

Decision of the European Ombudsman on complaint 1272/2001/SM against the European Commission

Decision

Case 1272/2001/SM - Opened on 22/10/2001 - Decision on 24/07/2002

Strasbourg, 24 July 2002

Dear Mr X.,

On 30 August 2001, you made a complaint on behalf of company to the European Ombudsman concerning a call for proposals with a view to improving the financial environment for small and medium sized enterprises (SMEs) in Europe ("Business Angels Network, Notice, OJ 98/C 263/10, 20.8.1998).

On 22 October 2001, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 7 January 2002. I forwarded it to you with an invitation to make observations, which you sent on 26 March 2002. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

In the present complaint, the underlying undisputed facts are briefly as follows.

The Commission published a call for proposals (the Notice) on 20 August 1998 with a view to improving the financial environment for European Small and Medium sized enterprises, SMEs. The complainant, a company, submitted its grant application, a feasibility study, within the first sphere of activities on networks of private investors and SMEs to the Commission on 30 September 1999 for a project starting in 2000. The Notice set out two procedures, the selection procedure based on the selection criteria in the Notice during which the eligibility of the grant applications is verified, and an award procedure during which the Selection committee compares the selected applications on the basis of the award criteria in the notice and in the end awards a contract to a recipient.

In May 2000, the Commission asked the complainant for bank details with a view to setting up a contract. Following this fax, the complainant reinforced the structure (marketing, staff) of its company whilst waiting for approval by the Commission. The Commission's financial services however started an audit of its JOP projects, that is Community aid schemes in Phare countries,



and within this audit launched an investigation of one of the company's partners. The action involving the complainant was put on hold until clearance of the allegations against his business partner. In the meantime, the Commission's program priorities changed and the present project was closed in April 2001.

The complainant, having received no contract by the end of December 2000/January 2001, contacted the Commission to inquire about the timetable of the project and the approval of a grant for its feasibility study. The complainant was informally told that an audit had been launched of the JOP Programme. In August 2001, the Commission informed the company that it had been on a reserve list but that the project had come to an end and that there would be no contract. The complainant submitted a complaint to the European Ombudsman on 30 August 2001 and asked for his assistance.

In its complaint the complainant makes the following allegations:

- 1) The Commission failed to pay the grant after having approved the proposal.
- 2) The Commission failed to inform the complainant within a reasonable time that the project had come to an end. The Commission also failed to inform the complainant that its application was put on hold and that the company's business partner, Mr X, was under investigation by the Commission services.

The complainant claims that the Commission should sign the grant contract as promised and pay the grant.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments.

On 28 August 1998, the Commission published a call for proposals aimed at supporting Small and Medium Sized Enterprises (SMEs) by developing 'Business Angels' networks through the provision of subsidies. The complainant, a company, submitted a proposal for projects starting in 1999 on 30 September 1999. The Commission acknowledged receipt by letter of 29 October 1999 informing the complainant that its Selection Committee would analyse it in due course. Following this analysis the authorising department, DG Enterprise, put it on a reserve list which meant that the proposal passed the first selection phase but no decision on the award of the subsidy had been taken at that stage. On 4 May 2000 the DG Enterprise asked the complainant for bank details with a view to conclude a grant agreement. Following the launch of an audit of several JOP projects the Commission services investigated more closely one of the complainant's business partner's activities. While this investigation was on-going, DG Enterprise decided to put the company on hold whilst waiting for clearance of the allegations.

On 24 January 2001, a meeting took place between the DG Enterprise and the company's representatives, who made it clear that they still expected to conclude a grant agreement with



the Commission and expressed dissatisfaction with the long duration of the internal audit process. The DG Enterprise then informed them that the Commission did not intend to conclude a grant agreement with the company before clearance of the allegations against the business partner and that the proposal was put on hold in the meantime. Some months later, in April 2001, DG Enterprise decided to close the Business Angels network action whereby three remaining proposals including that of the complainant were not followed up.

In reply to the complainant's letter of 11 June 2001, the Commission informed the complainant by letter of 23 August 2001 that the action had been closed and that there would be no grant agreement. On 30 August 2001, the complainant replied to the Commission's letter asking for more details and requesting that a grant agreement be signed. On the same date, the complainant submitted a complaint to the Ombudsman. The Commission sent a holding reply to the complainant on 11 October 2001 informing it that the DG Enterprise was proceeding with additional verification of the complainant's proposal comprising a request for information to the "Tribunal de Commerce de Nivelles" in Belgium regarding the constitution and registration of the company.

Finally, the Commission comments on the allegations put forward by the complainant:

The Commission considers that it did not fail to pay the grant, as it has not committed itself to award such a grant to the complainant. The fact that the proposal was put on a reserve list, meaning that it passed the first selection phase but that no decision on the award of the grant was taken yet, does not correspond to an obligation to award the grant to those on that reserve list. The acknowledgement of receipt sent to the complainant on 29 October 1999 and the fax of 4 May 2000 asking for bank details are part of the Commission's administrative practice and do not amount to a promise committing the Commission.

As regards the alleged failure to inform the complainant that the project had come to an end within a reasonable period of time, the Commission states that the company was put on hold whilst waiting for clearance of suspicion of fraud. Then the remaining budget relating to the Business Angels action for the year 2000 was carried forward to the year 2001 and ceased to be valid by the end of March 2001. At that stage, the DG Enterprise decided to close the Business Angels Action and informed the complainant that the action was closed and that no further subsidy would be granted.

