

## Decision of the European Ombudsman on complaint 1317/2001/PB against the European Commission

Decision

**Case 1317/2001/PB - Opened on 02/10/2001 - Decision on 31/10/2002**

Strasbourg, 31 October 2002

Dear Mr Y. C.,

On 13 September 2001, you lodged a complaint with the European Ombudsman concerning a contractual dispute that you had with the European Commission.

On 2 October 2001, I forwarded the complaint to the Commission for its comments. The Commission sent its opinion on your complaint on 20 December 2001. I forwarded the Commission's opinion to you on 10 January 2002 with an invitation to make observations, if you so wished.

On 26 February 2002, you sent me your observations on the Commission's opinion.

On 11 March 2002, I conducted further inquiries, requesting a second opinion from the Commission. I informed you of my decision to conduct further inquiries by letter the same date.

On 7 May 2002, the Commission sent the first part of its second opinion. On 26 June 2002, the Commission sent the second part of the opinion.

On 2 July 2002, I forwarded the Commission's full second opinion to you with an invitation to make observations, if you so wished.

On 8 July 2002, you sent me your observations on the Commission's second opinion.

On 25 July 2002, I wrote to the Commission in order to propose a friendly solution. I informed you of this by letter the same date.

On 14 October 2002, the Commission sent me its opinion on my proposal for a friendly solution. I informed you about the Commission's opinion by email on 24 October 2002. You replied by email on the same date.

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



## THE COMPLAINT

The complaint was submitted in September 2001. It concerned three contracts that the complainant's company had with the Commission's Eurostat office in the period 1993-1995.

In 1997, the Commission carried out an audit of the contracts. The results of the audit led the Commission to make a recovery order for money paid by the Commission to the complainant. It appears that the recovery order was made because the Commission considered that there had been contract overlaps and that work had been done outside the contract periods.

The complainant considered that there was maladministration on the part of the Commission. He took the view that the rules and procedures applied by the Commission in its relations to contractors are inconsistent, and that the Commission's recovery order in this case was unjustified.

As regards the Commission's contract rules and procedures, the complainant's view can be summarised as follows : The inconsistency is between the rules relating to the officials who work directly with contractors, and the rules relating to the officials who are responsible for auditing contracts. What happens in practice is that when the officials who work directly with contractors ask for changes to the work delivered, the officials responsible for auditing subsequently refuse to recognise the contractual validity of those changes. The complainant suggested that the rules be changed to make them more consistent.

As regards the complainant's specific contractual dispute, he stated in summary the following:

In each case, the work was done as instructed by the Commission's Eurostat officials and sometimes before the contract period. In all cases, the work was accepted by these officials. One letter confirmed that work had been requested and undertaken to the satisfaction of the responsible official outside the contract period. The complainant also had minutes and spreadsheets of progress meetings with the responsible persons of the Commission, confirming that work had been done under the direction of the responsible official before the contract signature.

The complainant added that he was repeatedly assured by the Commission that the problems with the apparent overlap of the contracts would be sorted out internally. However, at the end of the day the only action from the Commission was a request for repayment of money.

Finally, the complainant stated that he had been subject to various forms of pressure, including oral statements to the effect that he should not go to court, or refusals to award new contracts.

In summary, the complainant made the following allegations:

1. The Commission's contracting unit and the financial services apply inconsistent rules to third



party contracts.

2. The complainant's company suffered from this inconsistency in relation to contracts that it had with the Commission.

The complainant claimed that the Commission's rules should be amended, and that his company should receive just payment and compensation.

## THE INQUIRY

### **The Commission's opinion**

The complaint was forwarded to the Commission, which submitted the following opinion:

Technical responsibility for the files in question lay with Eurostat, financial responsibility with ex-DG23. The contracts were co-signed by Eurostat and ex-DG23.

The rules applicable required the signature of both parties before entry into force of the contract, and a formal written amendment for any subsequent variation of terms.

