

Decision of the European Ombudsman on complaint 447/2001/OV against the European Commission

Decision

Case 447/2001/OV - Opened on 10/04/2001 - Decision on 30/10/2001

Strasbourg, 30 October 2001

Dear Mr H.,

On 26 March 2001 you made a complaint to the European Ombudsman against the Commission on behalf of the Stiftung Ökologie und Landbau concerning the Commission's decision to exclude it from the evaluation of the proposals under the call for proposals 1999/C 361/06.

On 10 April 2001 I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 19 June 2001. I forwarded it to you with an invitation to make observations, which you sent on 31 August 2001. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

On 11 October 2000 Mrs Helga Willer, on behalf of the Stiftung Ökologie und Landbau (hereafter "the complainant") sent to the European Commission a research and technological development (RTD) proposal under the call for proposals 1999/C 361/06 (hereafter "the call for proposals"). She went to the post office in Bad Dürkheim and used the service "Post Express" offered by the Deutsche Post Express GmbH. The proposal was delivered to the Commission on 13 October 2000.

On 12 February 2001 the complainant received a letter by the Commission dated 30 January 2001. According to the eligibility checklist attached to the aforementioned letter the proposal did not meet the criterion regarding the date and the time of sending the proposal by post.

On 13 February 2001 the complainant sent a letter to the Commission expressing its opposition. On 2 March 2001 the Commission sent a letter to the complainant informing it that the proposal should be rejected on grounds of ineligibility. According to the Commission's interpretation



regarding the sending method used for the proposal, the complainant had used a courier service to send its proposal to the Commission. Thus point 5, indent 2 of the call for proposals was applicable and the proposal should have been received before or on the final date, namely 11 October 2000 at 17.00, Brussels time. As a result the proposal was ineligible for reasons of late arrival.

On 16 March 2001 the complainant sent a letter to the Commission asking for a reconsideration of the case. On 20 March 2001 the complainant got in touch with the responsible Commission services and the answer it received was that the proposal was still considered ineligible. It was explained to the complainant that the distinction between an official post Service and a courier service was that the date of handing over a proposal to the post is more likely to be properly recorded in a post office with an official post mark than with a private courier service.

On 26 March 2001 the complainant received a letter dated 22 March 2001 from the Commission according to which its request for reconsideration of the case was rejected on the basis of an explanation which was completely different from the one given in the earlier telephone contact. This time the distinction between an official post office and a courier service was drawn on the basis of the fact that the sender using the courier service may revoke the order to send the proposal and have it called back, whereas a sender using the post cannot do so.

On 26 March 2001 the complainant wrote to the Ombudsman alleging that the decision of the Commission to exclude it from the evaluation of the proposals was unjustified as its proposal was correctly posted and stamped with the official postmark. The complainant wanted an amicable settlement to be reached.

On 29 March 2001 the complainant made a second complaint alleging that in the letter of the Commission of 22 March 2001 the explanation for the distinction between the post and the courier service was different from the explanation given in the earlier telephone contact.

THE INQUIRY

The Commission's opinion

In its observations the Commission stresses the fact that the complainant in submitting a proposal accepted the procedures and the conditions as laid down in the call for proposals.

The call for proposals itself foresees three possible ways of submitting a proposal, namely by post, by courier service or hand delivery, and by electronic mail. As far as the first two options are concerned, there is a very important distinction.

If the proposal is sent by post, then there is a two stage procedure: firstly, the proposal must be posted before or on the final date provided for in the call for proposals, and secondly, the proposal must be delivered within the ten working days following that date. On the other hand, if the proposal is sent by courier service or is hand delivered, then there is a one stage procedure: the proposal must be delivered to the Commission before or on the final date laid down in the call for proposals. No ten working days period after the deadline is allowed.



The distinction between these two methods is based on the fact that if a proposal is posted, then it cannot be recovered from the postal service, whereas if it is sent by courier service it can be recovered and its contents can be altered. Thus, the postmark specifying the sending date of an envelope sent by a courier service is not the determining element, as such envelopes can be stopped and their contents modified during their transportation. If ten supplementary working days for arrival at the Commission were given to the senders by courier then it would have been unfair for the applicants having sent their proposals by post who had no possibility of stopping the shipment and possibly changing the content of their parcel.

The complainant sent its proposal on 11 October 2000 and the proposal reached the Commission's offices on 13 October 2000, two days after the deadline set out in the call for proposals. The complainant cannot invoke the ten supplementary working days period, because it sent its proposal via Deutsche Post Express GmbH, which is a courier and not a post service. Therefore, following a favourable opinion from its Legal Service, the Commission declared the proposal to be ineligible by decision C (2001) 1051 of 11 April 2001.

