



Decision of the European Ombudsman on complaint 641/2001/GG against the European Commission

Decision

Case 641/2001/GG - Opened on 08/05/2001 - Decision on 31/10/2001

Strasbourg, 31 October 2001

Dear Mr W.,

On 19 April 2001, your firm made a complaint to the European Ombudsman in relation to an agreement for the delivery of heifers to Bosnia-Herzegovina in which it claimed that the Commission had failed to pay it an amount of $\text{€} 24\,420$ that had been invoiced by a transport firm. This complaint was received by me on 3 May 2001.

On 8 May 2001, I forwarded the complaint to the Commission for its comments.

The Commission sent its opinion on your complaint on 2 August 2001. I forwarded the Commission's opinion to you on 14 August 2001 with an invitation to make observations, if you so wished, by 30 September 2001 at the latest. No such observations were received from you.

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

THE COMPLAINT

In November 1999, the complainant, an Austrian cattle-trading firm, entered into a contract with the European Commission for the delivery of 2027 heifers (breeding cattle) to the Brcko District (Bosnia-Herzegovina). Some 300 animals were delivered every one or two months. In May 2000, problems arose at the border of the Brcko district in relation to one of these shipments. As a result, the animals had to stand for some time in hot weather on their lorries and could neither be discharged nor provided with water.

According to the information provided in the complaint, the selection and delivery of the animals was organised as follows: The complainant notified the dates when the transport would be carried out. The Commission then informed the representatives of the recipient bodies in Bosnia-Herzegovina who went to Austria to select the animals. These animals were then bought by the complainant, put on lorries rented by the latter and transported to their destination.

In two letters sent by fax on 2 and 6 June 2000, the complainant informed the Commission's delegation in Sarajevo that the next transport would take place in calendar weeks 24 or 25 and that the recipients' representatives were to arrive in Austria on 19 June. On 7 June 2000, the Commission informed the complainant of the names of the representatives. On 8 June



2000, the Brcko district wrote to the Commission's delegation in Sarajevo in order to ask for the next delivery to be postponed by one month until 10 July. According to this letter, the recipients wished to choose a new importer, apparently as a result of the circumstances in which the last delivery had been carried out. On 12 June 2000, the Commission's delegation in Sarajevo forwarded this fax to the complainant and asked it to provide an answer.

In the complainant's view, it was clear from this letter that the delivery could not go ahead as planned. The complainant thereupon turned to the cattle-breeders from which it was going to obtain the animals and the transport company to inform them that the purchase and the loading of the cattle had been postponed indefinitely.

On 13 June 2000, the complainant wrote to the Commission informing the latter that due to various problems (including the financial demands the breeders would make if it failed to honour its commitments), it was unable to postpone the delivery and asked the Commission to reply as soon as possible. In the absence of a reply, the complainant again sent a fax to the Commission on 14 June 2000, asking for a reply by 2 p.m. that day to the question as to whether it could proceed with the selection of the animals. It also pointed out that the transport company had threatened to make claims if the transport should not be carried out. The Commission apparently did not reply to this fax.

According to the information provided by the complainant, the cattle could in the end only be loaded on the lorries one week after the date originally envisaged. The transport company sent the complainant an invoice over ATS 336 000 (≈ 24 420) on account of the fact that the lorries had stood idle for a week. The complainant asked the Commission to reimburse this amount. The Commission refused to do so, however.

In its complaint to the Ombudsman, the complainant took the view that the present costs had been due to a shortcoming on the part of the Commission's delegation in Sarajevo, which had furthermore failed to reply to several letters. It pointed out that the export of the animals concerned required a considerable amount of time to prepare. The complainant alleged that it had been obvious from the letter of 8 June 2000 that the purchase of the cattle could not go ahead and that the transport thus had to be postponed. It therefore claimed that the Commission ought to pay the relevant sum.

