

Decision of the European Ombudsman on joined complaints 92/2000/PB and 93/2000/PB against the European Commission

Decision

Case 92/2000/PB - Opened on 14/02/2000 - Decision on 14/02/2002

Case 93/2000/PB - Opened on 14/02/2000 - Decision on 14/02/2002

Strasbourg, 14 February 2002

Dear Mr C.,

On 19 January 2000, you made a complaint to the European Ombudsman concerning disputes about payment for contracts in Guinea-Bissau and South Africa respectively, funded by the EDF/EPRD.

On 14 February 2000, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 15 May 2000. I forwarded it to you with an invitation to make observations, which you sent on 22 June 2000.

On 16 November 2000, I informed you that I had decided to conduct further inquiries into your complaint. On 8 January 2001, I received the Commission's opinion in reply to my request for further information. On 23 January 2001, I forwarded the Commission's opinion to you, and you sent me observations on it by letter dated 26 January 2001.

In email-correspondence from 14 May 2001 till 6 June 2001, I informed you of my view that a friendly solution could be proposed to the Commission, and obtained from you the approval to make such proposal.

On 8 June 2001, I proposed to the Commission a friendly solution of your complaint, and sent you a copy of the proposal.

On 10 October 2001, the Commission sent an opinion on my proposal for a friendly solution. I forwarded the Commission's response to you by letter dated 22 October 2001. On 6 November 2001, you submitted observations on the Commission's opinion.

On the basis of your observations, I decided that further inquiries were necessary, and requested the Commission for clarification by letter dated 14 November 2001. The Commission



responded in its final opinion on 22 January 2002.

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

The complaint

In January 2000, the complainant submitted two complaints against the European Commission. Both complaints concerned payment disputes relating to contracts for the organisation of training courses in Guinea-Bissau and South Africa. The courses were funded out of the European Union's EDF/EPRD resources. It was decided to deal with both complaints in one inquiry.

The complainant presented the following background to the cases.

In regard to the contract for training courses in Guinea-Bissau, no payment had been made to the complainant. The Commission claims that it had phoned the complainant to declare *force majeure* due to sudden insecure conditions in Guinea-Bissau (civil war). The complainant disputed that the Commission did so, and stated that *force majeure* should in any case have been made in writing.

In regard to the contract for training courses in South Africa, the complainant stated that payment by the Commission was delayed, incomplete and without interest. The responsible Commission Director-General, Mr Soubestre, had been contacted, and he had replied to the complainant on 1 February 1999, sincerely apologising for the long delay, and stating that "*All that could go wrong did go wrong, it seems.*" Mr Soubestre also informed the complainant that the amount due had in the meantime been credited to his company's bank account.

On 25 February 1999, the complainant informed the Commission that his company's bank account had been credited with an amount of ₦ 49,943, whereas the correct amount was ₦50.000. He also claimed interests for late payments, and referred to a 60 days deadline for making payments.

In summary, the complainant made the following claims and allegations:

1. In regard to the Guinea-Bissau contract, the complainant claimed that the Commission should make whole, or at least part, payment in respect of a training course that GIC Limited was due to deliver in Bissau in June 1998 and that the Commission should also pay interest in respect of the delay in making the payment.
2. In regard to the South Africa contract, the complainant alleged that the Commission was late in making payments in respect of a series of training courses delivered by the complainant's company and that the sum finally paid was ₦57 less than the amount of the invoice. The complainant also claimed interest in respect of the late payment.

The complainant further mentioned that his company had changed name, and provided details of its new bank account.

The Commission's opinion



The complaints were forwarded to the Commission, which submitted the following opinion.

The complainant's company had contracted with respectively the government of Guinea-Bissau and a South African cultural fund (hereinafter the CWCI Fund). The Commission therefore had no contractual obligation towards the complainant's company, nor did it have any direct payment obligations. The Commission considers itself answerable to the Ombudsman only as regards the aspect of maladministration by its own services in handling these files.

