Decisión del Ombudsman Europeo sobre la queja 221/2002/ME contra la Comisión Europea

Declaración

Caso 221/2002/ME - Abierto el 18/02/2002 - Decisión el 16/01/2003

Strasbourg, 16 de enero de 2003

Querido Sr. R.,

El 5 de febrero de 2002, usted formuló una queja al Ombudsman Europeo en nombre de MRA Consultants Limited concerniente al funcionamiento del Programa de Tecnologías de la Sociedad de la Información (IST) bajo el Quinto Programa Marco.

El 18 de febrero de 2002, le enviamos la queja al Presidente de la Comisión Europea. La Comisión envió su opinión el 23 de abril de 2002. La envié a usted con una invitación para hacer observaciones, a las que respondió el 12 de junio de 2002. El 19 de septiembre de 2002, solicité a la Comisión más información. La Comisión envió su opinión adicional el 8 de noviembre de 2002. La envié a usted con una invitación para hacer observaciones, que respondió el 12 de diciembre de 2002. En los días 26 de febrero, 27 de junio, 16 de septiembre, 15 y 27 de noviembre de 2002, nos proporcionó más información.

Escribo ahora para informarle de los resultados de las investigaciones que se han llevado a cabo.

LA QUEJA

En febrero de 2002, se formuló una queja ante el Ombudsman Europeo por parte de MRA Consultants Limited contra la Comisión Europea. La queja se refiere al funcionamiento del Programa de Tecnologías de la Sociedad de la Información (IST) bajo el Quinto Programa Marco.

En principios de 2000, la demandante era miembro del "BEST" consortium, que presentó una propuesta en el apartado de "Best Practice" del segundo Llamado del Programa de IST. La propuesta fue realizada de acuerdo con la información proporcionada por la Comisión, el IST Guide for Proposers. Según el guía, el máximo financiamiento especificado fue un máximo coste de €100,000 por usuario calculado en un 100% de coste adicional. Cuando la demandante recibió la carta de evaluación de la Comisión, encontró los comentarios técnicos para ser altamente inapropiados. La carta decía que "La cantidad solicitada en fondos supera el máximo permitido por socio." Según la demandante, ya que varios usuarios pueden encontrarse en un solo socio o empresa, la diferencia entre usuario y socio es claramente notable. La demandante consideró que algo había ido mal durante el proceso de evaluación, ya que su propuesta había sido penalizada por el uso correcto de los criterios. Dado que el uso de máximo por socio no se ajustó con el manual de evaluación citado en la carta de la Comisión, la evaluación de la propuesta BEST fue claramente
The complainant raised the matter with MANIST, a UK IST Programme contact point, and the UK DTI (Department of Trade & Industry). In response, the complainant was invited to take part in a meeting. At the meeting, one participant informed MANIST and DTI that he had been an evaluator of Best Practice proposals submitted under the second Call and added that the evaluators had used the Trials criteria when evaluating Best Practice proposals. According to the complainant, this information raised several alarming factors. It was clear that BEST's proposal was not the only one being subject to incorrect evaluation criteria. The use of incorrect criteria works against correct proposals and favours incorrect proposals. The overall effectiveness of the IST Programme and the Fifth Framework Programme would be reduced. Furthermore, there had already been complaints from the industry against the previous Best Practice section. MANIST and DTI raised this with the Commission at their next meeting in May 2000. In September 2000, the complainant raised the matter in an e-mail to the IST Services. The Commission stated that the matter had been passed on to another section of the IST Services and the complainant heard nothing.

In the summer of 2000, MRA Consultants Limited and Loughborough University produced a report on how three independent evaluators and a Commission official used the wrong criteria for the IST Programme. The report identified weaknesses in the structure and description of the IST Programme and contained proposals aimed at rectifying the situation. The response of the IST Services to the report had not resulted in any significant improvements to the programme. This was due to the fact that the Commission's IST Services erroneously described the conflict as a disagreement between MRA and the evaluators when in reality it was a disagreement between the IST Guide for Proposers and the evaluators. The complainant further described weaknesses that had been identified from the response of the IST Services.

