

Decision of the European Ombudsman on complaint 543/2000/JMA against the European Commission

Decision

Case 543/2000/JMA - Opened on 27/06/2000 - Decision on 16/07/2001

Strasbourg, 16 July 2001

Dear Mr D.,

On 17 April 2000, you lodged a complaint with the European Ombudsman against the European Commission, on behalf of your colleague, Professor Mainardi. Your complaint concerned the financial loss suffered by Professor Mainardi, as a result of the Commission's alleged lack of due diligence in its evaluation of a Community financed project he had undertaken (ALR/B7/3011/94.04/2.382.8).

On 27 June 2000, I forwarded the complaint to the President of the European Commission. I received the Commission's opinion on 10 November 2000. I forwarded it to you with an invitation to make observations. On 31 December 2000, I received your observations. On 17 January 2001, I wrote to the President of the European Commission in order to seek some additional information. The Commission sent its reply on 20 March 2001, and I forwarded it to you for possible observations. On 5 June 2001, you sent your observations to me.

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

THE COMPLAINT

According to the complainant, the facts were as follows:

The complainant set up a " *European-Latin American network on Physics in Medicine* " (RELAFEM), in a joint venture with Professor Mainardi from the National University of Cordoba, Argentina, and other researchers from Italy, Mexico and Wales (UK). The establishment of the network was financially supported by the Commission, with a contribution of \approx 10.000, through its ALFA programme (project ALR/B7/3011/94.04/2.382.8). In order to have some exchanges among the network's participants, two meetings were held in Europe and Latin America respectively, in 1997 and 1998. Dr Mainardi acted as the co-ordinator of the network. In this role he had to advance part of the funding for the two preparatory meetings.



The work was completed in July 1998. At that time, the network submitted the necessary technical and financial reports to the Commission. The payments of the Community's contribution, however, encountered serious problems. The complainant thus made the following allegations:

- (1) The Commission took a position on the final technical and financial reports in April 1999, even though these documents had been sent by the complainant in July 1998. As a result of this nine-month delay, the complainant suffered important losses due to the devaluation of the Euro (₣) during this period. The complainant also had to bear the fees charged by the Bank for the transfers, as well as other additional administrative charges which the Commission refused to factor in as costs of the project.
- (2) In its final payment, the Commission disregarded the sharp rise in the price of air tickets which forced the complainants to reduce the number of trips. The institution decided to pay only for the actual number of trips made, and at the price at which they had been calculated in the original project.

The complainant therefore claimed that the Commission should fully pay for the above items.

THE INQUIRY

The Commission's opinion

The Commission indicated that it had approved the final report of the project (contract ALFA, n° ALR/B7-3011/94.04-2.0382.8), having found that the expected results had been obtained. It added that its services had re-analysed the expenses claimed by the complainant, and concluded that they could be eligible under the application of the flexibility clause which applies to grant contracts.

Although the amounts claimed by the complainant differed from those presented in the initial budget, the Commission considered that the total amount claimed was less than the approved grant. It explained that the contract did not permit the beneficiary to carry out changes in the items of the approved budget. Thus, the changes made by the complainant without the Commission's approval could not be considered eligible under the grant contract. Since the total costs of the contract had not been changed, the Commission agreed to the requested amount on the basis of the explanations given by the complainant and the positive results achieved.

The Commission pointed out that a final supplementary payment of ₣ 1.410,45 would be forwarded to the complainant.

The complainant's observations

The complainant expressed in his observations his gratitude for the successful intervention of the Ombudsman, and underlined the relevance of the Ombudsman's inquiry in clearing out possible misunderstandings with his Latin American colleagues on the Community support for scientific research.



However, he stated that there were two remaining aspects which the Commission had not addressed in its opinion. They were the reimbursement of transfer costs charged to him by the banks, and the depreciation value of the Euro from the time he submitted the final report until the Commission's approval (-29 %).

FURTHER INQUIRIES

The Ombudsman wrote to the Commission on 17 January 2000, requesting further information as regards the two aspects of the problem which, in view of the complainant, had not been addressed in the institution's opinion.

The Commission's second opinion

The Commission first set out the general background of the case. It explained that the project had been financed by the Commission within the framework of the ALFA programme. Its total budget was € 18,000, of which € 10,000 corresponded to the Commission's participation and € 8,000 to the financial contribution of the network.

The Commission then justified the position taken in its first opinion of 10 November 2000. It explained that following the reconsideration of the eligibility of certain expenditures, its services accepted to exceptionally pay a supplementary amount of € 1,410.45 in application of the flexibility clause; and as a friendly settlement. The complainant should therefore be receiving an amount of € 9,950.45 out of the € 10,000.00 initially foreseen in the grant contract. The Commission indicated that it had adopted a more flexible approach instead of merely considering the claim on belated payment which concerned a total sum of € 19.30 (1) .

