

Decision of the European Ombudsman on complaint 118/2002/ADB against the European Commission

Decision

Case 118/2002/ADB - Opened on 28/02/2002 - Decision on 18/09/2002

Strasbourg, 18 September 2002

Dear Mr. C.,

On 9 January 2002, you made a complaint to the European Ombudsman on behalf of ASCONTEX. It concerned the management by the Commission of project EURESPLIT-IBEX 970510001 IT.

On 28 February 2002, I forwarded the complaint to the President of the European Commission. The European Commission sent its opinion on 7 May 2002. I forwarded it to you with an invitation to make observations, which you sent on 12 July 2002.

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

THE COMPLAINT

The complainant is the Chairman of the Administrative Board of ASCONTEX (Associazione Consorzi Tessili). ASCONTEX was awarded a grant amounting to € 500.000. It received an advance payment of € 200.000. This grant was intended for the organisation of an international textile industry fair. This fair never took place and ASCONTEX wrote to the Commission to plan changes in the project. The Commission informed ASCONTEX that it would recover the advances. ASCONTEX contacted the Commission on several occasions to negotiate the possibility to reconsider and make new plans for the organisation of the fair. Furthermore, ASCONTEX sent an interim report which showed that it had already incurred expenditure in relation to the organisation of the event and that it would therefore not be possible to reimburse the whole advance. Despite repeated requests, the Commission allegedly never replied to the points raised by ASCONTEX. The complainant therefore lodged a complaint with the European Ombudsman and alleged that the Commission had not properly dealt with the project. It allegedly failed to assess the interim report sent in October 1999. It allegedly also failed to assess the proposed changes in the project and thereby jeopardised the project.

The complainant claimed that the file be reopened and the amounts to be reimbursed



recalculated.

THE INQUIRY

The European Commission's opinion

The Commission had an abundant exchange of letters with ASCONTEX. It enclosed a copy of all the correspondence that took place between December 1998 and December 2001. The opinion of the European Commission on the complaint was in summary the following:

The interim reports presented by ASCONTEX were considered inadequate by the Commission and the complainant had been repeatedly informed of the reasons thereof. In the absence of essential pieces of information, the Commission was not in a position to accept the report and to release the second payment amounting to 30 % of the grant.

The missing information repeatedly requested from the complainant were :

- a list of initiators and SMEs participating in the project and definitely registered;
- a financial report including supporting evidence for expenditure.

The complainant knew about the importance of this information. It was mentioned in the guide for IBEX project leaders, the vade mecum on IBEX projects and in the declaration signed by beneficiaries of the grants.

The complainant was informed that the failure to provide the necessary information would imply the cancellation of the grant and the reimbursement of the advance payment. In a letter of 18 October 2001, the complainant considered that the Commission's request for a list of initiators was devoid of sense at that stage of the project. However, the complainant had accepted the procedure in its declaration and in the project.

Eventually ASCONTEX sent a synopsis of its expenditure, but without supporting evidence, which still was unsatisfying. Furthermore, the Commission was never provided with a list of initiators.

It is the first time that the complainant blames the Commission for difficulties in the project. At an early stage of the project it became obvious that the organisation of the fair would be difficult. The complainant attributed it to difficulties in the textile sector. In view of its obligation of sound financial management of Community funds, the Commission monitored the project. Before deciding to withdraw the grant the Commission established a dialogue with the beneficiary. The first letter was sent on 14 December 1999, and the complainant was requested provide the above mentioned pieces of information.

By deciding not to reopen and to renegotiate the project, the Commission used its discretionary powers. The flaws in the organisation of the project, ASCONTEX's inability to stick to commitments and its failure to liaise with the IBEX fair in London, motivated this decision.



Besides, even the complainant, in his complaint, admits that he understands the necessity to put an end to the project.

As regards the amount to be reimbursed, the Commission points out that the grant is awarded for the realisation of the project. In the present case, the project was not realised and ASCONTEX's attempts to find alternative solutions only increased the expenditure. The expenditure for attempts to organise the fair are not taken into account if the project does not succeed.

The complainant's observations

The European Ombudsman forwarded the European Commission's opinion to the complainant with an invitation to make observations. In his reply of 12 July 2002, the complainant made the following observations :

The exchanges of correspondence should not be judged on its volume but on its content. The complainant considers that in October 1999, in its third version of the interim report, ASCONTEX has provided the Commission with the information requested. This report, however, has not been mentioned in the Commission's correspondence before 4 October 2001. In any event the Commission has never provided detailed comments on the report, the presented actions and the eligibility of expenditure. Furthermore, the complainant would like to point out the length of time that has lapsed between ASCONTEX's letters of 10 January and 10 April 2000 in which it proposed new alternatives for the project and the Commission's reply of 14 August 2000. ASCONTEX considers that this excessive delay prejudiced the project.

