

Decision of the European Ombudsman on complaint 1351/2000/(ADB)IJH against the European Commission

Decision

Case 1351/2000/IJH - Opened on 24/11/2000 - Recommendation on 04/12/2001 - Decision on 25/11/2002

Strasbourg, 25 November 2002

Dear Mr R.,

On 22 October 2000, you made a complaint to the European Ombudsman against the Commission concerning the payment of EU funds under the JOP Facility 2 programme.

On 24 November 2000, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 26 February 2001. I forwarded it to you with an invitation to make observations, which I received from you on 30 April 2001. On 15 May 2001, I asked the Commission for additional information and the Commission replied on 17 July 2002. I forwarded the Commission's reply to you with an invitation to make observations, which I received from you on 22 August 2001.

On 4 December 2001, I addressed draft recommendations to the Commission and on the same day I informed you of this action by letter.

On 13 February 2002, the Commission sent its detailed opinion on the draft recommendation. On 7 March 2002, I forwarded the detailed opinion to you with an invitation to make observations, which I received from you on 18 April 2002. On 17 October 2002, I wrote to inform you that the handling of your file had been transferred to a different legal officer.

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

I apologise for the length of time which it has taken to deal with your complaint.

THE COMPLAINT

The complainant, who is the executive director of GERE, a company registered in Luxembourg, complained to the Ombudsman in October 2000.



In summary, the complaint was as follows:

GERE applied for EU funds under the JOP Facility 2 programme. As required by the application procedure, the request was made through a Financial Intermediary (FI). The Commission accepted the project in October 1998. In August 1999, supporting documents were forwarded to the Commission through the FI, and GERE expected to be paid within 60 days. The Commission, again through the FI, requested further information on several occasions. It seems that none of the information provided satisfied the Commission and it therefore decided to carry out an audit on the company. This was done on 13 June 2000. By the end of October 2000, GERE had not been paid and despite several contacts with the Commission, it was neither informed of the outcome of the audit, nor had a ledger (*grand livre*) that the Commission took during the audit been returned to GERE.

In the complaint to the Ombudsman, the complainant made the following points:

1. The contractual situation of companies applying for JOP funds vis-à-vis the Commission is unclear. GERE never signed a contract with the Commission, but the Commission imposes obligations on GERE.
2. The way information is circulated is counterproductive. The relations between GERE and the Commission were mostly conducted through the FI. It is therefore unclear whether the complainant was asked to provide the information that the Commission really needed.
3. The Commission should have limited its audit of GERE to elements linked to the funded project, without checking the company's whole business accounting.
4. GERE was never informed of the results of the audit.
5. The Commission refused to return the ledger that it took for the purposes of the audit.

The complainant claims payment of the funds due and the return of the ledger.

THE INQUIRY

The Commission's opinion

The Commission's opinion on the complaint was, in summary, as follows:

1. The Commission and the FI signed a Framework Agreement (FA) on 18 January 1996. For each project, a Specific Agreement (SA) is signed between the Commission and the FI. The latter, in turn, signs a Financing Agreement (FinA) with the beneficiary of the funds. In GERE's case, the SA and FinA were both signed on 26 October 1998. The FinA specifically referred to the FA and the SA, which both contain provisions creating obligations of the beneficiary towards the Commission. The complainant could not therefore claim to be unaware of the situation and of his obligations towards the Commission.



2. In principle, all contacts with beneficiaries go through the FI. The Commission does not consider this as counterproductive. On the contrary, this arrangement offers potential beneficiaries throughout Europe the possibility to benefit from the assistance of experienced professionals. In the present case, the problems seem to originate in the relations between the FI and the complainant.

3. The FinA refers to provisions of the FA and SA which entitle the Commission to carry out "any and all controls.". The controls carried out were intended to check GERE's eligibility for financing and the funded action itself. This required access to all the company's files.

4. On 13 June 2000, the Commission's auditors informed GERE of their provisional conclusions. However, GERE was asked to provide additional supporting documents before finalisation of the audit. One of the declarations sent by the complainant's lawyer on 16 August 2000 was unsatisfactory. Since then, the Commission has been trying to obtain an adequate document from the person who issued the declaration. The complainant never complied with its obligations, the adequate supporting documents were never provided and could not, therefore, be approved. Consequently, the funds could not be paid.

