



Decision of the European Ombudsman on complaint 577/2001/OV against the European Commission

Decision

Case 577/2001/OV - Opened on 07/05/2001 - Decision on 20/11/2001

Strasbourg, 20 November 2001

Dear Sirs,

On 11 April 2001 you made a complaint to the European Ombudsman on behalf of EARL D. against the Commission's decision to demand the reimbursement of the Community contribution granted to EARL D. in the framework of the Project JOP Facility 2 in Poland (Reference Code: J2BNPDARHA).

On 7 May 2001 I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 28 June 2001. I forwarded it to you with an invitation to make observations, which you sent on 18 September 2001. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

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

In the framework of the Project JOP Facility 2, the company EARL D. (hereafter "the complainant") participated in an agricultural project in Poland, which started in January 1997. The complainant received Community contribution for the implementation of this Project.

In July 1998 two Commission officials carried out an inspection of the accounting records of the complainant.

In a letter sent to the complainant on 8 December 1999, the Commission pointed out that during the inspection the complainant failed to provide the requested documents concerning the registration of the invoices and the payments for the JOP Project. In addition, the Commission had detected a confusion between the complainant's bank account and private bank accounts. Finally, it appeared that a payment made by the complainant to one of its consultants was returned back to the complainant.

On 26 February 2000 the Commission therefore requested the reimbursement of the contribution granted to the complainant.

On 2 May 2000 the complainant had a meeting in Luxembourg with Commission officials in order to explain the situation and present the accounting records requested by the Commission.



On 26 February 2001 the Commission confirmed its request for reimbursement of the contribution and also demanded interest on the sum of the contribution.

The complainant observes that at the time of the inspection, the accounting records requested by the Commission officials were held by its accountant and, even though the complainant proposed them to inspect these documents, they refused to do so.

As regards the confusion between private bank accounts and the complainant's bank account, the latter states that the only aim was not to mix up the contribution granted for the JOP Project with sums used for activities of its companies.

With respect to the amount of money returned by the consultant, the complainant observes that it had been in need of financial help to implement the Project and, as a result, it borrowed a specific amount of money from one of its consultants.

The complainant finally points out that, since the feasibility study had been accepted by the Commission, there was no reason why the contribution should be reimbursed by the complainant.

In the light of the above the complainant lodged a complaint to the Ombudsman on 11 April 2001. The complainant claimed that the Commission's request of 8 December 1999 for reimbursement of the contribution should be annulled, because the complainant was not responsible for any fault: the joint venture created in Poland functioned well and the whole Project had been successfully implemented. The complainant had always acted in full transparency with the intermediary and, if there was a fault in the course of the implementation of the Project, the responsibility lay with the Commission.

THE INQUIRY

In its observations the Commission explains that on 4 March 1996 a Framework Agreement was concluded between the Commission and a French bank acting as the Financial Intermediary (hereafter "FI"). On 17 January 1997 the Commission and the FI signed the Specific Agreement and on 29 January 1997 the FI and the complainant signed the Financing Agreement, which specified the terms and conditions by which the contribution would be made available to the complainant.

On 25 November 1997 the FI sent to the Commission the correspondence of the complainant relating to the replacement of the external consultants. The offer for the new consultants dated 25 September 1997. The Commission notes that, in its complaint, the complainant claims that it began to invest on the joint venture in Poland in July 1997. The Commission however raises the question why the complainant asked, in September 1997, for new consultants to carry out a feasibility study - which is always a prerequisite for an investment - when the investment had already taken place in July 1997.

The Commission further points out that it received the feasibility study and the detailed accounts of expenses on 10 July 1998 and not in December 1997 as the complainant claims.



On 14 August 1998 the Commission asked for evidence that would prove the exact amount of money paid to the new external consultants. On the basis of a letter of 16 October 1998 and a fax of 20 October 1998 sent by the FI, the Commission discovered that a bank account of one of the consultants had been debited respectively credited for BEF 921.166 and BEF 910.912 at nearly the same moment. This transaction constituted an indication that the amount paid by the complainant to the consultant might have been returned to the former.

On 23 November 1998 the consultant sent a letter to the Commission claiming that the amount in question represented a loan without interest which he had made to the complainant and which would be paid back by the complainant after the receipt of the Community contribution. The Commission observes that this statement came from the consultant and not from the complainant.

Following a fax sent by the Commission on 28 May 1999, two Commission officials carried out an on the spot investigation on 1 July 1999. The findings of the investigation were, firstly, that in the course of the transactions carried out under the JOP Project, there had been confusion between private bank accounts and the complainant's bank account and, secondly, that no contract of loan without interest existed between the consultant and the complainant. Such a contract was signed only after the investigation had already taken place.

