

Decision of the European Ombudsman on complaint 634/2000/JMA against the European Commission

Decision

Case 634/2000/JMA - Opened on 22/06/2000 - Decision on 26/09/2001

Strasbourg, 26 September 2001

Dear Mr X,

On 11 May 2000, you lodged a complaint with the European Ombudsman, concerning alleged irregularities in relation to the development of PHARE project.

On 22 June 2000, I forwarded the complaint to the President of the European Commission. I received the Commission's opinion on 25 August 2000, which I forwarded to you with an invitation to make observations. On 20 October 2000, I received your observations. On 19 January 2001, you contacted my services by fax and also by telephone requesting information on any developments concerning your complaint. On 18 July 2001, I informed you that the Ombudsman expected to make a decision on your case shortly. I apologise for the length of time it has taken to deal with your complaint.

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

THE COMPLAINT

The complainant is a management consultant who, between 1997 and 1998, took part in the development of a PHARE project. He worked as a consultant for a consortium, which acted as a PHARE contractor. The tasks assigned to him consisted in the preparation of study tours and the organisation of short-term workshops.

At the end of March 1998, the complainant submitted his timesheet for the PHARE-related work performed during that month. The consortium's team leader, however, refused to endorse it, and as a result, the complainant received no payment for some of the tasks he had allegedly performed for PHARE-related work. In the complainant's view, this situation was a consequence of his refusal to agree to pay a bribe to a senior staff member of the Project Management Unit (PMU). He explained that at the end of March 1998, and during his work at the PMU, he was summoned to the offices of the Director, and was asked to agree to pay \$ 3.000 as a condition for undertaking one of the project's activities.



As the consortium refused to acknowledge part of his work, the complainant wrote to the Commission, asking it to recognize that the work reflected in his March 1998 timesheet fell within the programme's objectives. He also suggested that some anti-corruption clauses be inserted in future contracts. Following a number of written exchanges with the Commission services, the responsible Director in the DG Enlargement and responsible for the implementation of the PHARE programme, concluded in a letter to the complainant dated 27 January 2000 that the Commission was not in a position to judge whether all the work in dispute was actually related to the PHARE strategic management programme.

In February 2000, the complainant replied to the Commission, alleging that some of the documents produced as a result of the project proved that his March 1998 timesheet was fully in line with PHARE's mission and objectives. There was no further reply from the Commission. The complainant considered that the Commission's position undermined his attempts to seek redress from the consortium.

In his complaint to the Ombudsman, the complainant considered that the Commission should have intervened in the situation, in order to ensure that the timesheets submitted by the consortium contained no false statements. He pointed out that his approaches to the consortium had failed. The complainant also asked the Commission to formally acknowledge that the work mentioned in his March 1998 timesheet was related to the aims of the PHARE programme. The activities, for which he had not been paid yet, consisted in the planning and organization of a mission in 1998, as requested by the project management; as well as the production of a programme document.

Since his claims of corruption of PHARE senior management had apparently been disregarded, he also wished to know why the Commission, first, did not act upon his proposal to introduce anti-corruption clauses into future contracts; and secondly, reconfirmed the PMU Director despite allegations of illegal bribing.

In summary, the complainant made the following allegations in his complaint to the Ombudsman: (i) part of his work for this project has not been paid, and (ii) his claims of fraud to the Commission concerning the management of the project had not been properly investigated by the institution.

THE INQUIRY

The Commission's opinion

The Commission first offered a general overview of the situation, and then referred to the specific allegations made by the complainant.

Background information

The institution explained that the complainant worked as a consultant in a consortium, which provided technical assistance for a PHARE project. The contract had been established between: the Government of the assisted country and a consortium of several organizations.



Following allegations of fraud and mismanagement against the programme's PMU made by both by the complainant, and also by Mr. Y, a former Team Leader, the Commission decided in December 1998 to suspend the programme, and to order an independent audit to assess the allegations.

An independent accountancy firm carried out the audit, the results of which became available at the end of October 1999. It concluded that most of the allegations, and all of those related to fraud, had no grounds. Some management and financial recommendations were made, which the PMU and the contractor agreed to implement. At the end of this process and in the light of its results, the programme activities were resumed.