5. The ledger in possession of the Commission is dated 13 June 2000, the day of the audit, and was printed by GERE's bookkeeper at the request of the auditors. GERE transmitted its accounts for the year 1999 to its accountant on 13 April 2000; therefore, the original ledger had necessarily been prepared before that date. Finally, the Commission had offered the complainant's lawyer the possibility to inspect the documents that the Commission holds. This invitation was never taken up.

The complainant's observations

In summary, the complainant's observations on the Commission's opinion were as follows:

1. Despite GERE's requests, the FI never provided it with copies of the FA and SA, nor allowed it to consult the originals. Although these documents are mentioned as annexes to the FinA, GERE never saw them. The Commission was informed of this situation. However, GERE accepts its own responsibility on this point.

2. This kind of contract with references to other contracts involving third parties is confusing. Contrary to the Commission's expectations, the complainant does not consider the FI in question to be a highly-qualified professional. GERE would have hoped for better monitoring of the file and considers that the Commission should monitor the activities of Financial Intermediaries.

3. GERE was never opposed to an audit. However, the technical and financial reports were provided on 5 August 1999. Since then, GERE has never received any written comment or payment from the Commission. It would have been good administrative practice for the Commission to ask for additional information in writing, either directly or through the FI. In fact, GERE was asked for information orally and on several isolated occasions. Moreover, these requests were made only when GERE queried the progress of the file.



4. GERE did not receive any written conclusions or provisional conclusions of the audit. Although GERE repeatedly asked the Commission for the results of the audit and the payment of the funds, the complainant is still unaware of the Commission's reasons for not finalising the audit.

5. The complainant considers that it is not up to the Commission to decide whether the document that was provided is an original or not. In fact, each time the ledger is printed, the cost of doing so is invoiced to GERE. Each company established in Luxembourg has to keep a ledger on its premises. The Commission's refusal to return the ledger costs GERE at least EUR 100.

Finally, the complainant expressed regret that all the consequences of the flaws in this project are to be borne by the weakest party, i.e. GERE. Although GERE was not informed of all the terms of the contract, it never refused to collaborate.

Further inquiries

On 2 May 2001, the complainant informed the Ombudsman of a fax sent to GERE by the Joint Research Centre (JRC) of the European Commission in Ispra informing him that payment due for another project was blocked because GERE appeared on "*the black list of the EU*."

Further inquiries appeared necessary to clarify this new element. The Ombudsman therefore asked the Commission to inform him whether the Commission had blocked payments to GERE under undisputed contracts. Furthermore, the Ombudsman requested information about the operation of the black-list mentioned in the fax from the JRC.

In reply, the Commission expressed its regret at the wording used by one of its officials in referring to its internal Early Warning System (EWS), which was set up at the request of the European Parliament. The EWS aims at identifying beneficiaries of Community funds who have committed administrative errors or frauds. The EWS does not prevent a payment; it only makes it more difficult and requests further checking by the responsible services. GERE had been included in the EWS because of the questions concerning the company. The Commission expressed regret for the delays that occurred in making payment in relation to an undisputed project. In July 2001, the Commission had apologised to GERE for the delay and paid the amounts owed for the undisputed project as well as interest in respect of the delay.

In observations on the Commission's reply, the complainant stated that GERE had never been informed of any fraud or administrative error that could justify its inclusion in the EWS. According to the complainant, Commission officials commonly refer to the EWS as a black-list and its effect is to block payments. Furthermore, a company that is included in the EWS should be informed of that fact in writing.

THE DRAFT RECOMMENDATIONS

On the basis of his inquiry, the Ombudsman made the following provisional findings:



- From the documents at hand, the Commission does not appear to have made the complainant aware of the documents he is supposed to provide in order not to delay the Commission's decision as regards the payment of the funds.
- The Commission has not provided the Ombudsman with a reasonable explanation for its refusal to continue its work on a photocopy of the ledger and to return to GERE the original document printed on 13 June 2000.

The Ombudsman therefore addressed the following draft recommendations to the Commission on 4 December 2001:

The Commission should inform the complainant in writing of the documents he is supposed to provide to enable the Commission to make a decision on the payment within a reasonable time limit. Furthermore, the Commission should return to the complainant GERE's ledger for 1999 printed on 13 June 2000.