The complainant added that the problems will damage the future Commission Programmes supporting research unless corrective measures are implemented.

The complainant submitted the correspondence it had with the Commission on the discussions of the MRA report. The documentation showed that the correspondence had continued throughout 2001 until early 2002.

In summary, the complainant alleged malfunctioning of the IST Programme as well as use of incorrect evaluation criteria in 2000. The complainant in particular pointed out that the evaluation in 2000 was based on funding per partner instead of funding per user as stated in the IST Guide for Proposers.

The complainant claimed improved administration and effectiveness of the IST Programme and the use of correct evaluation criteria.

THE INQUIRY The Commission's opinion
The complaint was forwarded to the Commission which submitted the following comments.

The BEST proposal "Best practice for implementing electronic commerce in the textile
industry”, was submitted three times under the IST Programme. MRA Consultants Limited was involved in all submissions and the co-ordinating role was assumed by Centro Tecnológico das Indústrias Têxtil e do Vestuário de Portugal.

BEST was first submitted under the second Call launched by the IST Programme. The Call was published on 1 October 1999 and the closing date for proposals was 17 January 2000. The proposal was submitted under IST Action Line 2.1 as a Best Practice action. This action line comes under Key Action II: New Methods of Work and Electronic Commerce. The Commission referred to the text of the Call (1), the text of the Work Programme (2) and the Evaluation Manual, which describe the objectives of the Programme. The Commission stated that the Evaluation Manual (3) also provides the additional and/or specific elements to be applied under the standard evaluation criteria for Best Practice actions. This information is similarly provided for Trials actions, as referred to by the complainant. The weights and thresholds for both types of actions are also laid down in the manual.

According to the Commission, Best Practice actions are aimed at users. In this sense the definitions of user and use as given in the Council Decision (4) concerning the rules for participation and dissemination of results are relevant. The terms legal entity, users and partner are interchangeable when referring to proposals for Best Practice actions. Furthermore, the evaluation of a proposal is based on the text of the Call, the Work Programme and the Evaluation Manual, all of which are formally adopted by the Commission. The various guides for proposers and evaluators only serve as background information and do not and cannot introduce general or specific evaluation or selection criteria. The Guide for Proposers’ reference to “per user” is therefore only a guidance and does not introduce disqualifying factors into the evaluation process.

The Commission stated that the evaluators had been fully briefed and the presentation made clear the distinction between Best Practice actions and Trials. As regards BEST’s proposal, the Evaluation Summary Report showed that it did not meet the threshold for criterion 1, 4 and 5 and the proposal was therefore rejected (5). The scores and comments are provided entirely by the independent evaluators.

As regards the reference in the Evaluation Summary Report to “allowed maximum per partner” and the fact that the complainant alleged that an evaluator had stated that the Trials criteria were used in the evaluation process, the Commission put forward that the evaluator’s statement was not substantiated in any of the communications. No evaluators had made any such comment to the Commission. The Evaluation Summary Report which the Commission supplied, showed the thresholds used, which are those that pertain to Best Practice actions.

The Commission had made it clear to the complainant on several occasions that the BEST proposal was fairly and properly treated and that the applicable evaluation procedures were correctly followed. The Commission attached relevant correspondence to its opinion.

The BEST proposal was resubmitted under the third Call of the IST Programme, which was published on 10 February 2000 (6), but was deemed to be outside the scope of the Call. A
further submission was made under the fourth Call of the IST Programme (7) but this proposal was received by the Commission after the deadline and thus found to be ineligible.

**The complainant's observations**

In its extensive observations, the complainant maintained the complaint. In addition, the following comments were made.

As regards the proposal that was submitted under the third Call of the IST Programme, the complainant had been advised to do so by the Commission. Again, due to an error by the evaluators, the proposal was deemed ineligible. The proposal had been submitted without being linked to any individual Action Line but to a group of Action Lines, which is specifically permitted under the IST Programme. In this case however, the Commission inserted Action Line II.1.6 into the process, deemed this Action Line ineligible and left the proposal unevaluated. As concerns the proposal submitted under the fourth Call of the IST Programme, the complainant did not complain about its rejection.

