

## **Decision of the European Ombudsman on complaint 1224/2002/ADB against the European Commission**

Decision

**Case 1224/2002/ADB - Opened on 18/07/2002 - Decision on 22/10/2003**

Strasbourg, 22 October 2003

Dear Mr X.,

On 30 June 2002, you made a complaint to the European Ombudsman concerning the management by the Commission of a project (ARG/B-3010/95/172) to be carried out in Argentina.

On 18 July 2002, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 25 October 2002. I forwarded it to you with an invitation to make observations, which you sent on 23 December 2002.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the time it has taken to carry out these inquiries.

### **THE COMPLAINT**

The complainant is Italian and was hired for a 30-month contract by, an Italian company (hereafter "the company"), to participate as an expert in a 3-year training project in Argentina. The project was financed by Community funds. The day before leaving for Argentina on 1 August 2000, the Commission asked the company to delay the complainant's departure because the Argentinean authorities had allegedly not confirmed the availability of the complainant's office in Buenos Aires. Finally, after further delaying, on 10 October 2000, the company informed the complainant that the Commission had withdrawn his post and that his contract therefore had to be cancelled.

The complainant turned to the Commission and was finally informed that following an Argentinean request, his post had been replaced by posts for experts with short-term contracts. According to the complainant, these experts were to be paid less and chosen without the Commission's consent. The complainant therefore considered that there was a risk of corruption and that the company would be able to increase its profits. The complainant lodged a complaint with OLAF (European Anti-Fraud Office), and also decided to complain to the European



Ombudsman.

In his complaint to the Ombudsman, the complainant made the following allegations:

1. After the project had been awarded the Commission made substantial changes to it and failed to carry out a prior inquiry.
2. In dealing with the issue, the Commission lacked transparency, especially in its relations with the complainant. It gave vague and even contradictory explanations for the situation.
3. By making significant changes to the project the Commission prejudiced both the complainant and the unsuccessful applicants.

The complainant claims that the maladministration should be acknowledged and that he should receive compensation for material and non-material damage.

The complainant informed the European Ombudsman that his complaint with OLAF was still ongoing and that he had been heard by its services. The complainant considers that there is no impediment for the European Ombudsman to carry out an inquiry at the same time as OLAF.

## THE INQUIRY

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

The opinion of the European Commission on the complaint was in summary the following:

#### *Background*

In 1999 the Commission signed a financing agreement (hereafter "the Convention") with Argentina in view of the financing of a project aiming at reinforcing the structures supporting small and medium enterprises (SMEs) in Argentina. For practical reasons the Convention foresaw the creation of a management unit based in Argentina. The creation of this unit required the recruitment of both local and European experts. In order to recruit the European experts, the Commission launched a call for expression of interest, which was concluded by the award of a technical assistance contract to a consortium led by an Italian company.

#### *Facts*

The technical assistance contract with the company was signed on 23 June 2000. The terms of reference foresaw a team of experts composed of two-long-term experts (the European co-director and the expert in training - this post was to be filled by the complainant) and 10 posts per month to be filled by experts on short-term missions to be defined during the implementation of the project. In July 2000, the Commission informed the company that the co-director would start his mission to sort out practical details (premises, bank accounts, etc.) before the long-term expert in training, i.e. the complainant, could start his mission. On 14 September 2000, the Argentinean authorities presented an official request to amend the Convention and asked to transform the post for a long-term expert in training into several short-term posts in order to be able to benefit of European expertise in other areas. The Commission examined the request, and the Convention was amended accordingly on 15 January 2001. On 22 May 2001, the contract with the company was amended accordingly.



### *The complaint*

1. Contrary to the complainant's assumption, the technical provisions of the Convention with Argentina are not immutable. The beneficiaries may propose to adapt the project to the actual needs, especially when a long period of time has passed after the identification of the needs and the decision to finance the project. There is no provision that would oblige the Commission to carry out an "inquiry" about the proposed changes. However, the Commission checks the appropriateness of the proposed amendments and in a second stage checks that they would not substantially modify the project as to its objectives, resources and mutual obligations. The Commission considered that in the present case the proposed changes could and should be accepted in the interest of the project. The Commission declares that this is in line with the *"changes in the Commission's management culture towards a greater flexibility and a results-oriented approach"* called for by the Court of Auditors in its report n° 21/2000 (1) .

