European Ombudsman

Decision of the European Ombudsman on complaint 1840/2001/ME against the European Commission

Decision
Case 1840/2001/ME - **Opened on** 21/01/2002 - **Decision on** 10/09/2002

Strasbourg, 10 September 2002
Dear Mr J.,

On 23 December 2001, you made a complaint to the European Ombudsman concerning Phare project RO9504.01.04.L005.

On 21 January 2002, I forwarded the complaint to the President of the European Commission. On 25 January 2002, you sent an additional letter, which I forwarded to the Commission on 6 February 2002. The Commission sent its opinion on 26 March 2002. I forwarded it to you with an invitation to make observations, which you sent on 10 May 2002.

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

THE COMPLAINT

The complainant lodged his complaint with the European Ombudsman in December 2001. The complainant had been the team leader for Phare project RO9504.01.04.L005: Jui Valley Regional Study, in Romania. A contract was drawn up between the Romanian Ministry of Industry and Trade and West Midlands Enterprise Board (WMEB), a consortium performing the project. The complainant was employed by the company Kienbaum, a sub-contractor. The Commission financed the project through its Delegation in Romania.

The complainant and his company Kienbaum had prepared a study as part of their tasks under the project. It turned out that the Ministry of Industry and Trade was dissatisfied with the study and it did therefore not immediately issue payment to WMED for this part of the project. Consequently WMED did not pay Kienbaum for the work it had performed. The Commission Delegation suggested the Ministry seek independent advice from another expert nominated by the Delegation, in order to check the quality of the study. The damage caused was enormous because the contractor, WMED, of course believed that the Delegation was fully supporting the assessment and it thus contracted another company, IMC to perform the work. Later, the Delegation distanced itself from the assessment report, giving contradictory statements, one

saying that it did not nominate the expert. The assessment report was flawed and later disowned by its author. The complainant stated that he had made a loss of ¤ 80,000 since he had not been paid. He had asked the Commission Delegation for help in solving the problems on several occasions without success. According to the complainant, the Commission Delegation had caused the problems by giving directions or permission to the Ministry that were contrary to the Phare rules.

The complainant stressed that his work was only repeated by IMC to no use and his study had been fully used by the beneficiaries. The way in which IMC came into play did not follow the framework contract rules and furthermore the Head of Energy PMU at the Ministry retired at the end of the contract and was employed by a firm very close to IMC. The Commission Delegation advised the complainant to pursue the matter with his company Kienbaum. These efforts were unsuccessful.

Taken together, the complainant alleged that the Commission Delegation in Romania did not respect the Phare rules and the Terms of Reference in relation to this project. The complainant stated that he had not been paid, which amounted to a loss of ¤ 80,000. More specifically, the complainant alleged that:

(i) The Commission Delegation agreed to abandon the process laid down in the Terms of Reference relating to approval of the studies. According to the Terms of Reference, a Steering Committee shall approve the studies. Instead the Head of Energy PMU at the Romanian Ministry of Industry and Trade was granted the right to approve the studies.

(ii) The Commission Delegation acted in breach of Phare rules when it, in the absence of substantiated arguments for not accepting parts of the study, agreed that the opinion of an independent expert should be sought.

(iii) The Commission Delegation agreed to an illegal change of the Terms of Reference in changing "Task 4" of the study to "The Final Report".

In an additional letter, the complainant underlined that point (ii) was the key point of his complaint. Furthermore he wished to propose the following, more substantiated wording, to this part of his complaint:

"The Commission Delegation acted in breach of Phare rules when, in the absence of the Steering Committee's opinion and the absence of substantiated arguments for not accepting parts of the study, it suggested, without the consent of the parties involved, that a third party's opinion was sought. The Delegation acted in further breach of rules when it allowed that this opinion was misrepresented as 'the opinion of an independent expert nominated by the Delegation' and instrumentalised to bring in another consultant, when it knew that (a) the opinion was not independent, (b) the expert had not been nominated by the Delegation and (c) the opinion was flawed."

THE INQUIRY

The Commission's opinion

The complaint and the additional letter were forwarded to the European Commission who submitted the following opinion.

The Commission explained that it had entered into a framework contract, on behalf of Romania's Ministry of Industry and Trade, with WMED. The framework contract defined procedures and conditions under which an assignment can be contracted by a candidate country to implement a project funded by the Phare programme. This assignment was managed under the Decentralised Implementation System where Romania acted as contracting authority and had full responsibility for the management of the contract. The obligations of WMED were set out in a contract, Order for Supply of Services RO9504.01.04.L005, entered into between the Ministry and the consortium led by WMED. Kienbaum was subcontracted by WMED to implement the project and the complainant was employed by Kienbaum for the project.