Concerning the Commission's statement that the Guide for Proposers only serves as background information, the complainant noted that the Commission accepted that the evaluation is based on the text of the Call, the Work Programme and the Evaluation Manual. The terms and conditions of the Evaluation Manual must thus apply. In Annex E of the Evaluation Manual it is stated that "Commission staff will organise a confidential, fair and equitable evaluation of each proposal according to the criteria described in the programme-specific evaluation annex and guide to proposers in full respect of the relevant procedures, rules and regulations set out for this task." The Commission thereby admitted that maladministration took place as it failed to respect Annex E of the Evaluation Manual and further it had failed to understand the evaluation process. Since these statements have been made at or near the end of the IST Programme, it cast serious doubt over the correct evaluation of the entire Programme.

The complainant strongly reacted on the fact that the Commission had distributed the information in the Evaluation Manual, which refers to the Guide for Proposers as an evaluation document, when the Commission in its opinion to the Ombudsman stated that the Guide does not and cannot introduce general or specific evaluation or selection criteria. By failing to use the Guide for Proposers as an evaluation document, the Commission failed to provide a clear framework for researchers preparing proposals for funding. The supply of false or contradictory information is even more astonishing since the Commission regularly updates the Guide for Proposers for each Call. The statement of an evaluator revealed that the evaluation had been based on incorrect criteria because neither the Commission nor the evaluators knew what they were looking for. Given that the Commission now admits that the Guide for Proposers was not used, it is obvious that the evaluators were deprived of essential information required to carry out an accurate evaluation of the proposal.

Regarding the Commission's statement that the terms legal entity, users and partner are interchangeable, the complainant stated that this was fundamentally incorrect. The complainant argued that within a legal entity or partner many individuals, each of them being users can exist. The term "user" is far more appropriate to Best Practice actions as a measure of funding than legal entity or partner, as Best Practice actions deal with the
practices or procedures used within a company when implementing computer systems. As such it is appropriate to measure the complexity of this by the number of users involved. A company with 100 users is far more likely to need a complex procedure than a company with 10 users. By contrast, other Commission actions such as Trials, use a funding maximum per partner. Even if the Commission used the term "user" by accident, unaware of the significant difference, it still has an obligation to act on the basis of what it actually published. To an outsider reading the Commission's documentation, the clear usage of the term suggests that the Commission was fully aware of the difference in meaning between user and partner and that it used the term "user" for Best Practice instead of the more common funding maximum per partner.

Regarding the functioning of the Programme, the complainant insisted on the proper enforcement of the regulations and procedures and referred to Annex E of the Evaluation Manual, which states that "Commission staff will, where needed, take action to ensure the correct implementation of the process." The Commission must thus correct identified problems. The Commission had been made aware of problems to be corrected in the meeting in May 2000 with MANIST and DTI and later by the proposer. However, the Commission continued to be of the view that the evaluation of the BEST proposal was correct despite the statement of the evaluator. It was the Commission's failure to act that led to the complaint with the Ombudsman.

In light of the above, the complainant made an additional request for the immediate suspension of those responsible for the administration of the IST Programme pending a full investigation by the European Parliament in order to prevent the errors in the Fifth Framework Programme to be repeated in the Sixth Framework Programme. Should the investigation conclude that incorrect information was published, correct information must be supplied to those concerned. The investigating body must have power to include changes in the Sixth Framework Programme.

Finally, the complainant suggested the possibility that the Commission pay compensation to the BEST consortium for the time spent on the proposal and on corresponding with the Commission.

In two further communications, the complainant submitted additional documentation. In particular, it sent the list of the persons that attended the meeting in April 2000 in which an evaluator stated that the wrong criteria were used and further referred to page three of the Guide for Proposers where it is stated that the Guide was an evaluation document.