Finally, regarding the failure to inform the complainant that it was put on hold, the Commission states that the company was informed of this during the meeting with DG Enterprise staff which took place on 24 January 2001. Concerning the allegation that the Commission failed to inform the complainant that its business partner was the subject of an audit by the Commission services, the Commission states that the complainant was informed of this also during the latter meeting in January 2001. The Commission moreover informed the complainant in its opinion of 7 January 2002 that the European Anti-Fraud Office, OLAF, initiated an inquiry in October 2000 in particular involving one of the complainant's business partners.

The complainant's observations

The complainant maintains its claim in the observations and makes the following remarks.



The complainant maintains that the Commission committed itself by stating in its letter of 4 May 2000 requesting bank details that "in order to set up a contract with X, could you please be so kind to (.)." The complainant argues that the Commission's commitment is also illustrated in the minutes from the meeting with the Commission on 24 January 2001 which state that the company's proposal "received a rather high score in the evaluation, and a contract with X was prepared in order to support the setting up and development of the (.) network". The complainant is of the view that the contract was established, that the Commission accepted its offer and that only the finalising of the contractual procedure remained.

The Commission's statement that the letter of 4 May 2000 asking for bank details was automatically sent to all the bidders on the reserve list is incorrect in that the complainant did not figure on such a list as at that date.

The complainant moreover considers that the Commission should have informed it of the initiated fraud investigation against one of its business partners and notified the partner in question directly in this respect. The way the situation was handled deprived both of the right of defence, which is a fundamental right. The complainant moreover points out that the allegations of fraud against his business partner do not in any way concern the company.

The complainant notes that the OLAF investigation is as at the date of the Commission's opinion, 7 January 2002, not finalised, having been initiated in October 2000 whilst mentioning that its partner therefore has no comments on the subject of the alleged irregularities.

The complainant also stresses that the Commission has not to date replied in substance to its letter sent to the latter of 30 August 2001.

It finally requests compensation including interest for damages suffered.

THE DECISION

1. The complainant's new allegations and claims

1.1 In its observations, the complainant alleges that the Commission has not provided a substantive reply to its letter of 30 August 2001 and that the Commission has deprived both it and his business partner of the right of defence. The complainant also claims damages including interest for the Commission's failure to pay the grant.

1.2 The Ombudsman considers that the new allegations and claim cannot be dealt with satisfactorily in the framework of the present inquiry. The allegations could be the subject of a new complaint to the Ombudsman. The complainant may address the new allegations and claim directly to the Commission and consider making a new complaint to the Ombudsman if the Commission does not provide a satisfactory reply.

2 Alleged failure to pay the grant after having approved the proposal

2.1 The complainant alleges that the Commission failed to pay the grant after having approved the proposal and claims that the Commission should sign the grant contract and pay the grant.



2.2 The Commission considers that it did not fail to pay the grant, as it has not committed itself to award such a grant to the complainant. The fact that the complainant's proposal passed the first selection phase but that no decision on the award of the grant was taken yet, does not correspond to an obligation to award the grant to the pre-selected companies on the reserve list.

2.3 The Ombudsman notes that the tender procedure applicable in the present case is set out in the notice for the call for proposals aimed at improving the financial environment of SMEs of 20 August 1998. When selecting companies with a view to strengthen the financial structure of SMEs in Europe the Commission firstly makes a pre-selection of potential candidates to whom a grant agreement might be awarded which is followed by a second phase during which the award procedure takes place. In the event the Commission approves the grant application a grant agreement will be concluded. In the present case, it appears that the complainant was selected and thus considered as an eligible contract partner but was not however awarded a contract.

2.4 On the basis of the available evidence, the Ombudsman considers that the Commission did not commit itself to conclude a grant agreement with the complainant.

2.5 In these circumstances, there appears to be no maladministration on the part of the Commission as regards this aspect of the complaint.

3 Alleged failure to inform within a reasonable time that the project had come to an end

3.1 The complainant alleges that the Commission failed to inform it within a reasonable period of time that the project had come to an end.

3.2 According to the Commission, it decided to close the Business Angels Action programme in April 2001, at a time when only three applications remained to be dealt with including that of the complainant. It informed the complainant, by letter of 23 August 2001, of the fact that it had closed the programme and that the complainant's application was therefore no longer under consideration.

3.3 The Ombudsman notes that the Commission failed to inform the complainant of the closure of the Business Angels Action programme until four months after the closure decision was made. According to Article 41 of the Charter of Fundamental Rights of the European Union, every person has the right to have or her affairs handled within a reasonable time by the institutions and bodies of the Union. The Commission has offered no explanation for the delay. In these circumstances, the Ombudsman considers that the Commission should have informed the complainant without delay. Its failure to do so is an instance of maladministration and the Ombudsman will make a critical remark below.

4 Alleged failure to inform that the grant application was put on hold and that a business partner was under investigation

4.1 The complainant alleges that the Commission failed to inform it that its application was put on hold and that its business partner, Mr X, was under investigation by the Commission services.



4.2 The Commission argues that DG Enterprise staff met the complainant on 24 January 2001 and informed it of the audit of several JOP projects, the investigation into the activities of its business partner and of the fact that its application had been put on hold.

4.3 The evidence available to the Ombudsman does not support the complainant's allegation that the Commission failed to provide it with information. The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

5 Conclusion

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

The Commission made its decision to close the Business Angels Action in April 2001. It informed the complainant of this fact only on 23 August 2001. According to Article 41 of the Charter of Fundamental Rights of the European Union, every person has the right to have or her affairs handled within a reasonable time by the institutions and bodies of the Union. The Commission has offered no explanation for the delay. The Commission should have informed the complainant without delay. Its failure to do so is 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 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