The Commission finally refers to the conclusions of OLAF's investigation on the matter raised by the complainant. According to the Commission, OLAF concluded that its inquiry had revealed no irregularities or fraud by the Commission.

2. The Commission rejects the complainant's allegation as to the lack of transparency. The Commission's contractual partner, the company, was duly informed of the delays in the project. The Commission responded to the complainant's correspondence and even received the complainant in its premises to explain the Commission's decision regarding the changes proposed by the Argentinean authorities.

3. The Commission acted within the contractual remit when it proposed to adapt the contract signed with the company to the new provisions of the Convention. The contract expressly foresaw this possibility. The Commission understands the complainant's disappointment as regards the shortening of his mission. However, the complainant could still have worked on short-term missions. He refused that option on several occasions although the agreement he signed with the company, which the complainant does not put into question, foresaw the possibility to modify his mission in accordance with the requirements of the Convention.

The Commission underlines that it is a third party to the contract of 11 August 2000 between the complainant and the company. According to Article 12 of its technical assistance contract with the company, the Commission cannot be held responsible for damage caused by the company to its experts in relation to the execution of the technical assistance contract. The Commission can therefore not be held contractually responsible. According to Article 288 of the Treaty establishing the European Community, the non-contractual liability implies that the complainant proves that the Commission acted illegally, that there is a damage and that a causal link exists between the Commission's action and the damage.

The Commission concludes that it acted legally. Neither the Commission's contractual, nor the non-contractual liability are applicable in this case. Furthermore, the agreement concluded between the company and the complainant appears to have been respected as well. The Commission considers the complainant's accusations to be unfounded and rejects his claims.

### **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 the complainant in summary repeated his allegations and stated the following:

The Commission's opinion is general, incomplete and partly false as regards the facts. The Commission cannot get away from its responsibility towards the complainant on the basis of the contract signed with the company. The complainant's post was an essential part of the project, his qualifications were decisive for the award of the project and Commission officials have actively participated in the amendment of the project as well as in the manoeuvres to deceive the complainant.

The complainant considers that the Commission, the Argentinean authorities and the company had an interest in postponing the changes in the project until after the award of the contract and therefore created the situation that harmed the complainant. According to the complainant, the Commission and the Argentinean authorities wanted to avoid applying more restrictive conditions adopted in response to alleged irregularities in the administration which led to the fall of the Santer Commission in 1999. the company in turn would not have been awarded the contract if the post of long-term expert in training had been suppressed.

1. The Commission should have amended the terms of reference of the call for expression of interest before awarding the contract, instead of substantially modifying the project shortly afterwards. One of the explanations given on 30 October 2000 by the Argentinean authorities to support their claim for modification of the project referred to the orientations of the new government of 1999. They were therefore known well before the deadline for the tender, i.e. 7 February 2000. The complainant therefore considers that launching a call for expression of interest for an outdated project constitutes an instance of maladministration.

2. The Commission and the company misled the complainant on purpose. The latter considers that the practical reasons put forward to explain the delaying of his departure for Argentina in July 2000 were poor excuses. He declares that although his contract with the company was concluded on 11 August 2000, both the Commission and the company already knew then that the Argentinean authorities wanted to amend the Convention as regards the post of long-term expert in training. While the Argentinean request to amend the project was only made on 14 September 2000, a Commission official on mission in Argentina between 29 July and 2 August 2000 already reported about the Argentinean authorities' wish to suppress and to replace the complainant's post. The complainant got hold of this information through OLAF's final report on his complaint dated 13 June 2002. The complainant believes that by the beginning of August 2000, the changes had already been agreed upon by all the parties. The complainant's contract with the company on 11 August 2000 was only finalised for formal reasons in order to show that the company complied with the contract with the Commission and that the responsibility for the suppression of the complainant's post lay entirely with the Argentinean authorities.

