



Decision of the European Ombudsman on complaint 210/2001/GG against the European Commission

Decision

Case 210/2001/GG - Opened on 15/02/2001 - Decision on 04/12/2001

Strasbourg, 4 December 2001

Dear Mrs A.,

On 8 February 2001 you made, on behalf of the European Forum for Child Welfare, a complaint to the European Ombudsman concerning the European Commission's handling of grant agreement no. JAI.1999/DAP/004/WC.

On 15 February 2001, I forwarded the complaint to the Commission for its comments.

On 13 March 2001, you sent me a copy of a letter that you had sent to the Commission on 12 March 2001.

The Commission sent its opinion on your complaint on 20 April 2001.

On 9 May 2001, you submitted copies of a letter from the Commission dated 21 March 2001 and of your reply of 19 April 2001.

I forwarded the Commission's opinion to you on 14 May 2001 with an invitation to make observations, if you so wished. On 26 June 2001, you sent me your observations on the Commission's opinion.

On 18 July 2001, I wrote to the Commission in order to ask for further information. The Commission sent its reply on 26 September 2001, and I forwarded it to you on 1 October 2001, with an invitation to make observations, if you so wished.

On 29 November 2001, you sent me your observations on the Commission's reply.

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

THE COMPLAINT

The complainant is a non-profit making Brussels-based network of NGOs working for the well-being of children and young people in need across Europe. In 1999, it applied to the Commission for funding for a project called: "Inventory of skilled resources in the EU to respond, following appropriate training, to the needs of children and women suffering from violence in Kosovo". This funding was to be covered by the Commission's Daphne project that supports measures for combating violence against children, young persons and women.



The original application was lodged on 11 June 1999. The three expert evaluators (among whom a Mrs Kane) to whom the Commission entrusted the examination of the application raised various objections. Following discussions with the Commission's services, a revised application was submitted on 6 September 1999. On 28 September 1999, the complainant was informed by the Commission that its proposal had been accepted for funding, subject to the submission of a revised budget and its scrutiny and acceptance by the Commission's financial control service. On 4 October 1999, the complainant submitted a revised budget.

On 15 November 1999, the Commission informed the complainant that it had decided to grant it a financial contribution of a maximum amount of € 32 000 for the organisation of the above-mentioned project. The relevant grant agreement (reference no. JAI.1999/DAP/004/WC) was signed by the Commission and the complainant and dated 15 November 1999. According to the agreement, the project was to start on 15 November 1999 and to end no later than 15 November 2000.

Article 8 of the agreement stipulated that the General terms and conditions applicable to grant agreements of the European Communities (the "General terms and conditions") set out in annex II of the agreement were an integral part thereof.

Article 3 of the General terms and conditions which concerns the termination of the agreement contains the following provisions:

"3 (2) The Commission may terminate the agreement should the beneficiary, for no valid or technical reason, fail to honour one of the obligations under the agreement and, after being given notice by registered letter to comply with these obligations, have still failed to do so one month after receiving that letter.

In that event the Commission shall pay only the costs actually borne by the beneficiary at the time of termination, and no costs related to contracts already concluded but for performance after the date of termination."

Pursuant to Article 9 of the General terms and conditions, the Court of First Instance of the European Communities is competent to deal with complaints against decisions of the Commission concerning the application or interpretation of the agreement.

On 16 March 2000, Mr Simpson, the Commission official running the Daphne programme, informed the complainant (and other organisations) that he would be retiring from the Commission on 1 April 2000 and presented his successor, Mr Trousson. In an e-mail message sent on 28 March 2000, Mr Simpson congratulated the complainant "on the progress of the project so far".

On 10 May 2000, Mrs Kane, a technical expert from the Daphne programme, visited the complainant's office in order to review the work carried out so far. The expert subsequently drew up a report in which she recommended that the Commission should consider terminating the project. An advance copy of the draft report was sent to the complainant



who made detailed comments on it in a letter to the Commission of 5 June 2000. In this letter, the complainant further expressed the view that there was an urgent need to resolve the matter and that an opportunity for a meeting would therefore be appreciated. The complainant proposed several dates for such a meeting. A reminder was sent to the Commission via e-mail on 22 June 2000.

In a letter of 14 July 2000, Mr Trousson (head of Unit A/1 within the Commission's Directorate-General Justice and Home Affairs) wrote to the complainant in order to inform it that in his view the project as it was run could not continue. He gave three reasons for this position: 1) the project's major beneficiaries were not those mentioned in the original project, i.e. children and women, but field agencies that had themselves funds to do this work; 2) there was insufficient evidence that the proposed database was set up according to standard practices and 3) the project fell outside the Daphne Initiative guidelines, which stipulated that projects should not have activity or expenditure outside the Communities. However, in view of the complainant's commitment and reputation, and as a sign of good faith, Mr Trousson accepted that the complainant should be given the opportunity to define a properly designed and executed database project. Several conditions were mentioned, notably that a re-defined work plan and budget should be submitted and approved by the Commission by the end of July 2000.