**Further inquiries**

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman therefore asked the Commission to provide him with the following information:

(i) In Annex E of the Evaluation Manual it is stated that "Commission staff will organise a confidential, fair and equitable evaluation of each proposal according to the criteria described in
the programme-specific evaluation annex and guide to proposers in full respect of the relevant procedures, rules and regulations set out for this task." As the Evaluation Manual refers to the Guide for Proposers as stated in this quote, and since the Evaluation Manual is one of the bases for the evaluation, the complainant is of the view that the Guide for Proposers should be used as an evaluation document. The Ombudsman asked the Commission to comment on this and on the text of the third page of the Guide to Proposers as mentioned by the complainant in a letter of 27 June 2002.

(ii) In the light of the complainant's observations as regards the difference between the term "user" and "partner" (or legal entity), the Ombudsman asked the Commission to substantiate its views as regards the interchangeable character of these terms. In this regard, the Ombudsman noted that the Commission referred to the term "users" (plural) and "legal entity" or "partner" (singular) and wondered if the Commission deliberately used the plural form to indicate that several users can be equal to one partner? The Ombudsman also asked the Commission's view on the implications when referring to "maximum per user" and "maximum per partner" (both singular)?

(iii) The complainant alleged that the Commission did not react when it was made aware of problems in the evaluation of the proposals under the second Call, first in the meeting in May 2000 and later by the complainant. According to the complainant, the Commission had a responsibility to act (see Annex E of the Evaluation Manual). The Ombudsman is aware of the fact that the Commission explained its position in several communications. The Ombudsman however asked the Commission to provide further comments on the complainant's allegation that an evaluator at a meeting of 4 April 2000 put forward that the Trials criteria had been used instead of the Best Practice criteria. Had the Commission made any follow-up to this allegation?

(iv) The Ombudsman further asked the Commission to supply the texts of the Work Programme and of the Evaluation Manual.

A copy of the complainant's observations and an additional letter was also sent to the Commission.

The Commission's further opinion

In its further opinion, the Commission submitted the texts of the Work Programmes 1999 (applicable to the first submission of the BEST proposal) and 2000 (applicable to the second and third submissions of the BEST proposal) and of the Evaluation Manual. In relation to the Ombudsman's requests for further information, it put forward the following:

(i) The Commission pointed out that for the second IST Call, in order to avoid unnecessary repetition, the five evaluation criteria were not repeated in the Guide for Proposers as they were already described in the programme-specific evaluation annex. That is why the words evaluation criterion/evaluation criteria appear nowhere in the Guide for Proposers for the second IST Call. However, the five evaluation criteria were set out in the programme-specific evaluation annex, namely: Scientific/technological quality and innovation; Community added value and contribution to EC policies; Contribution to Community social objectives; Economic development and S&T prospects; and Resources, partnership and management. As regards
the suggestion by the complainant that the Guide for Proposers is in itself an evaluation document, the Commission stated that the text of the seventh paragraph of the third page of the Guide for Proposers refers to the “Guidelines for Evaluators...” which is a different document from the Guide for Proposers.

(ii) The Commission made reference to the text in the Guide for Proposers referring to the term "user" which states: "Best Practice Actions are expected typically to have in the order of 5 to 10 participants, from more than one EU Member State or Associated State, with a maximum cost of € 100 000 per user calculated on a 100% additional cost basis". The Commission was however not of the view that one partner or participant, the two terms being synonymous, can consist of several users. It pointed out that the evaluators took the same view that one partner is equivalent to one user as evidenced by their remark on the Evaluation Summary Report stating that "The total requested funding exceeds the allowed maximum per partner". The Commission stressed that if one takes the view, as the complainant does, that an individual partner can identify as user as many of his employees as he likes, each one at € 100 000, then the concept of a maximum as expressed in the Guide becomes without actual meaning.