The Commission's detailed opinion

In its detailed opinion, the Commission gave, in summary, the following reasons for not accepting the Ombudsman's draft recommendations:

As regards the alleged failure to inform the complainant in writing of the documents he was supposed to provide.

In reply to the Commission's letter of 7 February 2001, the complainant provided the Commission with a declaration by a sub-contracting consultant. However, this document does not comply with the precise request made by the Commission on 11 July 2000 and repeated on 7 February 2001 for a signed declaration of the amount paid to a named sub-contracting consultant for his contribution to a feasibility study. The declaration should be counter-signed by the statutory auditor.

Instead, the complainant provided:

- a vague declaration which neither mentioned the name of the sub-consultant, nor the amount paid and which did not bear the signature of the statutory auditor.
- a declaration signed by the sub-contracting consultant which neither mentions the company making the payment, nor the date of receipt of the payment. Furthermore, it took the complainant five months to provide this declaration.

The Commission takes the view that the complainant was repeatedly informed of the documents he was supposed to provide. This was done orally during the audit on 13 June 2000 and in writing by two letters dated 11 July 2000 and 7 February 2001.

In view of new elements available since the Commission's opinion to the Ombudsman of 26 February 2001, the Commission takes the view that it cannot take a positive position on the payment. The Commission will only take a decision on this issue after completion of the ongoing inquiry about this file.

Regarding the return of the ledger



Since the date of the Commission's opinion to the Ombudsman of 26 February 2001, the Commission has discovered new elements which reveal possible irregularities. The ledger is an important element in an ongoing inquiry into the possible irregularities.

The complainant's observations

The complainant takes the view that the Commission set up new requirements for information that had already been provided in a different form. The complainant had provided both a declaration that money had been paid by the named sub-contracting consultant as well as a declaration by the sub-contracting consultant that he had received money.

THE DECISION

1 The contractual situation of GERE vis-à-vis the Commission

1.1 The complainant argued that the contractual situation of companies applying for JOP funds vis-à-vis the Commission is unclear. GERE never signed a contract with the Commission, but the Commission imposes obligations on GERE.

1.2 The Commission argued that the complainant could not be unaware of its obligations towards the Commission. All the provisions were clearly set out in the Financing Agreement and in the Framework and Specific Agreements attached to it.

1.3 The Ombudsman considers that the contractual documents informed the complainant of GERE's obligations towards the Commission. Moreover, the complainant has acknowledged GERE'S responsibility in this respect. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the case.

2 Circulation of information between GERE and the Commission

2.1 The complainant argued that the way information is circulated is counterproductive. The relations between GERE and the Commission were mostly conducted through the Financial Intermediary. It is therefore unclear whether the complainant was asked to provide the information the Commission really needed. In observations, the complainant argued that the Commission should monitor the activities of Financial Intermediaries.

2.2 The Commission argued that it is not counterproductive for contacts between the Commission and beneficiaries to go through the Financial Intermediary because this arrangement offers potential beneficiaries the possibility to benefit from the assistance of experienced professionals. In the present case, the problems seem to originate in the relations between the Financial Intermediary and the complainant.

2.3 On the basis of the available evidence, the Ombudsman does not consider that the difficulties in the relations between GERE and the Commission can be attributed to the system of using Financial Intermediaries as such. Nor has the Ombudsman been presented with evidence of inadequate monitoring by the Commission of its Financial Intermediaries. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the case.

3 Extent of the audit

3.1 The complainant argued that the Commission should have limited its audit of GERE to



elements linked to the funded project without checking the company's whole business accounting.

3.2 The Commission argued that the extent of the audit accorded with GERE's contractual obligations.

3.3 On the basis of the available evidence, the Ombudsman does not consider that the extent of the audit exceeded the Commission's powers under the relevant contractual provisions. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the case.

4 Information about the results of the audit

4.1 The complainant alleged that GERE never received any written conclusions or provisional conclusions of the Commission's audit. According to the complainant, it would have been good administrative practice for the Commission to ask for additional information in writing, either directly or through the Financial Intermediary. The complainant claims payment of the funds due.