According to the complainant, the criticisms expressed by Mr Trousson were unjustified.

On 24 July 2000, the complainant nevertheless submitted a new work plan and budget. In his reply of 18 August 2000, Mr Trousson informed the complainant that some points in the new work plan still needed to be improved "before we finalise an official additional agreement to your contract with the new workplan and budget." On 4 October 2000, the complainant submitted a revised version of the work plan and the budget.

On 16 November 2000, the complaint asked the Commission (by fax and via e-mail) to reply to its proposal of 4 October 2000. A further reminder was sent on 29 November 2000.

In a letter dated 30 November 2000 that was sent by registered mail, the Commission informed the complainant that it was unable to let it resume its work and that the project should thus be stopped now. The Commission also asked the complainant to submit its final accounts with the expenses incurred so far. It insisted, however, that only the direct costs related to the activities carried out until the Commission's "first request for changes (August 2000)" could be taken into account.

The complainant thereupon turned to the Director-General of DG Justice and Home Affairs. However, the latter confirmed the Commission's position in a letter of 5 February 2001.

It emerges from the complaint that the complainant considers its problems to be mainly due to the change in personnel dealing with the contract on the part of the Commission.

In substance, the complainant made the following allegation:



The Commission's decision to terminate the contract constituted maladministration since the conditions of Article 3 of the General terms and conditions applicable to grant agreements of the European Communities were not fulfilled.

The complainant requested the Ombudsman's assistance in mediating with the Commission with a view to (a) receiving the outstanding payment for the project costs and (b) compensation for both the time spent and subsequent severe financial difficulties imposed on a small NGO such as itself.

THE INQUIRY

The complaint was sent to the Commission for its opinion.

The Commission's opinion

In its opinion, the Commission made the following comments:

The complainant's project belonged to 53 projects that had been accepted in 1999. Every one of these projects had been the subject of a mid-term assessment that had the double aim of detecting any problem in project implementation and of advising grant recipients on possible solutions to their difficulties. The monitoring report on the complainant's project had been the most worrying of all.

During the weeks following the mid-term assessment, special efforts had been made by the Commission to give the complainant the chance to reorientate its project in a way that might have made it possible for it to be continued. After two attempts at adaptation, the complainant had still not been in a position to reorientate its project effectively.

The change in the Daphne programme co-ordinator had not influenced the management of the case.

The Commission had complied with Article 3 (2) of the General terms and conditions. Serious reasons (technical, managerial and administrative) supported the characterisation of the complainant's project as "failing to honour one of the obligations under the agreement", namely to perform properly the tasks listed in the work programme within the given time frame of the said contract. Therefore, after six months of negotiation and advice, the conditions to apply Article 3 (2) of the General terms and conditions were clearly fulfilled.

The complainant's observations

In its observations, the complainant made the following comments on the Commission's opinion:

When the mid-term assessment was carried out, the project had fulfilled the targets set out in the agreement. The Commission's references to its efforts to "reorientate" the project highlighted the Commission's intention to change the original project which admittedly may not have been a typical Daphne project but which had nevertheless been approved and signed. The complainant had nevertheless made tremendous efforts to redefine the project so as to meet the Commission's demands.

It was not clear whether termination of the entire project was a proportionate measure. The Commission had in any event not invited the complainant by registered letter to comply with



its obligations.

The evaluation meeting had not been objective and the evaluator had been critical from the very beginning of the meeting.

The monitoring report referred to by the Commission had not been sent to the complainant.

Given that the project had in effect been paralysed for seven months after the visit of the technical expert, the actual costs incurred after August 2000 had covered minimal hours by staff and administration costs to maintain the project.

Further inquiries *Request for further information*

Having received the complainant's observations, the Ombudsman considered that he needed further information in order to deal with the complaint. He therefore asked the Commission to specify how it had complied with the requirement to give notice by registered letter set out at Article 3 (2) of the General terms and conditions and to submit a copy of the relevant letter.

The Commission's reply

In its reply, the Commission made the following comments:

Article 3 (2) of the General terms and conditions was intended to ensure that, by way of the registered letter mechanism, the sender knew for certain that the intended recipient had received the letter and had thus read the content warning the recipient of its failure to honour the agreement and giving it one month to comply with its obligations. Although no letter before that of 30 November 2000 had been sent by registered post, the purpose of Article 3 (2) had nevertheless already been achieved. The extensive exchange of letters and e-mails from May until November 2000 clearly showed that the complainant had received several letters and documents informing and warning it about the need to honour its obligations. Thus, whilst the Commission regretted its failure to send a warning letter by registered mail, it submitted that this omission had caused the complainant no real damage in the specific circumstances of the case.