The complainant alleged that work done outside the contractual period was accepted by the Eurostat official responsible for technical supervision but subsequently disallowed by the Special Audit Team.

The inconsistency related therefore not to the rules themselves but to Eurostat's acceptance of the work as carried out and the audit of the Special Audit Team which identified overpayments because of certain man-months reported by the complainant being outside the contractual period.

To the extent that the complainant relied and acted upon changes to the terms of the contracts allegedly made by oral agreement with the person responsible for the file, the subsequent decision not to allow expenditure falling outside the contractual period could be regarded as an inconsistency between departments of the Commission in the handling of the files.

Consequently, notwithstanding the formal regularity of the recovery order (the services were rendered outside the contractual period of validity), the Commission considered that in this specific case the complainant had a legitimate expectation deriving from the oral undertakings made by an official at the Commission. These oral undertakings were prompted by the desire not to have a gap between consecutive contracts, which would have led to the dismissal of the experts working on the file and to an interruption of the flow of information on Tourism Statistics.

In the light of the inconsistency referred to above and the legitimate expectations of the complainant, the Commission considered that the complainant should be reimbursed the amounts recovered. However, interest should not be considered as due in this case, taking into account the contributory negligence of the complainant.



Finally, the Commission had no knowledge of verbal threats, refusals to award new contracts etc. The complainant still had several contracts in progress with Eurostat, following due tendering.

### **The complainant's observations**

The Commission's opinion was forwarded to the complainant for observations.

In his observations, the complainant stated that he was pleased that the main point of the complaint had been accepted, and that the Commission would make a reimbursement.

However, the complainant also made the following observations:

- a) No mechanism had been suggested by the Commission as to how the reimbursement should be paid.
- b) The Commission's claim that there was contributory negligence on the part of the complainant was wrong. The Commission should therefore also pay interest on the amount to be reimbursed.
- c) The complainant also made three new claims: 1) To obtain on-the-spot access to the Commission's database on undesirable contractors (' *Early Warning System* ') to check that his company is no longer registered in this system; 2) to receive damages; 3) to know the state of the Luxembourg Police's records in regard to his company.

### **Further inquiries**

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary in regard to the Commission's position on the payment of interest. The Ombudsman therefore requested the Commission to clarify its position with regard to its view that there had been contributory negligence on the part of the complainant. The Commission was asked to submit its clarification with specific reference to the facts of the case as well as the rules on contributory negligence.

In his letter to the Commission, the Ombudsman also noted that the complainant made the following three claims: 1) To obtain on-the-spot access to the Commission's *Early Warning System* to check that his company is no longer registered in this system; 2) to receive damages; 3) to know the state of the Luxembourg Police's records in regard to his company. The Ombudsman stated that he had informed the complainant that claims 1 and 2 were additional claims which would not be taken up for review in the present inquiry. In regard to the third claim, the Ombudsman informed the complainant that he was free to contact the Luxembourg Police to request information on the state of any records concerning himself or his company. Thus, the Commission was not asked to respond to these claims in its second opinion.

### *The Commission's second opinion*

In its reply to the Ombudsman's further inquiries, the Commission responded as follows:

- a) The procedure for reimbursement required that the complainant send a formal payment request to Directorate-General Enterprise.



b) As regards contributory negligence, the Commission noted that its agreement to reimburse the amounts recovered was based on oral undertakings made by an official. The Commission considered that these undertakings led the complainant to act upon amendments to the contract not formalised in an appropriate written addendum.

Nevertheless, the complainant himself was equally bound by the terms of the contract. Article 7 of the contract provides that amendments to the contract must be made in writing.

Consequently, by entering into oral agreements, the complainant contributed to the uncertain legal and financial situation. The Commission considered that this conduct of the complainant was a factor that contributed to its decision to recover the sums involved.