It pointed out that the role of its Delegation in Romania was to endorse the contract before signature by the Ministry, i.e. to verify that the contract respected the objectives and the rules of the Phare programme, and to monitor the proper implementation of the project. The Commission was however not a party to the contract. It did not engage into any correspondence with the contractor to direct its work, nor did it express an opinion as to the quality of the contractor's or the complainant's work.

The Terms of Reference attached to the contract included various tasks to be implemented by WMED. The dispute refers to task 2, preparation of a regional development strategy, and task 3, preparation of a regional development Action Plan. The Ministry did not consider that task 3 had been carried out in accordance with the Terms of Reference. WMED accepted its viewpoint and in order to settle the dispute, they prepared and signed an addendum to the original contract through which a) the contract duration was extended and b) additional experts were provided by WMED in order to implement the tasks according to the Terms of Reference to the satisfaction of the Ministry. The Commission Delegation endorsed the addendum as part of its duties in order to allow the project to be finalised despite the delays encountered.

While all contractual matters were settled between the Ministry and WMED, it appears that the sub-contractor Kienbaum and the complainant were not paid by WMED for work not accepted by the Ministry. The Ministry or the Commission could not intervene in internal consortium matters and direct WMED to pay Kienbaum for services rendered under sub-contracting arrangements to which they were not a party.

The Commission also stated that even if it was not a party to the contract, its Delegation in Romania acted to facilitate an amicable settlement in the interest of all concerned. The Delegation thus suggested the Ministry to obtain a further independent view prior to rejecting the study. The Delegation suggested the name of a regional development expert, but it was the Commission's understanding that the Ministry contacted another expert for the assessment on an informal basis. The Commission did not contact the expert directly nor did its Delegation formally nominate the expert and it was unaware of the procedure by which the Ministry

appointed the expert. The Commission understood that the assessment of this expert was only one element but not the exclusive factor that helped the Ministry form its opinion.

The Commission pointed out that it had no obligation to deal with sub-contractors. Nevertheless, its Delegation had arranged a meeting with all parties in order to help them reach a settlement and it responded to numerous letters from the complainant.

The Commission concluded that the contractual obligations were met by the Ministry and WMED. Its Delegation adequately fulfilled its monitoring obligations and had issued recommendations to all parties concerned to settle the dispute. Had the Commission acted otherwise, it would have exceeded its prerogatives by intervening in contractual matters involving third parties. It stated that the remaining dispute should be resolved between the complainant and Kienbaum and/or WMED.

The complainant's observations

In his observations, the complainant put forward that the Commission's opinion did not disprove but actually supported his complaint.

The complainant referred to the fact that the Commission had stated that WMED had accepted the viewpoint and criticism of the Ministry of Industry and Trade. According to the complainant no documentation or communication suggest that WMED accepted the Ministry's view. After having received the comments of the Ministry, 30 additional pages of material were added and extensive explanations made before the final draft was submitted in January 1999. The Ministry's general comments contained in its letter of 25 February 1999, were rejected by Kienbaum on behalf of the consortium in its letter of 16 March 1999, which was copied to the Commission Delegation. The complainant therefore questioned how the Delegation could form the opinion that the views of the Ministry were fully accepted. On 18 March 1999, the Ministry forwarded an opinion, claiming that it was one of an "independent expert nominated by the Delegation". WMED and Kienbaum would not have accepted this opinion had they been told that the expert was chosen and appointed by the Ministry under unknown terms, which became clear only when reading the Commission's opinion. The documents suggest that the threat not to receive payment (contained in the letter of 25 February 1999) and the authority attached to the "independent" opinion through the purported nomination by the Delegation made WMED yield to the Ministry's request. It is therefore not correct to speak about WMED's acceptance of the Ministry's viewpoint, when in fact an opinion seems to have been forced upon it.