In March 2000, an independent consortium which assesses European Union PHARE programmes prepared an annual assessment report on the programme. As regards the overall achievement rating of the programme objectives, the assessment considered it "highly satisfactory".

The individual allegations made by the complainant had been specifically considered in the audit. As for the activities the complainant had reflected in his March 1998 timesheet, the audit concluded that they fell outside the direct scope of PHARE. The Commission explained, however, that these activities were different from the complainant's preparatory work related to the strategic management mission which, on the contrary, was an activity part of the PHARE programme. The Commission confirmed by letter of 27 January 2000 that this strategic management mission was an activity funded by PHARE. As regards the complainant's allegations of bribes and fraud, the report considered that they were unfounded.

The Commission also referred to some of the findings included in the audit and which related to tasks undertaken by the complainant without a contract. On the basis of these findings, his relationship with the consortium had to be redefined. Although the consortium had agreed to have him on a temporary contract, PMU decided not to continue its links with the complainant.

Specific allegations made by the complainant

As regards the first allegation made by the complainant concerning the disputed timesheet, the Commission underlined that the controversy had arisen between a consultant and a contractor in the framework of a PHARE programme, and the Commission could not interfere in such contractual disputes. The institution explained that the timesheet prepared by the complainant for the period March-April 1998 described two basic activities: (i) preparatory work carried out for a strategic management mission, and (ii) other tasks related to workshops and a seminar. As requested by the complainant, the Commission had confirmed by letter of January 2000 that the strategic management mission, was in fact an activity funded by PHARE.

The Commission explained that it had been informed by the consortium that there was an internal sub-contracting agreement governing the consortium members whereby only the delivery of the courses would be paid, thus excluding preparatory work. On the basis of these explanations, the Commission had concluded that the refusal by the consortium to pay preparatory tasks constituted a contractual dispute internal to the members of the consortium, in which the institution had no role to play.



The Commission pointed out that responsibility for payments under this PHARE programme rested with the national authorities, not with the European Commission. Its services, however, requested further information on the timesheet issue, to ensure that only activities pertaining to PHARE had been submitted, and that some coherence was maintained among the timesheets submitted by the different consultants.

As for the allegations of fraud, the Commission explained first, that following the complainant's letter of March 1999 recommending the inclusion of anti-corruption clauses in new PHARE contracts, the suggestion had been brought to the attention of the services responsible for PHARE financial management (SCR). Moreover, the institution explained that it intended to enact new rules on contract procedures as part of a new manual for a "Decentralized Implementation System", and to introduce an ethics clause in the future contracts.

In the light of the findings of the audit which concluded that the allegations against the PMU were unfounded, the programme activities were resumed under the same PMU management. The Commission pointed out that PMUs are an integral part of the national administration and the Commission has no role in appointing or reconfirming national officials.

The complainant's observations

The complainant replied in detail to the statements made by the Commission, restating his position as regards the work performed in March 1998 for the PHARE programme, as well as his allegations concerning the illegal demands made by the programme's PMU. He enclosed with his observations a number of documents as supporting evidence for which he asked for confidentiality.

The complainant stressed that, as pointed out by the Commission, the question of non-payment for preparatory work was an issue to be settled between contractor and consultant. However, he insisted on the fact that the institution should have known of the tasks to be performed in the context of the PHARE programme, and thus whether timesheets submitted reflected actual PHARE work, or had been unduly altered. He explained that the work pattern had always been similar and that preparatory work was an integral part of it.

As regards the question of fraud, he indicated that the Commission's readiness to include anti-fraud clauses in future contracts was to be welcomed, as an effective deterrent to illegal practices. However, he insisted on his claims of fraud against PMU management, considering that the audit, which had been used to set aside his allegations, amounted to a whitewash. In his view, the auditor had chosen to accept the story put forward by the PMU without examining the relevant project documents, and without seeking additional information from the two complainants. He concluded that the fact that two separate experts had submitted independent complaints should have added weight to their allegations of improper behaviour.