(iii) The Commission underlined that a report of error in evaluation is taken very seriously by the Commission and in response to the complainant's communications it examined all the records of the evaluation of the second Call of the IST Programme. To this effect the Commission put forward the following:

The evaluation of the second Call of the IST Programme was supervised by three independent observers who provided an extensive report of the evaluation making several recommendations for improvements in the procedures used. But at no point did they report observing the wrong criteria being applied. The Commission examined the briefing material supplied to the evaluators. Only the five criteria from the Evaluation Manual are described therein. No evaluator did at any time report to the Commission that they were misled about the criteria to be applied or that they applied criteria other than the official ones. Each evaluating panel wrote a Panel Report, in which account is given of the working methods, conclusions and recommendations. The Panel Report examining the complainant's proposal, Panel Area 3 of Key Action II, was reviewed and it was found that there is no mention of any evaluation criteria other than the five official ones. The Commission also confirmed that, by examining the evaluation form (E4) and the Evaluation Summary Report for the BEST proposal, the five criteria were indeed applied in relation to the complainant's proposal. The Commission thereby quoted the remarks and the scores made by the evaluators in relation to each of the five criteria for the BEST proposal.

The Commission stated that the Evaluation Summary Report shows that the correct thresholds for a Best Practice Action, as described in the IST-specific annex of the Evaluation Manual, were indeed applied to the scores given to the BEST proposal. However, the proposal failed to achieve the necessary threshold scores on three of the five criteria. The Commission underlined that it had explained these matters to the complainant on several occasions, both in letters and in meetings.

The complainant's further observations
The complainant made extensive observations in relation to the Commission's further opinion, which can be summarised as follows.

(i) The complainant stated that whether the five criteria were contained in the Guide for Proposers or not, it did not nullify the Commission's responsibility to use the Guide as an evaluation document. The Commission did not reply to the important question as to whether the Evaluation Manual, stating in Annex E that the Guide for Proposers should be used in the evaluation, should be ignored. Anyhow, the Commission already admitted in its first opinion that the Guide for Proposers was not used as an evaluation document.

The complainant then put forward a series of comments showing that the different documents relevant to the IST Programme make references to each other in a way in which certain documents are mentioned as evaluation documents, while others are not. In its first opinion, the Commission stated that "the evaluation of a proposal is based on the call text, work programme, and Evaluation Manual, all of which are formally adopted by the Commission. The information provided in the various guides for proposers and evaluators is only background in nature and does not, and cannot, introduce general or specific evaluation or selection criteria". According to the complainant, the Commission thereby wrongly used the different documents relevant to the IST Programme because when reading the documentation it is clear that the Work Programme and the Call for Proposals or the Call text are not specified as evaluation documents but the Evaluation Manual and Guidelines to Evaluators are. The complainant also stated that it was little wonder that evaluators were confused when trying to use the Call text and the Work Programme as evaluation documents due to their unclear nature. The complainant thereby referred to the texts and the references made therein in order to show how difficult it was to understand the documentation. The complainant concluded that the "rules for participation" are defined only in the Guide for Proposers, and therefore, the failure to use this Guide in the evaluation violated the evaluation process.

As regards the five evaluation criteria, the complainant stated that the BEST Proposal correctly contained elements that were inappropriate to Trials. Despite the Commission's statement, the actual contents of the Best Practice evaluation documents and the independent evidence from one of the evaluators both show that the Commission used the Trials criteria. It was therefore normal that the BEST Proposal received a low score.

(ii) The Commission's position shows that it wrote the Best Practice criteria in complete ignorance of the industry's meaning of the term "user" and that it was only a coincidence that it used the correct term "user" instead of the more common term "partner". The complainant did not agree with the Commission that this was only a coincidence or accident and stated that there was evidence implying that the Commission knows that the term "user" is fundamentally different from the term "partner".

(iii) The actions undertaken by the Commission are limited to internal checking as far as the follow-up is concerned. There is no mention of the Commission having tried to find out the name of the evaluator. It is a contradiction that the Commission claims to take the reports of error seriously but does not undertake any external checking. The complainant mentioned the Commission officials present at the meeting when the evaluator made the statement
that the Trials criteria were used and stressed that it might be worth asking them to comment.

The complainant also made some general comments and referred to the relevant documents, their nature and the instructions contained therein. The complainant thereby reiterated that "rules for participation", on which the evaluation should be based, are contained only in the Guide for Proposers.