In regard to the substance of the case, the Commission first addressed the Guinea-Bissau contract. It stated that the training courses were never held because a civil war broke out in Guinea-Bissau shortly before the courses were to take place. As regards payment, Article XXXV of the contract provides that "Payment shall be made as follows: A single lump sum will be payable on completion of each training course". As none of the courses were held, no payments were due.

However, the Commission stated that it may be prepared to consider an equitable solution in which real costs incurred in connection with the *force majeure* are reimbursed, subject to the submission of relevant supporting documentation.

In regard to the contract with the CWCI Fund, the Commission stated that it had paid the full contract price, i.e. €50.000, into the bank account of the complainant's company. It enclosed evidence that it had ordered the payment. The Commission had charged no fee for the transfer, and therefore suggested that the complainant contact his own bank to check further.

In regard to the allegation of late payment of the €50.000, the Commission noted that the contract did not stipulate a firm payment period and only made payment conditional upon the submission of a final report and its approval by the CWCI Fund. Payment requests were to be submitted to the Fund for approval, not directly to the Commission. The Commission received the disputed invoice of 28 September 1998 on 20 October 1998, and paid the full amount on 13 January 1999. Enclosed to the Commission's opinion was a copy of the "General conditions for service contracts financed by the European Development Fund (EDF)", Article 38 (1) of which states that payment shall be made within 90 days of interim payment certificates being delivered to the contracting authority. On that basis, the Commission considered that the request for payment had been treated with due diligence and expediency and that the claim for interest for late payment is not valid under these circumstances.

The complainant's observations

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

The complainant first addressed the Commission's general comments concerning the Commission's responsibility. He claimed that the Commission *is* responsible for the efficient management and payment of both the invoice and particularly in respect of the Guinea-Bissau training courses, for which a rider was signed by the Head of Unit responsible for payments in Brussels. During the three years that the complainant's company was engaged in delivering training courses in ACP states and OCTs (of which the one in Guinea-Bissau was one), the Commission was invoiced directly by the complainant's company in exactly the same manner



for 61 other courses.

In regard to the Guinea-Bissau contract, the complainant maintained his allegation.

In regard to the contract with the CWCI Fund, he enclosed a bank statement which showed that his company's bank had in fact only received ₦49.943, not ₦50.0000.

The complainant also maintained his allegation of delay in payment for the contract with the CWCI Fund. He stated that the South African cultural fund had informed him that it passes all invoices immediately to the Commission delegation in Pretoria, South Africa. The complainant also considered the Commission's reference to the "General conditions for service contracts financed by the European Development Fund" irrelevant, since funds for contracts in South Africa come from the Commission's EPRD budget line and not from the EDF.

FURTHER INQUIRIES

The Ombudsman concluded that the evidence submitted by the complainant and the Commission in regard to the missing ₦57 appeared to be conflicting. He therefore requested the Commission to provide more detailed information about the transfer. In his letter, the Ombudsman noted that a third bank (Lloyd's Bank) appeared to have been involved in the transfer.

In its reply, the Commission stated that Lloyd's Bank had informed the Commission that it erroneously deducted ₦57 when transferring the ₦50.000 to the bank account of the complainant's company. Lloyds Bank would transfer the ₦57 to the complainant's account.

The Commission also enclosed, again, a copy of the "General conditions for service contracts financed by the European Development Fund", and stated that "if one should apply the General Conditions", they provide a 90-day delay for payment, and the amount was paid within that period. Referring to Mr Soubestre's letter to the complainant (above), the Commission stated that payment procedures are inevitably longer in a large organisation than in a small one.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The complainant's second allegation gave rise to a proposal for a friendly solution by the Ombudsman.

In regards to the missing ₦ 57, the Commission investigated the matter, and stated that a bank which acted on behalf of the Commission (Lloyd's Bank) would pay the complainant the ₦57, which the bank had deducted by mistake. The complainant subsequently informed the Ombudsman that his company had not received the ₦57.



As regards the alleged late payment, the Ombudsman noted that the Commission did have payment obligations, as explained in the Decision Part further below. The failure to ensure the existence of written maximum payment periods was therefore primarily attributable to the Commission. The reference in the Commission's opinion to an imprecise standard of "due diligence" is not relevant for a matter such as the exact length of payment periods. It should be noted in this context that the Commission already in 1991 set itself a time limit of 60 days for payment of creditors (1) .