3. The complainant rejects the Commission's assertion according to which the modification of the project did not imply a complete suppression of the tasks initially attributed to the long-term expert in training. The Addendum to the Convention precisely foresaw the suppression of the



post. The possibility foreseen in the contract with the company to modify the complainant's tasks on the basis of the requirements of the Convention cannot legitimise the complete suppression of his post. The complainant rejects the Commission's assertions according to which he had been offered to work on short-term missions. Furthermore these offers would have been belated and in no relation with the actual importance and amount of work foreseen in the beginning. On the contrary, in February 2002 the company repeated that it had not been able to find an alternative participation for the complainant in the project.

Together with his observations the complainant provided the Ombudsman with a copy of OLAF's final report on his complaint. The report in particular contains information about the procedure followed by the Commission before the amendment of the contract with the company.

## THE DECISION

### 1 Scope of the inquiry

1.1 The complainant was hired for a 30-month contract by the company, an Italian company, to participate as an expert in a 3-year training project financed by Community funds in Argentina. The complainant's contract was cancelled after the Commission had informed the company that the complainant's post was no longer foreseen in the project.

1.2 In the framework of his complaint against the European Commission and in his observations, the complainant made, certain allegations against his employer, the company.

1.3 According to Article 195 of the EC Treaty, the European Ombudsman has the power to receive and examine complaints about maladministration in the activities of the Community institutions and bodies. No action by any other authority or person may therefore be the subject of a complaint to the Ombudsman. The complainant's allegations concerning the company will therefore not be examined in the present decision.

### 2 The Commission's alleged failure to carry out an inquiry before making substantial changes to a project after it had been awarded

2.1 The complainant alleged that after the technical assistance contract for a 3-year training project in Argentina had been awarded to the company, the Commission made substantial changes to the project and failed to carry out a prior inquiry.

2.2 The Commission explained that the Convention with Argentina, on which the technical assistance contract was based, was not immutable, especially when a long period of time had passed after the identification of the needs and the decision to finance the project. Although there was no express obligation for the Commission to carry out an inquiry as alleged by the complainant, the Commission had checked the appropriateness of the proposed amendments and in a second stage checked that they would not substantially modify the project as to its objectives, resources and mutual obligations. The Commission also underlined that OLAF's investigation following the complainant's complaint had not revealed any irregularity.

2.3 The Ombudsman notes that from the information at his disposal, it appears that the Argentinean authorities applied for the project in 1995, the identification of the needs of the



Argentinean authorities dates back to 1997, the financing agreement was signed on 27 May 1999, the call for expression of interest was launched the same year and the deadline for the submission of financial proposals was on 7 February 2000. The Commission stated that the Convention with Argentina had to be adapted to new needs put forward by the Argentinean authorities. There is nothing to suggest that the Commission could not formally amend a Convention if the latter was found to be inadequate to allow a proper delivery of financial aid. In view of the chronology of events set out above the Commission's explanation appears to be reasonable.

2.4 The change requested by the Argentinean authorities in particular related to the replacement of a long-term expert in training foreseen to work in Argentina for 30 months by several short-term experts. There is nothing to suggest that the Commission did not carry out appropriate checks before accepting the changes in the project. It should be noted that according to OLAF's final report that was submitted to the Ombudsman by the complainant, the Argentinean request dated 14 September 2000 was assessed from a technical and financial point of view by several units of the RELEX Joint Service (SCR) of the Commission before it was approved. The Ombudsman therefore concludes that there is no evidence of maladministration as regards this aspect of the case.

2.5 In his observations on the Commission's opinion, the complainant alleged that launching a call for expression of interest for an outdated project constituted an instance of maladministration. In view of the above findings (paragraph 2.3) and of the fact that there is not enough evidence in the file to support the complainant's allegation, the Ombudsman considers that there is no need to carry out further investigations in relation to this further allegation which the complainant had not made in his original complaint.

### **3 Lack of transparency, vague and contrary explanations**

3.1 The complainant alleged that in dealing with the issue, the Commission lacked transparency, especially in its relations with her. According to the complainant, the Commission gave vague and even contradictory explanations for the situation.