The Commission had never sought to change the project in any way, but merely to ensure that the terms of the contract agreed between the parties were correctly performed. This was clearly demonstrated by the monitoring report. The complainant's claim that the full monitoring report and its comments had not been accessible to it was wholly incorrect. The complete document had been sent to the complainant as attested by the fax from the expert of 19 May 2000 and by the complainant's lengthy answer to it.

The allegation of bias on the part of the evaluator was entirely baseless.

The complainant's observations

In its observations, the complainant made inter alia the following comments:

From the Commission's letters dated 14 July 2000 and 18 August 2000, the complainant had understood the serious nature of the Commission's concerns but had not realised that a threat of termination was imminent. Termination of a project was a very serious matter and the complainant would have expected clarity in this respect. However, in its letter of 18



August 2000 the Commission had thanked the complainant for its efforts in redefining the project. This had indicated to the complainant that it was moving in the right direction. The complainant very much regretted the Commission's unwillingness to agree to a meeting.

The complainant did not agree with the Commission's claim that it had failed to perform its obligations under the contract. It had put forward valid amendments on two occasions and made tremendous efforts to resolve the situation.

The failure to terminate the contract via the correct procedure did, contrary to what the Commission claimed, cause real and significant damage. This damage concerned the other co-funders to this project. If the situation had been clarified at an earlier stage, the complainant could have informed them earlier and limited the financial damage incurred as a consequence.

The complainant had not seen the monitoring report annexed to the Commission's opinion prior to receiving it through the Ombudsman. The document it had received from the evaluator was substantially different.

The complainant's criticism that the evaluation meeting was not objective had not been meant as a personal criticism against the evaluator. However, it was not unbiased to send an evaluator to draw up a report who had already objected to the project at the application stage.

On 27 September 2001, the complainant had, to its surprise, received a debit note from the Commission requesting payment of 4 001.87 € for "recovery of part of the advance". A comprehensive explanation was provided by the Commission on 9 November 2001, further to a request to that effect made by the complainant. Whilst the complainant had expected a payment of about 9 000 € from the Commission, it now understood that the latter's position was different. As the project co-funders had paid their contribution in full, and in advance, the Commission had deducted this from the overall project costs accepted by it. This approach did however not take into account that the project was terminated prematurely. The co-funding to be taken into account thus needed to be reduced proportionally according to the reduced project period (8 out of 12 months). As a result, the amount still owed by the complainant to the Commission was only 390 €.

The complainant now understood and accepted that it owed the Commission some money but it believed that this should not exceed the amount of 390 €. Given the inconvenience and damage caused to it, the complainant hoped "that the Ombudsman will see fit to waive this final payment".

THE DECISION 1 Wrongful termination of contract

1.1 In November 1999, the Commission entered into an agreement (reference no. JAI.1999/DAP/004/WC) with the complainant within the framework of the Daphne programme in which it had agreed to grant the complainant a financial contribution of a maximum amount of € 32 000 for the organisation of a project called "Inventory of skilled resources in the EU to respond, following appropriate training, to the needs of children and women suffering from violence in Kosovo". The complainant claims that the Commission's



subsequent decision to terminate the contract, by letter dated 30 November 2000, constituted maladministration since the conditions of Article 3 of the General terms and conditions applicable to grant agreements of the European Communities (the "General terms and conditions") were not fulfilled. Article 3 (2) of these General terms and conditions provides that the Commission "may terminate the agreement should the beneficiary, for no valid or technical reason, fail to honour one of the obligations under the agreement and, after being given notice by registered letter to comply with these obligations, have still failed to do so one month after receiving that letter."

1.2 The Commission takes the view that the termination of the contract was justified. According to the Commission, Article 3 (2) of the General terms and conditions was intended to ensure that, by way of the registered letter mechanism, the sender knew for certain that the intended recipient had received the letter and had thus read the content warning the recipient of its failure to honour the agreement and giving it one month to comply with its obligations. Although no letter before that of 30 November 2000 had been sent by registered post, the purpose of Article 3 (2) had nevertheless already been achieved in the Commission's view. According to the Commission, the extensive exchange of letters and e-mails from May until November 2000 clearly showed that the complainant had received several letters and documents informing and warning it about the need to honour its obligations. Thus, whilst the Commission regrets its failure to send a warning letter by registered mail, it submits that this omission caused the complainant no real damage in the specific circumstances of the case.