The Commission would furthermore appear to have been inattentive to the need for establishing a clear arrangement for communication of invoices to itself from the CWCI Fund. The Ombudsman did therefore not consider it reasonable that the payment period should only be calculated from the point when the invoices arrive in its offices in Brussels.

On this basis, the Ombudsman proposed a friendly solution on the basis of Article 3 (5) of the Statute of the Ombudsman (2) , which directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant. In his proposal for a friendly solution, the Ombudsman asked the Commission to:

1. consider taking steps to ensure that the complainant receive the €57 that were mistakenly deducted when the Commission transferred the €50.000 due to the complainant's company. In doing so, the Commission should also consider paying interest on the late payment of the €57.
2. consider to make a payment of interest to the complainant in regard to the contract for courses in South Africa, applying a 60-day time-limit from the date of the complainant's submission of invoices to the CWCI Fund.

In its reply to the European Ombudsman, the Commission explained that its normal 60-day payment period does not apply to all contracts. Certain regulations continue to stipulate a 90-day period, especially for contracts under the provisions on the use of the European Development Fund. This disparity is due to the special nature of the EDF procedure, which is characterised in particular by a more complex payment procedure making payment periods longer.

In the present case, the Commission notes that the contract between GCI Ltd. and GWCI does not stipulate the period within which payment should be made. However, Article 5.4 of Title II "Conclusion of Contracts" of the financial agreement between the Government of South Africa and the Commission for the CWCI project (ref. SA/7012/000) states that the General Conditions referred to above shall apply, and these provide for a 90-day payment period. The Commission's reference to 90 days is therefore not an attempt on its part to apply by analogy the EDF rules, but is pursuant to the General Conditions applicable to service contracts under the CWCI project, as stipulated in the financial agreement between the Commission and the Government of South Africa.

Concluding on this point, the Commission feels that the contract should, in the interest of clarity,



have stipulated the payment period applicable as provided for in the General Conditions. To avoid this type of confusion in the future, the Commission, in the context of the new EuropeAid Office for Cooperation, is endeavouring to improve the contract documents used for projects by drafting standard contracts for all its programmes.

Concerning the question of the reference date for the registration of the invoice, the Commission, in order to settle the dispute with the complainant, accepts the Ombudsman's solution consisting in regarding the date of registration with the CWCI as the date of registration of the payment request. On this basis, the sum of interest due for late payment amounts to $\text{€} 58,25$.

In regard to the second part of the Ombudsman's proposal for a friendly solution, the Commission contacted the bank again to ask whether it had refunded the sum deducted in error and whether it was intending to pay interest. On 14 September 2001, the bank replied to the effect that the $\text{€}57$ had been refunded to the complainant's account on 9 January 2001. Lloyds Bank refused, however, to pay any interest. With a view to settling the dispute, the Commission accepts the Ombudsman's solution and, by way of exception, will reimburse the amount due from Lloyds Bank to the complainant, namely $\text{€}6,37$.

In conclusion, the Commission offers the complainant, as compensation for late payment, the sum of $\text{€} 58.23 + \text{€} 6.37$, a total of $\text{€}64.60$.

On 22 October 2001, the Ombudsman forwarded the Commission's reply to the complainant for observations.

In his observations of 6 November 2001, the complainant stated that given the time it had taken for the Commission to produce evidence of the legislation by which it justifies the application of a 90-day payment period, the Ombudsman's proposed friendly solution should be implemented. Second, the complainant's company had not received the amount of $\text{€} 57$. The complainant drew attention to the new bank account that he had referred to in his complaint.

FURTHER INQUIRIES

On 14 November 2002, the Ombudsman wrote to the Commission again, asking it for evidence that the disputed amount of $\text{€} 57$ had in fact been paid into the complainant's account. Such evidence was not included in the Commission's reply to the Ombudsman's proposal for a friendly solution. The Commission was also invited to comment on the complainant's observations.