3.2 The Commission rejected the complainant's allegation as to the lack of transparency. According to the Commission, its contractual partner, the company, was duly informed of the delays in the project. The Commission responded to the complainant's correspondence and even received the complainant in its premises to explain the Commission's decision regarding the changes proposed by the Argentinean authorities.

3.3 The Ombudsman notes that it emerges from the documents at his disposal that the complainant's employer, i.e. the company, informed the complainant of the reasons for delaying his departure and afterwards for the reasons for suppressing his post. The Commission appears to have regularly informed the company of the situation regarding the complainant's post. Furthermore, the Commission provided information to the complainant although, neither the complainant, nor the Commission have submitted information to the Ombudsman regarding the substance of the discussions that took place between the complainant and the Commission after the company had informed the complainant of the suppression of his post. It is undisputed that an exchange of letters and a meeting took place. In these conditions, the complainant's



allegation regarding a lack of transparency cannot be regarded as having been established.

3.4 The complainant's allegation concerning allegedly vague and contradictory explanations given by the Commission to the complainant partly refer to the practical reasons given by the Commission to delay the complainant's departure and partly to the reasons given to justify the acceptance of the changes in the contract. The Ombudsman notes that the complainant has not provided the Ombudsman with supporting evidence for these allegations which can therefore not be regarded as having been established. He therefore concludes that there is no evidence of maladministration as regards this aspect of the case.

3.5 In his observations, the complainant stated that before he was informed by the company of the suppression of his post on 10 October 2000, he had allegedly been deceived as to the actual reasons for delaying his departure. He put forward that the decision to suppress his post had already been taken by the end of July 2000. This constitutes a further allegation which the complainant had not made in his original complaint. From the information at his disposal, the Ombudsman notes that discussions were held in July 2000 between a Commission official and the Argentinean authorities about the possibility to propose the suppression of the complainant's post. However, it has not been shown why the Commission should have informed the company or the complainant of this possibility before the Argentinean authorities officially applied for it on 14 September 2000. Furthermore, there is no evidence in the file that the practical reasons put forward by the Commission to justify the delaying of the complainant's departure are unfounded. In view of the above findings, the Ombudsman considers that there is no need to carry out further investigations in relation to this new allegation.

#### **4 Damage caused by the Commission's action**

4.1 The complainant alleged that by making significant changes to the project the Commission prejudiced both the complainant and the unsuccessful applicants.

4.2 The Commission took the view that it acted within the contractual remit when it proposed to adapt the contract signed with the company to the new provisions of the Convention. The contract of 11 August 2000 the complainant signed with the company also foresaw the possibility to modify his mission in accordance with the requirements of the Convention. Finally, according to Article 12 of the technical assistance contract, the Commission cannot be held responsible for damage caused by the company to its experts in relation to the execution of the technical assistance contract. The Commission considered that it could therefore not be held contractually responsible. As regards its non-contractual liability, the Commission argued that the complainant must prove that the Commission acted illegally, that there is a damage and that a causal link exists between the Commission's action and the damage.

4.3 The Ombudsman notes that the Commission is a third party to the contract between the company and the complainant and that there was no contract between the Commission and the complainant. It thus appears that only the extra-contractual liability of the Commission could be applicable in this case. One of the cumulative conditions for extra-contractual liability is that the Institution acted illegally.

4.4 As already mentioned above (paragraphs 2.3 and 2.4), the Ombudsman considers that





there is no indication that the Commission acted illegally when it accepted to amend the Convention following the Argentinean authorities' application or when it amended the technical assistance contract concluded with the company.

4.5 The Ombudsman therefore concludes that there is no evidence of maladministration as regards this aspect of the case. This conclusion does not affect the right of the parties to have their dispute examined and authoritatively settled by a court of competent jurisdiction.

#### **5 Payment of compensation by the Commission to the complainant**

5.1 The complainant claimed that the maladministration should be acknowledged and that he should receive compensation for material and non-material damage.

5.2 In view of the above findings, there is no need to pursue the inquiry into this aspect of the complaint.

#### **6 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 President of the European Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ C 57 of 22.2.2001, page 3, point 8.