As regards the first allegation, the complainant stated that the Commission's opinion did not deny that the Steering Committee was responsible for approval and that the Steering Committee had not been heard. According to the complainant, the Head of Energy PMU at the Ministry controlled the procedure, whereas the Commission Delegation should have sought and considered the opinion of the other stakeholders represented in the Steering Committee, some of whom had already provided positive opinions. Thus, the Delegation did not only give permission, but approved a procedure that was flawed. The documents show that the Head of Energy PMU, with the obvious knowledge of the Delegation, and though admittedly lacking expertise, went ahead rejecting the study even before receiving the opinion of the independent expert. As the expert was chosen and appointed by the PMU, the opinion could not have been

independent. The suggestion to appoint an independent expert clearly came from the Delegation when WMED had suggested that it would not issue payment for the study. The complainant questioned whether the Ministry had in fact carefully read and evaluated the study (consisting of 228 pages and 70 pages of annexes) before it sent the letter of 21 January 1999 mentioning its intention to seek independent advice. The study had been submitted only on 18 January 1999 and the Delegation should thus have asked the Ministry to first read it and come up with more detailed observations.

Concerning the second allegation, the complainant stated that the Commission did not deny that the request for another expert was not legal. It also did not provide any evidence that the conditions laid down in the Phare rules for such a request were met, namely substantiated arguments for not accepting the study and prior permission through the Commission Delegation. The Commission's statement that it had discussed in length with the team leaders was not true as far as the complainant was concerned. Before an important decision like the rejection of a study is made, the Delegation should have made sure that the parties concerned are adequately informed and have been given the opportunity to respond to the issues. The Delegation neglected its monitoring obligation by allowing or not preventing an illegal request. Despite this the complainant was grateful to the Delegation when, at a meeting on 24 August 1999, it managed to get the Ministry to reverse its decision in view of the quality of his work. However, this was too late.

Regarding the fact that another expert's view was sought, the complainant stated that the Commission had admitted that its Delegation had suggested that procedure. This was done without the consent of the contracting parties as foreseen in the Terms of Reference. Furthermore, the Steering Committee was not consulted. The Delegation also allowed the opinion to be presented as independent, when it knew it was not, as the expert was chosen by the Ministry. Given the exclusive weight that the verdict of this expert had, the Delegation should have monitored the selection and the terms of appointment. The Delegation also allowed the expert to be presented as one nominated by itself when it knew he was not. It thereby led WMED to believe that the expert was independent and nominated by the Delegation when it came to signing the addendum. Moreover, the Delegation knew that the opinion was flawed. Before the Delegation endorsed the addendum it was aware of very positive opinions on the study given by competent parties. In June and July 1999, the Delegation was informed about severe flaws in the expert's opinion and finally arranged the meeting on 24 August 1999.

The complainant also provided information on how profitable it was for IMC, the firm employing the expert, to produce the report. This firm received a disproportionately high part of the contracted budget without performing much work. IMC essentially re-stated the complainant's study, which it had been sent, carrying out no additional research or fieldwork and was paid 75% of the contract budget for only two of the four tasks. However, research and fieldwork (Task 1) required most efforts and costs, in the complainant's case beyond 80%. It must have been very attractive financially for IMC to get paid 75% of the budget just for re-stating 20% of a study. These incredible proportions were well known to the Delegation. The Ministry maintained that 25% was the amount to be paid contingent to approval of Task 1. This was however a mere payment schedule, which had no connection with the value of the work performed. The

Delegation was aware of this fact but still allowed that 25% be considered the value of the work done when endorsing the addendum.

As to the third allegation, the complainant stressed that the Commission's statement that the Terms of Reference remained unchanged was not true. The documentation show that Task 4 delivered by IMC was the "final report", while the Terms of Reference state that Task 4 consists of various specific actions. IMC did not carry out these actions but Kienbaum clearly did, and in addition Kienbaum delivered the final report. Still IMC was fully paid for Task 4. The amount involved was substantial and the Delegation obviously consented to the change in the Terms of Reference despite the complainant's request to correct the mistake.

The complainant concluded that the Commission had not adequately exercised its monitoring obligations in issuing recommendations which were contrary to common practice, the Terms of Reference and Phare rules.

THE DECISION

1 Preliminary remark

1.1 The complaint relates to Phare contract No RO9504.01.04.L005 concluded between the Romanian Ministry of Industry and Trade and West Midlands Enterprise Board (WMEB), a consortium performing the project. The complainant was the team leader and was employed by the company Kienbaum, a sub-contractor. The Commission had a framework contract with WMED and was financing the project through its Delegation in Romania. The complainant alleged that the Commission had not respected Phare rules and the Terms of Reference. Further, he had not been paid, which amounted to a loss of ¤ 80,000.

1.2 The Ombudsman notes that this case relates to a contractual dispute. 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. 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.

1.3 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.

1.4 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.