THE DECISION

1 Acknowledgement and payment of part of the complainant's work

1.1 The complainant alleges that a PHARE contractor (the consortium), has not pay for part of



the PHARE-related work included in his March 1998 timesheet. Since his approaches to the contractor failed, he argues that the Commission should have intervened in order to ensure that the timesheets submitted by the contractor contained no false statements. He also asked the Commission to formally acknowledge that the work mentioned in the timesheet was related to the aims of the PHARE programme.

1.2 The Commission underlines that the problem constituted a contractual dispute between a PHARE contractor and one of its consultants, and that the institution does not have any role to play in this type of situation. Payment for the disputed work is, in the view of the Commission, an internal issue to be solved among the members of the consortium which acted as a contractor for the PHARE programme. It points out that responsibility for payments under this decentralized contract rest with the national authorities.

Furthermore, the institution explains that in reply of January 2000 to a query from the complainant, its services confirmed that some of the activities in dispute, namely the strategic management mission, were in fact an activity funded by PHARE.

1.3 In order to determine first whether the Commission was under a duty to intervene to ensure that the programme's timesheets contained no false statements, it is necessary to consider the scope of the institution's powers and obligations in the context of a contract funded through the PHARE programme.

1.4 Under the basic regulation for the PHARE Programme (1) , aid is granted by the Community either independently or in the form of co-financing. This financial assistance is funded by the Communities' general budget in accordance with the Financial Regulation, as amended, in particular, by Regulation 610/90 (2) . As set out in its Arts. 107, 108 §2 and 109 § 2, as interpreted by the Community courts, contracts financed by the PHARE programme must be regarded as national contracts, which are binding only on the beneficiary country and the economic operator (3) . The Commission, on the other hand, is responsible for the funding of the projects, and has therefore to ensure that the resources devoted to PHARE projects are economically managed.

1.5 The situation denounced by the complainant arises from a dispute in the framework of a work relation between a PHARE contractor and his consultant or subcontractor. This type of situations, by their own nature, are not likely to affect the general funding of the PHARE programme or the economic management of PHARE related measures, and therefore can seldom trigger the Commission's intervention.

As the relationship between the PHARE contractor, the consortium, and the complainant was set up on the basis of a mutually agreed contract, any dispute on the rights and obligations of the parties should be determined on the basis of contractual rules.

1.6 The complainant believes that, despite the contractual nature of the dispute, the Commission should have intervened. The Ombudsman notes that there is no obligation for the Commission to mediate in a contractual dispute among partners in a PHARE-related contract.



Nevertheless, the Commission intervened by requesting additional information from the contractor. The basis for this action was explained on the need to ensure that only activities pertaining to PHARE had been included and that some coherence was maintained among the timesheets submitted by the different consultants. Having reviewed these materials, the Commission did not seem to identify any element which could have questioned their contents. The Ombudsman notes that, in order to establish its position, the Commission has taken stock of the findings made in the audit carried out by an independent accountancy firm, which reached a similar conclusion.

1.7 The complainant also requests that the Commission formally acknowledges that the tasks included in his March 1998 timesheet were related to the aims of the PHARE project.

The Ombudsman notes that following the request from the complainant, the Commission confirmed by letter of its services of January 2000 that some of the activities referred to in the complainant's timesheet were in fact activities funded by PHARE. As regards whether or not some preparatory work should have been included and therefore paid for, the Commission was informed by the consortium that the contractor had agreed with its consultants not to take into account preparatory work. On that basis, the Commission took the view that the disputed task was an internal issue between the contractor and its consultant, and that it thus ought to be settled between the parties.

1.8 Taking into consideration the nature of the PHARE-related contract and the parties and issues in dispute, the Ombudsman considers that the position taken by the Commission in relation to the unsettled tasks and their payment, as well as the information requested by the complainant concerning these issues, does not appear to be unreasonable. Thus, the Ombudsman concludes that the inquiry did not reveal an instance of maladministration as regards this aspect of the case.

2. Investigation of the claims of fraud made by the complainant

2.1 The complainant alleges that his claims of fraud to the Commission concerning the management of the PHARE programme were not been properly investigated by the institution. He considers that the audit of the PHARE programme prepared in response was a whitewash, since the auditor which had been charged with its preparation accepted the story put forward by the PMU without contrasting it. A lengthy confidential documentation was submitted with the complainant's observations in order to prove his allegations of fraud.