1.3 In its observations on the Commission's opinion, the complainant maintains its complaint. It submits that it was not able to gather from the Commission's letters dated 14 July 2000 and 18 August 2000 that a threat of termination was imminent. The complainant further claims that it did not see the monitoring report annexed to the Commission's opinion prior to receiving it through the Ombudsman. It adds that in the meantime, the Commission asked it to pay back an amount of 4 001.87 €. The complainant points out that it now accepts that it owes the Commission some money but that it believes that this should not exceed the amount of 390 €. In the complainant's view, this amount should be waived, given the inconvenience and damage that was caused to it.

1.4 The present allegation concerns the obligations arising under a contract concluded between the Commission and the complainant.

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 (1). 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. In particular, 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 It is good administrative practice for the administration to comply with the terms of contracts it has entered into. The Ombudsman notes that Article 3 (2) of the General terms and conditions provides that prior to terminating the contract, the Commission had to give notice to the complainant by registered letter to comply with its obligations, and that termination was only possible if the complainant should still have failed to do so one month after receiving that letter. It is true that notwithstanding the wording of this clause, a formal notice may be unnecessary in special circumstances (2) . The Ombudsman considers, however, that the Commission has not adequately explained why it should have been justified to terminate the contract without complying with the requirements set out in Article 3 (2) of the General terms and conditions in the present case (3) . As the complainant correctly points out, the Commission's letter of 18 August 2000 did not at all indicate that the Commission intended to terminate the contract. On the contrary, this letter gives the impression that subject to some points being "improved", the Commission would proceed to finalise an official additional document to [the complainant's] contract with the new workplan and budget". Contrary to what the Commission claims, the complainant had thus not been informed in clear terms that unless it complied with its contractual obligations within one month after having received such warning, the contract would be terminated. The Ombudsman further notes that the Commission has not established that the monitoring report drawn up by the evaluator had been sent to the complainant (4) .

1.9 In the light of these circumstances, the Ombudsman considers that the Commission's failure to comply with Article 3 (2) of the General terms and conditions represents an instance of maladministration. A critical remark will therefore be made in this respect.

2 Financial claims

2.1 In its complaint, the complainant asked for the Ombudsman's assistance in trying to obtain the amount that it believed was still owed by the Commission, together with compensation for both the time spent and subsequent financial difficulties imposed on it by the Commission. It emerges from the position taken by the Commission in its opinion and the reply to the request for further information that the Commission considers that no money is due to the complainant.

2.2 In its observations on the Commission's reply to the Ombudsman's request for further



information, the complainant accepts that it owes the Commission some money. It argues, however, that the amount due is only 390 € rather than the 4 001.87 € that the Commission now asked it to pay back, and that the amount due should in any event be waived.

2.3 The Ombudsman recalls that the scope of his inquiry in the case of allegations of maladministration based on contractual disputes is limited (5) . He notes, furthermore, that the decision as to whether a financial claim should be waived rests with the Commission (and not with the Ombudsman), and that the Commission has not yet had the opportunity to form a view on this request. The Ombudsman considers, therefore, that there is no need to pursue his inquiry into this aspect of the complaint. He trusts, however, that the Commission will take account of the present decision when dealing with the complainant's request to waive any outstanding amount.

3 Conclusion

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

It is good administrative practice for the administration to comply with the terms of contracts it has entered into. Article 3 (2) of the General terms and conditions applicable to the contract with the complainant provides that prior to terminating the contract, the Commission had to give notice to the complainant by registered letter to comply with its obligations, and that termination was only possible if the complainant should still have failed to do so one month after receiving that letter. The Commission has not adequately explained why it should have been justified to terminate the contract without complying with the requirements set out in Article 3 (2) of the General terms and conditions in the present case. This constitutes an instance of maladministration.

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. 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 Annual Report 1997, pages 22 sequ.

(2) In its judgement of 11 October 2001 in Case C-77/99 (Commission/Oder-Plan Architektur GmbH and others), the Court of Justice held, in respect of a clause that was virtually identical to Article 3 (2) of the General terms and conditions, that a specific notice had been unnecessary in the light of the circumstances of the case (loc. cit., paragraph 58).

(3) In the case decided by the Court, the contractor had informed the Commission "in



definite and unequivocal terms that the project had come to an end". Furthermore, "the relationship of trust between the parties to the contract, a precondition for due performance thereof, was destroyed" (loc. cit.).

(4) The documents submitted to the Ombudsman only prove that the draft report was sent to the complainant. There is nothing to show that the final report (which was substantially longer and deals with the complainant's objections to the conclusions set out in the draft report) was duly forwarded to the complainant.

(5) See point 1.6 sequ. above.