The complainant further requested to see the extensive report referred to by the Commission, which was drawn up by three observers on the evaluation of the second Call of the IST Programme.

THE DECISION 1 The functioning of the IST Programme
1.1 The complainant was a member of the "BEST" consortium, which submitted a proposal under the Best Practice section of the second Call of the IST Programme under the Fifth Framework Programme, managed by the European Commission. The complainant alleged malfunctioning of the IST Programme as well as use of incorrect evaluation criteria in 2000. The complainant in particular pointed out that the evaluation in 2000 was based on funding per partner instead of funding per user as stated in the IST Guide for Proposers. The complainant claimed improved administration and effectiveness of the IST Programme and the use of correct evaluation criteria.

1.2 The Commission argued that that it had taken the complainant's allegations very seriously, checked the evaluation and explained its standpoint to the complainant on several occasions. The evaluation was based on the text of the Call, work programme and Evaluation Manual and the correct evaluation criteria had therefore been used. According to the Commission, the terms "partner" and "user" are interchangeable.

1.3 The Ombudsman notes that, according to the Evaluation Summary Report, the BEST Proposal did not meet the threshold for three of the five applicable criteria. The five criteria mentioned are the same as those in the Evaluation Manual applicable to the call. Furthermore, the Ombudsman notes that the Call for proposals does not refer to the Guide for Proposers as a binding document and that the Guide for Proposers itself states that it does not supersede the relevant rules and conditions. In these circumstances, the Ombudsman does not consider that it has been demonstrated that the Commission has applied incorrect evaluation criteria.

1.4 As regards the use of the terms "user" and "partner", the Ombudsman recalls that principles of good administration require the Commission to provide accurate information to citizens. The Commission should therefore avoid presenting information in a form which is misleading or unnecessarily complex. The Ombudsman notes that, in ordinary language, the terms user and partner are not synonymous. The Ombudsman also notes that the programme in question is governed by a large number of documents, of varying legal status and with multiple cross-references (8). In these circumstances, the Ombudsman considers that the Commission's use of the terms user and partner interchangeably was an additional and unnecessary obstacle to clear communication with citizens. The Ombudsman will therefore make a critical remark on this point.
1.5 In observations, the complainant requested the immediate suspension of those responsible for the administration of the IST Programme and in further observations, requested to see the extensive report referred to by the Commission. In the light of the findings above, the Ombudsman does not deem it justified to inquire further into the request of immediate suspension. Concerning the requested report, the Ombudsman informs the complainant of the possibility to address the Commission directly in order to ask for access to the report.

2 Conclusion
On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

As regards the use of the terms "user" and "partner", the Ombudsman recalls that principles of good administration require the Commission to provide accurate information to citizens. The Commission should therefore avoid presenting information in a form which is misleading or unnecessarily complex. The Ombudsman notes that, in ordinary language, the terms user and partner are not synonymous. The Ombudsman also notes that the programme in question is governed by a large number of documents, of varying legal status and with multiple cross-references. In these circumstances, the Ombudsman considers that the Commission's use of the terms user and partner interchangeably was an additional and unnecessary obstacle to clear communication with citizens.

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 Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) OJ 1999 C 278/7.


(6) OJ 2000 C 38/11.


"Evaluation and selection criteria and modalities relevant to this call are given in the fifth framework programme, the specific programme, the Council Decision of 22 December 1998, concerning the rules for the participation of undertakings, research centres and universities and for the dissemination of research results for the implementation of the fifth framework programme (hereinafter referred to as the rules for participation and dissemination), and the work programme. The fifth framework programme Manual of Proposal Evaluation Procedures, along with its annex on this specific programme, and the European Commission Regulation on the implementation of the rules for participation and dissemination, provide further details. Information on how to prepare and submit proposals is given in the Guide for Proposers, which can be obtained, along with the work programme and other information relating to this call, from the European Commission (...)." Footnotes omitted.

The Ombudsman also notes that Annex E of the Evaluation Manual refers to the Guide for Proposers as containing criteria although no criteria appear to be contained therein.