On 22 January 2002, the Commission submitted the following reply to the Ombudsman's further inquiries.

In regard to the $\text{€}57$ deducted in error by Lloyds Bank, the Commission's investigations had established that the Bank transferred $\text{€}57$ to the complainant's account. The Commission



enclosed a copy of the transfer as evidence. The Commission acknowledged that the complainant had mentioned his company's new bank account in his complaint, but it appeared that the bank details were not forwarded to Lloyds Bank, which transferred the sum to the account specified in the contract between the complainant and CWCI. As this sum was paid, the Commission did not consider any additional late-payment interest to be due.

The Commission reiterated the fact that it has undertaken to pay the interest due from Lloyds Bank with a view to settling the dispute, although the delay on which additional interest is based was in no way caused by the Commission's action.

In regard to the second part of the complainant's opinion, the Commission maintained its previous position.

In conclusion, the Commission regretted the inconvenience suffered by the complainant, but felt that its departments had acted in conformity with the rules or principles binding on them. It therefore confirmed the position adopted previously by its departments.

THE DECISION

1 Preliminary remarks on the Commission's obligations and the Ombudsman's review

1.1 The Commission put forward that although it provided the funds for the courses here concerned, it does not have a direct payment obligation towards the complainant's company.

1.2 The Ombudsman notes that the Commission was involved in the contracts. The South Africa contract was "Endorsed by the Commission of the European Communities", with signatures by Commission officials, and a "Rider No.1", which amongst others changed the contract price, was only signed by the complainant himself and the Acting Director from the European Commission. Furthermore, Article 7 of the contract states that "Payment shall be made in Ecu by the services of the European Commission in Brussels".

1.3 It appears that the Commission did have payment obligations towards the complainant. The Commission has therefore acted correctly by responding to the complainant's allegations and claims in substance.

1.4 As regards the Ombudsman's review in contract related disputes, the Ombudsman draws attention to the information in his Annual Report for 1997:

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. As stated in the Annual Report for 1995, 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. 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.

2 The contract for courses in Guinea-Bissau

2.1 The complainant claimed that the Commission should make whole, or at least part, payment in respect of a training course that GIC Limited was due to deliver in Bissau in June 1998 and that the Commission should also pay interest in respect of the delay in making the payment.

2.2 The Commission considered that it made a valid oral *force majeure* declaration, and has cited a contract clause which provides that payment shall only be made when the courses have been held. The Commission has offered to consider an equitable solution in which real costs incurred in connection with the *force majeure* are reimbursed, subject to the submission of relevant supporting documentation.

2.3 The complainant rejected the Commission's view that it made a valid declaration of *force majeure*. He considered that the Commission never made such declaration. He also considered that even if the Commission had made such declaration orally - as the Commission claims it did - it would be invalid because such declarations have to be in writing. He also claimed that even if the Commission did make a valid declaration of *force majeure*, he nevertheless has a financial claim because his company tried to find alternative places for holding the courses.

2.4 The Ombudsman notes that the Commission has presented no evidence of having made the *force majeure* declaration. Even if the Commission is not obliged to make its original declaration of *force majeure* in writing, it must, as a matter of good administration, either keep a written record of having done so, or send a confirmatory letter to the contractors in question. On the basis of the documents submitted in this case, the Ombudsman does not consider it possible to conclude whether a valid declaration of *force majeure* was in fact made. The issue of whether a *force majeure* declaration should have been made in writing shall therefore not be reviewed in the present inquiry. In regard to the complainant's claim to receive payment, full or in part, the Ombudsman does not consider it practical to review this claim without a reliable finding on the question of whether a valid declaration of *force majeure* was made.

2.5 On the basis of his inquiries into this aspect of the complaint, the Ombudsman concludes that he has not been presented with evidence that the Commission has breached a rule or principle binding upon it, and concludes, therefore, that there appears to be no maladministration by the Commission. It should be noted that the Ombudsman's present review is without prejudice to the Commission's offer to consider an equitable solution in which real costs incurred in connection with the *force majeure* are reimbursed, subject to the submission of relevant supporting documentation.