ASCONTEX does not question the fact that it has not provided the list of initiators. However, this list would have been pointless without prior assessment by the Commission of the report and the proposed changes in the project.

Regarding the obligation to provide supporting evidence for the expenditure, it must be pointed out that according to the vade mecum on IBEX projects this information is only to be provided with the final report. The lack of supporting evidence is therefore not an acceptable argument.

To preserve the good relations it has with the Commission, ASCONTEX indeed never raised the issue of the Commission's responsibility for the difficulties in the project. Furthermore it never attributed the whole responsibility to the Commission. Nevertheless, the Commission failed to take a position on ASCONTEX's reports and proposals and to reply to its letters within a reasonable delay. It thereby jeopardise the project.

The complainant maintained his claim.

THE DECISION

1 Handling of the project by the Commission

1.1 The complainant alleged that the Commission had not properly dealt with the project. It allegedly failed to assess the interim report sent in October 1999. It allegedly also failed to assess the proposed changes in the project and thereby jeopardised the project.



1.2 The Commission informed the Ombudsman that it had had a large exchange of letters with ASCONTEX. The interim reports presented by ASCONTEX were considered inadequate by the Commission. ASCONTEX had been asked to provide specific information which it never provided although it had subscribed to the terms of the project. ASCONTEX had been informed that the failure to provide the requested information might lead up to the withdrawal of the grant.

1.3 The Ombudsman notes that according to the *Practical guide for IBEX project leaders*, the vade mecum on IBEX projects and the declaration signed by beneficiaries of the grants, both the pre-interim report and the interim report had to contain the list of firms repeatedly requested by the Commission. The complainant's argument, according to which this information did not make sense at that stage of the procedure, is therefore not supported by the applicable provisions.

1.4 The Ombudsman thoroughly examined the documentation submitted by the complainant and the Commission. Since January 1999, the exchange of correspondence between ASCONTEX and the Commission appears to show that the letters and the reports submitted by ASCONTEX have regularly been examined and replied to. The request for a list of firms has been repeated throughout the procedure.

1.5 The Ombudsman notes that after the Commission received the third version of the interim report, it requested the same information again. The complainant admitted that the requested information was never provided. The Commission's request therefore appears to be reasonable and consistent. Nothing suggests that the report had not been adequately dealt with by the Commission.

1.7 Furthermore, the applicable provisions do not seem to allow the Commission to depart from the terms of the project and to disregard the missing information required at that stage of the procedure. The Commission's requests to receive the list of firms before replying to the suggested alternatives appears to be reasonable. The Ombudsman therefore concludes that there is no evidence of maladministration as regards this aspect of the case.

2 Reconsideration of the file and recalculation of the amounts to be reimbursed

2.1 The complainant claims that the Commission should reconsider its decision to withdraw the grant and recalculate the amounts to be reimbursed in view of the expenditure incurred by ASCONTEX.

2.2 The Commission argued that it used its discretionary powers to decide to recover the payment made to ASCONTEX for a project that had not succeeded. The flaws in the organisation of the project, ASCONTEX's inability to stick to commitments and its failure to liaise with the IBEX fair in London, motivated its decision. The Commission takes the view that expenditure can only be taken into consideration if the project was successfully finalised.

2.3 In this context, the question whether, despite the failure of the project, the costs incurred by ASCONTEX are eligible, is of contractual nature. In this respect, the Ombudsman recalls his approach on contractual disputes :



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.

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.

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.

2.4 In the present case, the Commission referred to Article 24 of the Council Regulation 4253/88 (1) according to which *"the Commission may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity and in particular a significant change affecting the nature or conditions of the operation or measure for which the Commission's approval has not been sought."* Taking into account that in the present case the project did not succeed, and that the Commission appears to have encountered difficulties in obtaining essential information from ASCONTEX, the Commission's decision to recover the funds does not appear to be unreasonable. The Ombudsman therefore concludes that his inquiry has not revealed any instance of maladministration as regards this aspect of the complaint.

3 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 therefore closes the case.

The Ombudsman's conclusion does not prevent the complainant from taking the matter to a competent court.

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

Yours sincerely,



Jacob SÖDERMAN

(1) COUNCIL REGULATION (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards co-ordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments - OJ n° L 374, 31/12/1988