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 Commission's delegation in Sarajevo had in no way indicated to the complainant that the selection or the transport of the animals was to be postponed. All it had done was to forward the letter from the Brcko authorities dated 8 June 2000 and ask the complainant for its comments. The complainant had clearly indicated in its letters of 13 and 14 June 2000 that a postponement was not possible. The Commission had thereupon informed the Brcko authorities accordingly on 15 June 2000. On the same day, it had telephoned the



complainant to tell it not to postpone deliveries and that the selection could be carried out on 19 June 2000. Any possible misunderstanding was thus very quickly resolved. However, in a letter dated 16 June 2000 the complainant had informed the Commission that the selection would take place from 23 June until 27 June 2000 and that the representatives from Brcko should arrive on 22 June 2000. The complainant had thus decided to delay the selection by three days and consequently the delivery had been delayed, too.

The postponement appeared to be due to logistic problems other than the exchange of faxes related to the hesitations of the authorities in Brcko. The complainant had indicated that selection and transport were to be organised in weeks 24 and 25, that is to say, between 12 and 25 June 2000. However, the complainant had then informed the Commission that the selection was to be carried out on 19 June 2000, i.e. in week 25. Bearing in mind that selection took some time, it appeared improbable that both the selection and the transport could have been organised in week 25. Moreover, the selection had been delayed not by a whole week, but only by three days. If the initial planning had been done properly, transport itself would also only have been delayed by three days.

Finally, regard had to be had to Article 10 (1) of the General Conditions of Supply Contracts that read as follows:

"The Supplier shall ensure that the Supplies are delivered to the place of destination as stipulated and in time to allow the person responsible to proceed with acceptance of the Supplies. The supplier is deemed to have fully appreciated the difficulties which he might encounter in this respect, and he shall not be permitted to advance any grounds for delay in fulfilling his obligations."

On the basis of the above, the Commission considered that its position not to cover the expenses for the waiting trucks was justified.

The complainant's observations

No observations were received from the complainant.

THE DECISION 1 Failure to pay transport expenses for the waiting trucks

1.1 The complainant, an Austrian cattle-trading firm, entered into a contract with the European Commission for the delivery of 2027 heifers (breeding cattle) to the Brcko District (Bosnia-Herzegovina). Some 300 animals were delivered every one or two months. The shipment envisaged for June 2000 was delayed, and as a result the complainant received an invoice from its transport company over ATS 336 000 (≈ 24 420) on account of the fact that the lorries ordered for the transport had stood idle for a week. The complainant considers that the delay was caused by the Commission, and that the Commission's refusal to reimburse the said amount thus constitutes maladministration.

1.2 The Commission takes the view that it never asked the complainant to delay the shipment and that it could not be held responsible for the delay. It suggests, moreover, that the delay was in effect due to logistical problems on the part of the complainant rather than the reasons alleged by the latter. Finally, the Commission refers to Article 10 (1) of the General Conditions of Supply Contracts according to which the supplier was to ensure that the supplies are delivered to the place of destination in time and that that he was not



permitted to advance any grounds for delay in fulfilling his obligations.

1.3 The Ombudsman notes that upon having received the letter from the Brcko authorities, the complainant wrote to the Commission on 12 June 2000 asking for a reply regarding the postponement requested by the Brcko authorities. In the absence of such reply, the complainant wrote again on 13 June 2000 requesting that a reply be sent by 2 p.m. that day. However, the Commission only appears to have contacted the complainant on 15 June 2000. Given the urgency of the matter and the express requests for an immediate reply made by the complainant, the Ombudsman considers that the Commission does not appear to have proceeded with the celerity that would have been appropriate.

1.4 It should be considered, however, that the complainant has only incidentally criticised the Commission's failure to reply to its letters. The only claim raised by the complainant concerns the Commission's failure to pay the amount of ATS 336 000 (≈ 24 420) mentioned above. However, this claim 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 In the present case, the Commission has put forward a coherent and reasonable account of the reasons for which it believes that the balance claimed by the complainant is not due.

1.9 In these circumstances, there appears to be no maladministration on the part of the Commission.



2 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it appears that there is no maladministration on the part of the 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) See Annual Report 1997, pages 22 sequ.