4.2 The Commission argued that the auditors informed GERE of provisional conclusions on 13 June 2000 and asked for additional supporting documents before the finalisation of the audit. Despite repeated requests, the complainant never complied with its obligations and these documents were never provided.

4.3 Based on the available information, the Ombudsman made a provisional finding that the Commission did not appear to have made the complainant aware of the documents he is supposed to provide in order not to delay the Commission's decision as regards the payment of the funds. The Ombudsman therefore made a draft recommendation that the Commission should inform the complainant in writing of the documents he is supposed to provide to enable the Commission to make a decision on the payment within a reasonable time limit.

4.4 In its detailed opinion, the Commission provided copies of letters to the complainant dated 11 July 2000 and 7 February 2001 requesting a signed declaration of the amount paid to a named sub-contracting consultant for his contribution to a feasibility study. The declaration should be counter-signed by the statutory auditor. According to the Commission, the complainant never provided the declaration in the form required and consequently, the funds could not be paid. The complainant argued that the information had already been provided in another form.

4.5 The Ombudsman considers that the Commission has demonstrated that the complainant has been made aware, in writing, of the additional supporting documents required for finalisation of the audit and of the form in which such documents are required to be provided. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the case.

5 Refusal to return the ledger taken during the audit

5.1 The complainant alleged that the Commission refused to return the ledger that it took for the purposes of the audit. The complainant claims the return of the ledger.



5.2 The Commission argued that the ledger in its possession is not an original document and was printed by GERE's bookkeeper at the request of the auditors.

5.3 Based on the available information, the Ombudsman made a provisional finding that the Commission had not provided the Ombudsman with a reasonable explanation for its refusal to make a copy of the ledger and return the original to GERE. The Ombudsman therefore made a draft recommendation that the Commission should return the original document to GERE.

5.4 In its detailed opinion, the Commission stated that it has discovered new elements which reveal possible irregularities. The ledger is an important element in an ongoing investigation into the possible irregularities.

5.5 The Ombudsman considers that the Commission's detailed opinion provides a reasonable explanation for its refusal to make a copy of the ledger and return the original to GERE. The Ombudsman therefore finds no maladministration by the Commission as regards the Commission's retention of the ledger.

5.6 The Ombudsman notes with concern that the complainant does not appear to have been duly informed of the ongoing investigation into possible irregularities which the Commission has stated is taking place. The Ombudsman considers that such investigations should respect the rights of the defence and will consider, at a later date, a general own initiative inquiry into this subject. The Ombudsman makes a further remark on this point below.

6 Alleged registration of GERE on a black list and its consequences

6.1 During the course of the inquiry, the complainant made an additional allegation that Commission had put GERE on a black-list and blocked all payments to GERE even under undisputed contracts.

6.2 The Commission expressed its regret at the wording used by one of its officials in referring to its internal Early Warning System (EWS), which was set up at the request of the European Parliament. The EWS aims at identifying beneficiaries of Community funds who have committed administrative errors or frauds. The EWS does not prevent a payment; it only makes it more difficult and requests further checking by the responsible services. GERE had been included in the EWS because of the questions concerning the company. The Commission expressed regret for the delays that occurred in making payment in relation to an undisputed project. In July 2001, the Commission had apologised to GERE for the delay and paid the amounts owed for the undisputed project as well as interest in respect of the delay.

6.3 In observations on the Commission's reply, the complainant stated that GERE had never been informed of any fraud or administrative error that could justify its inclusion in the EWS. According to the complainant, Commission officials commonly refer to the EWS as a black-list and its effect is to block payments. Furthermore, a company that is included in the EWS should be informed of that fact in writing.

6.4 The Ombudsman considers that the Commission has provided a reasonable explanation of



the nature of the EWS. The Ombudsman also notes that the Commission has apologised for delays in payments to GERE resulting from its inclusion in the EWS and has paid interest in respect of the delay. The Ombudsman therefore concludes that no further inquiries into the complainant's additional allegation are necessary.

7 Conclusion

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

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

FURTHER REMARK

The Ombudsman notes with concern that the complainant does not appear to have been duly informed of the ongoing investigation into possible irregularities which the Commission has stated is taking place. The Ombudsman considers that such investigations should respect the rights of the defence and will consider, at a later date, a general own initiative inquiry into this subject.

Yours sincerely,

Jacob SÖDERMAN