2 Approval of the studies

2.1 The complainant alleged that the Commission Delegation agreed to abandon the process laid down in the Terms of Reference relating to approval of the studies. According to the Terms of Reference, a Steering Committee shall approve the studies. Instead the Head of Energy PMU at the Romanian Ministry of Industry and Trade was granted the right to approve the studies.

2.2 The Commission argued that the Delegation had adequately fulfilled its monitoring obligations and had issued of recommendations to all parties concerned to settle the dispute.

2.3 The Ombudsman firstly wishes to point out that he can only scrutinise the acts of the Commission. The Ombudsman thereby notes that the role of the Commission was to endorse the contract, i.e. to verify that the contract respected the objectives and the rules of the Phare programme, and to monitor the proper implementation of the project.

2.4 The Ombudsman examined the applicable Terms of Reference. On the basis of the information available to the Ombudsman, the Ombudsman finds that the complainant has not put forward any evidence to prove that the Commission Delegation agreed to abandon the foreseen procedure or that it granted the PMU the right to approve the studies. The Ombudsman therefore finds no maladministration in relation to this part of the complaint.

3 The opinion of an independent expert

3.1 The complainant alleged that the Commission Delegation acted in breach of Phare rules when, in the absence of the Steering Committee's opinion and the absence of substantiated arguments for not accepting parts of the study, it suggested, without the consent of the parties involved, that a third party's opinion was sought. To this effect, the complainant submitted an extract of the "Practical Guide to Phare, Ispa & Sapard contract procedures".

3.2 The Commission argued that the Delegation had adequately fulfilled its monitoring obligations and had issued recommendations to all parties concerned to settle the dispute. When it became clear that the Ministry was dissatisfied with some work performed by the complainant, the Delegation suggested the Ministry to obtain a further independent view prior to rejecting the study. The Delegation later endorsed the addendum as part of its duties in order to allow the project to be finalised despite the delays encountered.

3.3 The Ombudsman has not found any evidence to show that the Commission did not respect the relevant provisions of the "Practical Guide to Phare, Ispa & Sapard contract procedures".

3.4 The complainant also alleged that the Delegation acted in further breach of rules when it allowed that this opinion was misrepresented as 'the opinion of an independent expert nominated by the Delegation' and instrumentalised to bring in another consultant, when it knew that (a) the opinion was not independent, (b) the expert had not been nominated by the Delegation and (c) the opinion was flawed.

3.5 The Ombudsman does not find that the complainant has proven that the Delegation let the expert's opinion be misrepresented as "the opinion of an independent expert nominated by the Delegation" and thus acted in breached of any rules.

3.6 Furthermore, when endorsing the addendum, the Delegation had to verify that the addendum respected the objectives and the rules of the Phare programme. In doing this, the Commission Delegation possesses a wide margin of discretion. In its letter of 25 May 1999 to the Head of Energy PMU, the Commission stated that when endorsing the addendum, the Delegation bore in mind the risk that without the addendum, the project would not meet its objectives and fail to achieve its planned result. The Ombudsman finds that no evidence has been put forward to suggest that the Commission thereby exceeded its legal authority.

3.7 In the light of the above, the Ombudsman therefore finds no maladministration in relation to this part of the complaint.

3.8 The Ombudsman would finally like to point out that he understands the disappointment of the complainant in this matter especially since the documents in the file have shown that his study was appreciated by all parties and used by the beneficiaries, with the exception of the Head of Energy PMU. The problems encountered with the PMU can however not be attributed to the Commission who was not responsible for the evaluation of the quality of the work. Furthermore, the complainant and his employer Kienbaum has the right to pursue the dispute in a court with competent jurisdiction, as far as work performed under the terms of the contract with WMED is concerned.

4 Change of the Terms of Reference in relation to Task 4

4.1 The complainant alleged that the Commission Delegation agreed to an illegal change of the Terms of Reference in changing "Task 4" of the study to "The Final Report".

4.2 The Commission did not comment on this allegation.

4.3 The Terms of Reference describe that Task 4 consist of arranging a three-day local Workshop, a three-day local Round-Table and arrange and organise a FDI campaign. Furthermore a report and recommendations on Task 4 shall be produced. From the information available it is not clear which tasks were performed by which company. The Ombudsman further finds that the complainant has not been able to prove that the Commission Delegation agreed to any illegal changes. There is therefore no maladministration in relation to this part of the complaint. This does not prevent the complainant from having the dispute examined and settled by a court, as outlined in point 3.8 above.

5 Conclusion

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