The Commission stressed that this supplementary payment was exceptional. It justified it on the grounds of the personal involvement of Dr Mainardi in the implementation of the project, and further to the results obtained.

As regards the complainant's request for the reimbursement of transfer costs charged to him by the banks, and for the depreciation value of the Euro (-29 %), the Commission considered that they were unfounded. These allegations were not based on the terms of the contract. Thus, Art. 18 indicates that any additional expense or cost could not be accepted unless a rider had been signed within the same terms of the contract and before the contract's expiring date. The items claimed by the complainant had not been foreseen in the contract. As regards currency depreciation, the Commission referred to the "Vade-mecum on grant management" which stipulates in its Art. 5. 14(6) that "exchange losses, unless specifically provided for by way of exception" cannot be considered (annex 2).

The complainant's observations on the Commission's second opinion

The complainant expressed his satisfaction for the flexibility with which the Commission had handled the problem.

However, he underlined the extra costs caused by the bank transfers. He further explained that unless they were clearly reflected in the contract, consultants would be induced to hide them under other contractual items. The complainant referred to the practice followed by other



international organizations which take unexpected currency fluctuations into account, in order not to penalize recipients of contractual payments.

THE DECISION

1 Additional payments requested by the complainant

1.1 The complainant claimed full payment for the work undertaken in connection with a project (contract ALFA, n° ALR/B7-3011/94.04-2.0382.8) financed by the Commission. In his view, the amount paid by the Commission had not included a number of items, in particular,

(i) losses resulting from the depreciation of the Euro (₣) during the nine -month period which it took the Commission to review the final reports, as well as fees charged by the banks for money transfers;

(ii) sharp rises in the price of air tickets which forced the complainant to reduce the number of trips. The institution decided to pay only for the actual number of trips made, and at the price at which they had been calculated in the original project.

1.2 The Commission proposed a friendly settlement of the problem, consisting in a final supplementary payment of ₣ 1.410,45, which would entitle the complainant to obtain almost the total amount initially foreseen in the grant contract. In the view of the institution, this settlement would be more advantageous for the complainant than compensation based on a claim of belated payment, which would involve a total sum of ₣ 19.30. The institution explained that this offer had been made on an exceptional basis, in view of the efforts and the personal involvement of Dr Mainardi in the implementation of the project and further to the results obtained.

The Commission added that it was under no obligation to pay for some of the additional requests from the complainant, such as bank transfer fees or currency fluctuations, since these items had not been foreseen in the contract.

1.3 The complainant expressed his satisfaction for the positive outcome and his gratitude for the successful intervention of the Ombudsman. He underlined the relevance of the Ombudsman's inquiry in clearing out possible misunderstandings with his Latin American colleagues.

He expressed concern at the Commission's refusal to cover certain additional costs such as Bank transfer fees or currency fluctuations, as it seems to be the practice of other international organisations.

1.4 The Ombudsman notes that, following his inquiry, the Commission has proposed a friendly settlement which appears to be reasonable. The complainant has pointed out that the Commission should have also borne some particular costs, such as Bank transfer fees or those derived from the devaluation of the Euro (₣).

1.5 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 (2) . Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

1.6 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. 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 disputed issues of fact.

1.7 The Ombudsman therefore takes the view that in 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 reasonable 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 his 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.

1.8 In order to determine whether the position taken by the Commission in the present case has been reasonable, it is first necessary to consider the relevant provisions of the contract.

As regards the potential consideration of certain extra-costs such as Bank charges, Art. 6 § 2 indicates that "*prices [set in the contract] are fix and cannot be revised*".

Art. 7 §. 4 states that "*[t]he use of unforeseen amounts shall be done in writing [x], and will only be paid with previous approval by the Commission*". In a similar vein, Art. 18 foresees that "*[a]ny additional expense or cost could not be accepted unless a rider had been signed within the same terms of the contract and before the contract's expiring date*". This clause has also been included verbatim in Annex B of the contract (Financial Provisions).

As for the applicable rates of exchange, Art. 9 § 4 points out that "*For currency conversion into ECU, the applicable exchange rate will be the one published in the annex to the Official Journal of the European Communities corresponding to the day after the tenth day of the month in which the expenditure was made*".

1.9 The Ombudsman considers that the position taken by the Commission in relation to the payment of both bank charges, as well as losses due to currency depreciation, does not appear to be unreasonable. Thus, the Ombudsman has concluded that the inquiry has not revealed an instance of maladministration as regards this aspect of the case.

2. Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, there appears to



have been 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) The Commission indicated that *"the amount of ₣ 19,30 is the result of the calculations applicable regarding interest on belated payments and considering the delay of 236 days (reception of the financial report: 16.7.1998; payment "bank value date" 10.5.1999, regarding the 60 days of payment delay dating from September 1998 as far as the payment of the accepted amount of ₣ 540)"*.

(2) See Annual Report 1997, pages 22 et ss.