On 8 December 1999 the Commission sent a letter to the complainant asking for the reimbursement of the contribution. The Commission based its decision on three grounds: 1) it was impossible to verify the registration of the invoices and the payments for the JOP Project in the complainant's accounts because the relevant documents were not made available to the Commission's officials; the complainant claimed that the records were held by its accountant who was on leave at the time of the investigation; 2) most of the Project payments had been made via private bank accounts and not via the recognised complainant's bank account; 3) the invoice by the complainant to one of its consultants was immediately returned to the complainant. At the time of the investigation, no contract existed for this loan without interest.

On 2 May 2000, the Commission had a meeting with representatives of the complainant but the latter failed to provide new, complete and persuasive documentary evidence in support of their claims.

On 2 February 2001 the Commission confirmed its position to request the reimbursement of the contribution.

The Commission finally observes that the feasibility study carried out by the complainant's consultants was neither serious nor well prepared: The statistic information given in one chapter of the study was not up to date, a whole chapter was a mere translation of contracts signed by the complainant in the past, and the wording used in one of the tables included in the study was just a reproduction of the wording used in another feasibility study.

The complainant's observations

The complainant observes that it started to invest in this joint venture in July 1997, as this constituted an administrative requirement in order to proceed with the Project. The amount



of money invested at that time was limited and the investment to which the feasibility study refers took place in the autumn of the year 2000. The complainant is not responsible for any delay in the sending of information to the Commission, since it had provided the FI with the necessary documentation always in time.

The feasibility study was submitted to the FI on 21 January 1998. The complainant is not responsible for what took place between that date and 10 July 1998, the date on which the Commission claims to have received the study.

Concerning the findings of the inspection, the complainant makes the following remarks:

Firstly, it was proposed to the Commission officials to inspect the requested documents, but they refused to do so.

Secondly, in the course of the Project the payments were made via private accounts, because the activities external to the company can not be taken into consideration via the company's account.

Thirdly, the loan which the complainant obtained from one of its consultants was just an amount of money given in advance in order to proceed with the investments. There was no contract because the consultant accepted the complainant's request and returned the money immediately.

In the meeting of 2 May 2001 in Luxembourg, all the documentation concerning the transactions of the Project was put at the disposal of the Commission.

The complainant finally observes that it believed it had always acted in conformity with the applicable regulations and that it had confidence in the FI. The Project is serious and well implemented and the joint venture created in Poland functions well. The complainant concluded that, due to the investments made in this joint venture, it was not in the position to reimburse the contribution.

THE DECISION 1 The request for reimbursement of the contribution granted

1.1 The complainant claims that Commission's request of 8 December 1999 for reimbursement of the contribution should be annulled, because the complainant was not responsible for any fault: the joint venture created in Poland functioned well and the whole Project had been successfully implemented. The complainant had always acted in full transparency with the intermediary and, if there was a fault in the course of the implementation of the Project, the responsibility lay with the Commission.

1.2 In its opinion, the Commission observed that during the inspection carried out at the premises of the complainant the latter failed to provide the requested documents. In addition, there had been confusion between private bank accounts and the recognised bank account of the complainant. Finally, the invoice by the complainant to the one of its consultants was immediately returned to the complainant. No contract justifying this transaction existed.



1.3 The Ombudsman notes that the conditions for the reimbursement of the contribution granted in the course of the JOP Project are provided for in both the Framework Agreement and the Specific Agreement. Point 8 of the Specific Agreement concluded between the Commission and Financial Intermediary provides that *"EC Financing may become repayable by the Beneficiary including all expenses, if any, which EC will have exposed in pursuing its claims, in compliance with articles 10.5 and 18.3 of the FA"*. Article 10.5 and 18.3 of the Framework Agreement determine the conditions under which the Commission may request repayment of all or part of its contribution from the beneficiary. These conditions became binding upon the complainant by signing the Financing Agreement.

1.4 In the present case, it appears that the Commission's request for reimbursement of the contribution was well-founded: the Commission decision is based on three grounds: 1) it was impossible to verify the registration of the invoices and the payments in the complainant's accounts because the relevant documents were not made available to the Commission; 2) most of the Project payments had been made via private bank accounts and not via the recognised complainant's bank account; 3) there was a loan, for which no contract existed, between the complainant and one of its consultants.

1.5 The explanation for the reimbursement request which the Commission gave to both the complainant and the Ombudsman, appears thus to be reasonable. Its request therefore seems to be made in conformity with the terms and conditions laid down in the Framework Agreement and the Financing Agreement. No instance of maladministration was therefore found.

Conclusion

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