3 The contract for courses in South Africa



3.1 In regard to the contract with CWCI Fund, the complainant alleged that the Commission was late in making payments in respect of a series of training courses delivered by the complainant's company and that the sum finally paid was €57 less than the amount of the invoice. The complainant also claimed interest in respect of the late payment. The complainant appeared to consider that a 60-day payment period should apply. He also submitted evidence (correspondence with a Commission official) which indicated that the payment had not been made within a satisfactory period of time.

3.2 In its first and second opinion, the Commission failed to provide an adequate account of why it considered that a 90-day payment period should apply, and why the payment period should be calculated from the date of the Commission receiving the invoices. The Ombudsman therefore made an attempt to find a friendly solution, in which he asked the Commission to consider making a payment of interest to the complainant in regard to the contract for courses in South Africa, applying its normal 60-day payment period, and calculate this from the date of the complainant's submission of invoices to the CWCI Fund. The Ombudsman also asked the Commission to take steps to ensure that payment of the missing € 57 was made to the complainant.

3.3 In its response to the Ombudsman's attempt to find a friendly solution, the Commission clarified the relevant legal framework in regard to the payment period, referring to Article 5.4 of Title II "Conclusion of Contracts" of the financial agreement between the Government of South Africa and the Commission for the CWCI project (ref. SA/7012/000), which states that the *General Conditions for service contracts financed by the European Development Fund* shall apply, and these provide for a 90-day payment period. The Commission nevertheless felt that the contract should in the interest of clarity have stipulated the payment period applicable as provided for in the *General Conditions*. To avoid this type of confusion in the future, the Commission will endeavour to improve the contract documents used for projects by drafting standard contracts for all its programmes.

3.4 Concerning the registration date of the invoice, the Commission accepted the Ombudsman's proposal, which consisted in regarding the date of registration with the CWCI Fund as the date of registration of the payment request. On this basis, the Commission will pay the complainant interest for late payment.

3.5 In light of the above submissions and facts, the Ombudsman considers that the Commission has provided a coherent account of its legal position in regard to the payment period. The Ombudsman also welcomes the Commission's changed position in regard to the registration date of the payment request. On this basis, it appears that there is no maladministration in regard to these aspects of the complaint.

3.6 In regard to the missing € 57, the Commission submitted written evidence that Lloyds Bank had refunded, on 9 January 2001, € 57 to the bank account agreed in the complainant's contract. Lloyds Bank refused, however, to pay any interest. With a view to settling the dispute, the Commission accepted the Ombudsman's proposal and, by way of exception, would reimburse the amount due from Lloyds Bank to the complainant, namely €6, 37. The



Commission also acknowledged that the complainant had mentioned his company's new bank account in his complaint, but stated that this information did not appear to have been forwarded to Lloyds Bank, which transferred the sum to the account specified in the contract between the complainant and CWCI. As this sum was paid, the Commission considered that its departments had acted in conformity with the rules or principles binding upon them. It therefore confirmed the position adopted previously by its departments.

3.7 It appears from the above facts that the Commission took steps to procure the payment of the missing $\text{¤} 57$, and that the Commission will pay interest for the late payment. The $\text{¤} 57$ were, however, not paid to the new bank account that the complainant mentioned in his complaint to the Ombudsman. This, it appears, is what has led the complainant to conclude that his company had not been paid the $\text{¤} 57$. It appears reasonable that the complainant, if needed, takes the necessary steps to get the money in question from his company's old bank account.

3.8 In light of the above facts, the Ombudsman considers that the Commission has taken a reasonable position and acted with adequate diligence in addressing the question of the mistakenly deducted $\text{¤} 57$, and the Commission has therefore acted in accordance with the rules and principles that are binding upon it. On that basis, the Ombudsman concludes that there appears to be no maladministration on the part of the Commission.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to be no maladministration by the European Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN

(1) See the Commission's opinion in Decision of the European Ombudsman in the own-initiative inquiry OI/5/99/(IJH)/GG relating to the European Commission, <http://www.ombudsman.europa.eu/decision/en/99oi5.htm> [Link]

(2) 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, p. 15.