The complainant also suggests that the Commission should introduce anti-corruption clauses into future PHARE contracts.

2.2 The Commission explains that following these allegations of fraud and mismanagement against the programme's PMU, it decided to request an independent audit from a chartered accountancy firm. The audit, which was made public at the end of October 1999, concluded that most of the allegations, and all of those related to fraud, had no grounds.

The institution also indicated that it intended to enact new rules on contract procedures as part of a new manual for its "Decentralized Implementation System", and to introduce an ethics



clause in future contracts.

2.3 As regards the last one of these issues, the Ombudsman notes that in response to the suggestion made by the complainant, the Commission has undertaken to insert an ethics clause in future PHARE contracts. The complainant has welcomed this initiative which, in his view, should act as a deterrent to illegal practices. The Ombudsman underlines that in December 2000, the Commission made public its Practical Guide to PHARE, Ispa and Sapard contract procedures, which included an Ethics clause (4) in point 2.4.11. The special guarantees included in that clause should have been applicable to any PHARE contract as from 1 January 2001.

From the above information, the Ombudsman notes that the Commission followed the suggestion made by the complainant.

2.4 In connection with the specific allegations of fraud made by the complainant, the Ombudsman notes that the Commission did not remain inactive in response to these allegations. Soon after the claims had been made, the institution took steps to have the programme assessed, and commissioned an audit from an independent accountancy firm. The audit specifically reviewed the claims of fraud, and concluded that the programme's management had committed no wrongdoing.

The Ombudsman considers that, in the light of the audit findings and the other information available to it, the Commission was entitled to consider that no further action was needed at that stage. The inquiry has therefore not revealed any maladministration by the Commission in relation to this aspect of the complaint.

2.5 Subsequent to the audit and to the Commission's opinion in this case, the complainant has submitted to the Ombudsman documents which contain additional evidence in support of his allegations against staff of the Project Management Unit. The complainant does not appear to have submitted these documents to the Commission and asked the Ombudsman to treat them as confidential.

2.6 The Project Management Unit (PMU) is not a Community institution or body but part of the national administration. The European Ombudsman is competent to deal only with maladministration in the activities of Community institutions and bodies. He is not therefore competent to deal with allegations concerning the national administration.

Since the complainant has given his agreement to any potential transfer, the Ombudsman decides, in view of the nature of the new information, to transmit that evidence to the European Anti-Fraud Office (OLAF). OLAF should decide whether further action is required, and will inform the complainant of any new development.

3. 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) Council Regulation (EEC) No 3906/89 of 18.12.1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ 1989 L 375, p.11), as amended, by Council Regulations (EEC) No 2698/90 of 17.09.1990 (OJ 1990 L 257, p. 1), No 3800/91 of 23.12.1991 (OJ 1991 L 357, p. 10), No 2334/92 of 7.08.1992 (OJ 1992 L 227, p. 1), No 1764/93 of 30.06.1993 (OJ 1993 L 162, p. 1), No 1366/95 of 12.06.1995 (OJ 1995 L 133, p. 1), No 463/96 of 11.03.1996 (OJ 1996 L 65, p. 3) and No 753/96 of 22.04.1996 (OJ 1996 L 103, p. 5).

(2) Financial Regulation of 2.12.1977 applicable to the general budget of the European Communities (OJ L 356, 31.12.1977, p.1), as amended by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13.03.1990 (OJ L 70, 16.3.1990, p.1).

(3) Case T-231/97 *New Europe Consulting V. Commission* [1999] ECR II-2403, par. 32; case T-185/94 *Geotronics v Commission* [1995] ECR II-2795, par. 31; case C-395/95 P *Geotronics v Commission* [1997] ECR I-2271, par. 12.

(4) One of the most relevant paragraphs in this section reads as follows: *"The European Commission reserves the right to suspend or cancel project financing if corrupt practices of any kind are discovered at any stage of the award process or during the implementation of a contract and if the Contracting Authority fails to take all the appropriate measures to remedy the situation. For the purpose of this provision, "corrupt practices" are the offer of a bribe, gift, gratuity or commission to any person as an inducement or reward for performing or refraining from any act relating to the award of a contract or implementation of a contract already concluded with the Contracting Authority"* .