Throughout the contact with the complainant, the Commission deployed always the same argumentation, namely that the ineligibility reason was the late arrival of the proposal. In the letter of 22 March 2001 the Commission did not use a new argument but explained in more detail why the method of sending used by the complainant was considered to fall under the category "courier service" instead of "post".

The Commission finally notes that no amicable settlement can be reached, since the proposal has been treated in conformity with the applicable Community rules. The complainant is invited to resubmit its proposal in the course of a new Community programme.

The complainant's observations

The complainant observes that the real reason why there is a distinction between courier and post service is that the Commission wishes to have the date of posting verified by a post office with an official post stamp and not by an employee of a courier service on the premises of the customer. The argument that proposals sent by courier service could be intercepted and altered after they have been sent was presented only after the complainant had already proved that its proposal had been properly stamped in time in the German post office.

The complainant notes that the Commission considers the registration and sending methods of post services to be more credible and secure than those of courier services. However such a belief is not justified. Firstly, posted envelopes can be stopped and their content can be changed not only in courier services but also in post services. Secondly, the courier systems, contrary to post services, carefully track the trail of the registry, transportation and delivery of the sent item and thus render undetected alterations impossible.

In addition, a dividing line should be drawn between the sending method and the delivery method and thus a distinction between them should be made. The complainant used as a sending method the post services of the German post office. The latter used as a delivery method a courier service. The complainant is not responsible for the choice of the German post



office to use a courier service as a contractual partner for the fulfilment of its post obligations.

THE DECISION

1 The alleged unjustified rejection of the proposal

1.1 The complainant alleged that the decision of the Commission to exclude it from the evaluation of the proposals was unjustified as its proposal was correctly posted and stamped with the official postmark. The Commission argued that the sending method used was a courier service and, since the proposal arrived at the Commission offices two days after the deadline applicable to proposals sent by this method, it was justifiably considered ineligible for reasons of late arrival.

1.2 The Ombudsman notes that the call for proposals in point 5 indents 1 and 2 foresees two different possible sending methods. The first method (point 5, indent 1) is to use the post. The second method (point 5, indent 2) refers to the hand delivery and courier services.

1.3 In the present case, the evidence available to the Ombudsman is that the complainant's employee went to a German Post Office in Bad Dürkheim, and sent the proposal by Deutsche Post Express GmbH. The Ombudsman therefore considers that the complainant was entitled to consider that it had sent the proposal by post, in compliance with point 5 indent 1 of the call for proposals.

1.4 The Commission's decision to reject the complainant's proposal as ineligible appears to be based on the view that, although the complainant had used a service provided by the German post office, the underlying nature of the service was that of a courier. In the Ombudsman's view, the call for proposals cannot reasonably be understood as requiring applicants to analyse the underlying nature of services provided by a national post office. The Commission was not therefore entitled to reject the complainant's application and its decision to do so constitutes an instance of maladministration. The Ombudsman therefore makes the critical remark below.

2 The alleged change in the explanation for the distinction between post and courier service

2.1 The complainant alleged that in the letter of the Commission of 22 March 2001 the explanation for the distinction between the post and the courier service was different from the explanation given in the earlier telephone contact. In the former the argument deployed was that the registration methods of post services are more credible than those of courier services. However in the letter of 22 March 2001 the argument used was that a proposal sent by courier services can be recovered and its contents can be changed, whereas this cannot happen in the post services.

2.2 In its opinion, the Commission observed that in the course of the contact with the complainant there has been no change in its position on the case, namely ineligibility of the complainant's proposal due to late arrival. The letter of 22 March 2001 only explained in further detail the distinction between post and courier service.

2.3 The Ombudsman notes that, in its opinion to the Ombudsman, the Commission has made



clear that the reason why it distinguishes between post and courier services is that a proposal sent by courier services can be recovered and its contents can be changed, whereas this cannot happen in the post services. The Ombudsman considers therefore that the Commission has removed any confusion that may have arisen as to its reasoning and that there is no instance of maladministration in relation to this aspect of the complaint.

Conclusion

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

The Commission's decision to reject the complainant's proposal as ineligible appears to be based on the view that, although the complainant had used a service provided by the German post office, the underlying nature of the service was that of a courier. In the Ombudsman's view, the call for proposals cannot reasonably be understood as requiring applicants to analyse the underlying nature of services provided by a national post office. The Commission was not therefore entitled to reject the complainant's application and its decision to do so constitutes an instance of maladministration.

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement on the matter. The Ombudsman has therefore decided to close the case.

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

Yours sincerely,

Jacob SÖDERMAN