#### *The complainant's final observations*

The Commission's second opinion was forwarded to the complainant for observations. The complainant stated that he would make his request for repayment. He maintained his claim for interest.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

### **The Ombudsman's analysis of the issue in dispute : refusal to pay interest**

1. The issue in dispute concerned interest on the repayment that the Commission considered the complainant to be entitled to as a matter of a legitimate expectation. The Commission concluded that the complainant should not receive interest on the repayment, referring to contributory negligence by the complainant. It stated that the contractual rules only allowed written amendments to the contract, but that the complainant had nevertheless relied on an oral undertaking made by a Commission official. According to the Commission, this contributed to the financial and legal uncertainty which influenced the Commission's decision to recover the money from the complainant.

2. The Ombudsman noted that the complainant had a legitimate expectation, based on an undertaking made by one of the Commission's officials. The legitimate expectation was that the Commission would pay for work delivered by the complainant. It appeared, therefore, that the Commission's decision to recover the money from the complainant was an instance of maladministration.

3. In light of these findings, the Ombudsman failed to understand why the complainant should not receive interest on the amount to be repaid by the Commission. The Commission accepts that the behaviour of its official gave rise to a legitimate expectation on the part of the complainant that he could proceed as he did. In these circumstances, it was only logical and fair that the Commission not only repay the amount that it recovered but also pay interest on this sum.

4. The Ombudsman's provisional conclusion, therefore, was that the Commission's refusal to pay interest on the amount recovered could be an instance of maladministration.

### **The possibility of a friendly solution**

On 25 July 2002, the Ombudsman submitted a proposal for a friendly solution to the



Commission. In his letter, the Ombudsman suggested that the Commission should consider to pay interest on the amounts recovered from the complainant, calculated from the date when the recovery was made.

In its reply of 14 October 2002, the Commission maintained that the complainant had contributed to the legal and financial uncertainty surrounding the contract. However, it stated that in a response to the request from the Ombudsman for a friendly solution, and as a gesture of goodwill, the Commission would pay the interest concerned.

In his observations sent on 23 October 2002, the complainant stated that he was satisfied with the outcome, and expressed his deep gratitude to the Ombudsman for his help.

## **THE DECISION**

### **1 Application of inconsistent rules to third party contracts**

1.1 The complainant put forward that the Commission's auditing staff often refuse to recognise contractual amendments made between contractors and the Commission's officials directly responsible for the contracts. He therefore alleged that the Commission's contracting unit and the financial services apply inconsistent rules to contracts.

1.2 The Commission clarified that the inconsistencies established in this case did not relate to the rules themselves. Instead, they related to the fact that the Commission's Eurostat office accepted his company's work, whereas another Commission unit, the Commission's Audit Team, refused to recognise the contractual validity of work considered to have been done outside the contractual period.

1.3 Thus, the Commission has clarified that the inconsistencies referred to by the complainant relate to the specific facts of the present case, not to the rules themselves. This clarification seems correct, and it therefore appears that there is no maladministration with regard to this aspect of the complaint.

### **2 Detriment from inconsistent rules in this case**

2.1 The complainant stated that the Commission wrongfully recovered money from his company following an audit in 1997, applying the rules referred to above. He alleged, therefore, that his company had suffered from the inconsistency in the rules in relation to contracts that it had with the Commission. He claimed that his company should receive just payment and compensation.

2.2 The Commission considered that its order for recovery was formally correct, but recognised that a legitimate expectation had been created which entitles the complainant to reimbursement of the amounts recovered. However, the Commission initially refused to pay interest.

2.3 On 25 July 2002, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman suggested that the Commission should consider paying interest on the amounts recovered from the complainant, calculated from the date when the recovery was made.



2.4 On 14 October 2002, the Commission informed the Ombudsman that it agreed to accept his proposal and would pay the complainant the interest.

2.5 The complainant informed the Ombudsman that he was satisfied with the result that had been reached.

2.6 Thus, it appears from the Commission's comments and the complainant's observations that a friendly solution has been achieved.

### **3 Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it appears that a friendly solution has been achieved. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN