLAF expected to have concluded its investigations into the complainant's affairs, and b), the grounds which OLAF considered to justify an investigation.



On 8 October 2001, OLAF replied to the Ombudsman's request. OLAF stated that it expected to conclude its investigations by the end of 2001. The grounds which OLAF considered to justify an investigation were a) a submission from the SCR service in the Commission (i.e. the service dealing with Tacis matters), and b), some additional information indicating possible fraudulent invoicing and other irregularities.

THE DECISION

1 Wrongful withholding of payment

1.1 The complainant alleged that the Tacis Finance Unit of the Commission was wrongfully withholding payment of a final invoices for ₦ 86 283.49, dated 30 July 1998, for contractual work which the complainant's company had performed. In his observations, the complainant submitted two additional allegations, which were taken up for inquiry by the Ombudsman. These additional allegations are dealt with in Part 2 below.

1.2 The Commission has explained that its unwillingness to make the payment is due to the findings made in its audit of the complainant's contract. The Audit Report identified, amongst others, problems of double invoicing and a failure to use side-letters to cover the expenses relating to certain experts who were hired by the complainant.

1.3 The European Ombudsman clarified his method of review in contractual disputes in his Annual Report for 1997. As stated in that Report, in many Member States the Ombudsman does not deal with contractual disputes, either because of the general characteristics of such contracts under national law, or because the law establishing the Ombudsman's mandate expressly excludes contractual matters. Part of the mission of the European Ombudsman is to help relieve the burdens of litigation, by promoting friendly solutions and by making recommendations that avoid the need for proceedings in courts. The European Ombudsman, therefore, does deal with complaints of maladministration that arise from contractual relationships. He does not, however, seek to determine whether there has been a breach of contract by either party. 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. However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes that its view of the contractual position is justified.

1.4 In regard to the complainant's first allegation in this part, the complainant disputes some of the findings in the Audit Report, but acknowledges the correctness of others (double invoicing). To a large extent, the dispute concerns the extent to which the Commission itself was at fault in causing the invoicing problems, a point which is dealt with in Part 2 below. For the purpose of assessing whether the Commission has provided a coherent account of the legal basis for its actions and why it believes that its view of the contractual position is justified, the Ombudsman notes that the Commission relies on an Audit Report which appears to contain an objective evaluation of the complainant's contract with the Commission. The Ombudsman considers that



the findings in the Audit Report gave the Commission a relevant basis to conclude that the payment demanded by the complainant could not be met in full. In regard to this aspect of the complaint, the Ombudsman therefore considers that there has been no maladministration on the part of the Commission.

2 The additional allegations

2.1 In his observations, the complainant submitted the following two additional allegations:

- (i) that the Commission's opinion and the material on which it relies, in particular the Audit Report, do not take into account Addendum 2 to the contract between the Commission and the complainant's company; and
- (ii) that the auditor failed to take into account the fact that the absence of certain side-letters is the result of administrative problems in the Commission and is therefore not the responsibility of the complainant.

2.2 In regard to the first additional allegation, the Commission has rejected that the Audit Report failed to take into account 'Addendum 2'. In regard to the second additional allegation, the Commission has explained that it was prepared to regularise the case, as far as possible, to enable some payment to the complainant. Ultimately, however, any plans to regularise have been suspended due to the investigations initiated by the Commission's anti-fraud authority (OLAF).

2.3 In regard to the complainant's additional allegation that an 'Addendum 2' was not taken into account in the Commission's audit, the Ombudsman notes that Addendum 2 does, in fact, appear to have formed part of the auditor's evaluation. Thus, the first additional allegation is not substantiated, and there has therefore been no maladministration in regard to this aspect of the complaint.

2.4 In regard to the additional allegation that the auditor failed to take into account the fact that the absence of certain side-letters is the result of administrative problems in the Commission and is therefore not the responsibility of the complainant, the Ombudsman notes the following. On the basis of the evidence submitted in the course of this inquiry, it appears that there was a notable degree of flexibility in the approach of the supervising Commission services in regard to invoicing. It cannot be excluded that this had an influence on the way that the complainant himself dealt with invoicing matters. However, it is also clear that administrative problems in the Commission cannot normally exempt a complainant from complying with his or her contractual obligations. As stated above, the Ombudsman considers that the Commission has provided a coherent view of its position. Against this background, the Ombudsman considers that the second additional allegation has not been substantiated, and it therefore appears that there is no maladministration on the part of the Commission.

3 Behavioural and procedural questions

3.1 In his second set of allegations, the complainant alleged that officers of the Tacis Finance Unit had been discourteous, unhelpful and rude, that they had refused to answer his questions or to communicate with him, and that he had suffered racial discrimination.



3.2 The Commission has acknowledged that it some-times dealt with the complainant in a firm manner, but that this was necessary due to the complainant's own behaviour. The Commission has also entirely rejected the allegation that its staff is racially prejudiced, or that it failed to answer his questions or communicate with him.

3.3 In the present case, the Ombudsman has not been given any evidence which shows that the Commission's officials acted with racial prejudice, or that the Commission breached its duty to reply and communicate, and no maladministration has therefore been established in regard to this aspect of the complaint.

3.4 As regards the allegations of discourtesy and rudeness, the complainant appears to consider that the Commission has continued to be discourteous and rude during the present inquiry. He has referred to the wording of the Commission's first opinion, where the Commission made remarks about the complainant's "*efforts at imaginative accounting*", and: "*Other 'errors' of Mr A. concerned invoicing for work not included in the contract ...*".

3.5 The statements made in the Commission's first opinion appear to be discourteous and their insinuations defamatory. The grievance expressed by the complainant in his observations was therefore justified. The Commission's statements were furthermore contrary to the Commission's normal practice of responding to complaints in the most appropriate manner. On this basis, the Ombudsman concludes that there has been maladministration in regard to this part of the complaint, and makes a critical remark below.

4 Conclusion

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

Statements made in the Commission's first opinion appear to be discourteous and their insinuations defamatory. The grievance expressed by the complainant in his observations was therefore justified. The Commission's statements were furthermore contrary to the Commission's normal practice of responding to complaints in the most appropriate manner. On this basis, the Ombudsman concludes that there has been maladministration in regard to this part of the complaint.

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

Yours sincerely,

Jacob SÖDERMAN