

Decision of the European Ombudsman on complaint 1386/2002/IP against the European Commission

Decision

Case 1386/2002/IP - Opened on 18/09/2002 - Decision on 28/09/2004

Strasbourg, 28 September 2004

Dear Mr S.,

On 30 July 2002, I received the complaint you made on behalf of the Municipality of Naples. The complaint concerned the Commission's decision of 30 January 2001 to ask for the reimbursement of EUR 9 752 501,87 paid in the framework of the European Regional Development Fund for the project "*Emissario di Coroglio - Pedemontano di Posillipo - Arena S. Antonio*", and to revoke the payment of EUR 4 131 655,19 originally foreseen.

On 18 September 2002, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 19 November 2002. I forwarded it to you with an invitation to make observations, which you sent on 23 January 2003.

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

Please accept my apologies for the length of time it has taken to complete the examination of your case.

THE COMPLAINT

According to the complainant, the relevant facts are the following:

On 16 February 1988, the European Commission adopted decision C(88)0166041 concerning the granting of financial aid by the European Regional Development Fund (hereinafter ERDF) for the construction of a sewerage system (*Emissario di Coroglio - Pedemontano di Posillipo - Arena S. Antonio*) in Naples, Italy.

On 29 March 1995, the Italian government asked for an extension of time to carry out the project. The Italian authorities based their request on Article 12 of Council Regulation (EEC) No 2083/93 adopted on 20 July 1993, which reads that "*those portions of the sums (...) which have not been the subject of a request for a final payment to the Commission by 31 March 1995 shall*



be automatically released by the Commission by 30 September 1995 at the latest, without prejudice to those projects which are subject to suspension for judicial reasons" (1) .

In December 1998, the Commission invited the Italian government to substantiate the "judicial reasons" on the basis of which it had asked for the extension of time to carry out the project in question. On the basis of the subsequent exchange of correspondence and discussions between the Italian authorities and the Commission, the latter decided, on 30 January 2001, to propose the closing of its intervention and to cancel the last instalment of EUR 4 131 655,19. At the same time, the Commission asked for the reimbursement of EUR 9 752 501,87. By letter of 22 March 2001 to the Italian authorities, the Commission confirmed its position mentioned in the letter of 30 January 2001.

In his complaint to the Ombudsman, the complainant alleged: (i) that the Commission's decision to recover EUR 9 752 501,87 following its refusal to postpone the financing was manifestly wrong. The request was made in accordance with article 12 of Regulation (EEC) n° 2083/93 of 20 July 1993; (ii) that there was undue delay by the Commission which decided on the request to postpone the financing more than five years after the request was introduced; (iii) the Commission infringed the procedure of Article 3 of Commission's decision of 16 February 1988 concerning the ERDF project n. 870503006.

The complainant claimed that the Commission should annul the recovery order and pay the amount of EUR 13 884 157,06 which was the sum originally agreed.

THE INQUIRY

The European Commission's opinion

In its opinion, the Commission recalled the factual background of the complaint and made the following points:

By decision C(88)0166041 of 16 February 1988, the Commission agreed to co-finance the construction of the sewerage system concerning the *Emissario di Coroglio - Pedemontano di Posillipo - Arena S. Antonio* , in Naples (Italy). This decision foresaw that the EU should provide financing up to a maximum of 40 billion LIT (2) .

On 29 March 1995, the Italian authorities asked the Commission to postpone the deadline of 31 March 1995 for demanding the final payment. They based their request on Article 12 of Council Regulation (EEC) 2083/93.

On 11 November 1998, the Commission informed the Italian authorities of the urgency to proceed with the closing of the project in question. The Commission asked the Italian authorities to provide it with the supporting evidence confirming the fact that the delay in dealing with the project was due to judicial reasons.

On 11 December 1998, the Italian authorities informed the Commission that they could not submit the information requested within the deadline of 31 December 1998 foreseen by the



Commission and that they would send it in January 1999, after having contacted the administrative services involved. On 15 February 2000, the Italian authorities forwarded to the Commission a report which contained information concerning the legal proceedings on the basis of which they had asked the Commission, in 1995, for the postponement of the deadline demanding the final payment. Further information was sent to the Commission on 22 June 2000.

On 30 January 2001, the Commission informed the Italian authorities that it could not accept their request to postpone the deadline of 31 March 1995 for demanding the final payment. The Commission took the view that the reasons invoked by the Italian authorities could not be considered as relevant under Article 12 of Council Regulation (EEC) 2083/93. The institution therefore proposed to close the financial intervention on the basis of the certified expenses declared before 31 March 1995. The Italian authorities forwarded further information on 8 March 2001 and asked for the final payment of the financing. In their letter, the Italian authorities also confirmed that the legal proceedings on basis of which they had asked for the postponement of the final payment had been posterior to the suspension of the project. On the basis of this information, the Commission therefore sent a further letter to the Italian authorities on 22 March 2001, in which it confirmed its decision of 30 January 2001.

By letter of 9 May 2001, the Italian authorities informed the Commission that they did not have any observations about the Commission's position. The Commission therefore proceeded to the closing of its intervention, i.e. it cancelled the last installment of EUR 4 131 655,19 and asked for the reimbursement of EUR 9 752 501,87.

The legal framework applicable to the case in question was Council Regulation (EEC) n° 1787/84 on the ERDF (3) and Article 12 of Council Regulation (EEC) No 2083/93 of 20 July 1993 amending Regulation (EEC) No 4254/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the ERDF. In accordance with this Article *"[t]hose portions of the sums committed for the granting of assistance in respect of projects decided on by the Commission before 1 January 1989 under the ERDF which have not been the subject of a request for final payment to the Commission by 31 March 1995 shall be automatically released by the Commission by 30 September 1995 at the latest, without prejudice to those projects which are subject to suspension for judicial reasons"*.

Furthermore, Article 3 of the Commission's decision C(88)0166041 concerning the granting of financial aid by the ERDF foresees that *"[t]he failure to respect one of the conditions of the present decision, including those concerning the time limit for the realisation of the project, entitles the Commission to reduce or annul the grant awarded following this decision; in such a case, the Commission can ask for the partial or total restitution of the sum already paid. These reduction, annulment or recovery orders cannot be effective without giving the beneficiary the opportunity to submit its observations within the deadline set by the Commission"*.

As regards the grounds of the present complaint, the Commission stressed that since the creation of the structural policies, the planning of the structural measures is the joint responsibility of the Commission and the Member States. However, the realization of individual



measures is the sole responsibility of the Member State concerned. In the present case, the Commission's decision had been addressed to the Republic of Italy which was the sole interlocutor of the Commission (4) . All the Commission's correspondence relating to this case had therefore been addressed to the Republic of Italy.

The Commission took the view that the complainant's request for annulment of its decision of 29 January 2001 was without object, since the complainant had not been directly concerned by the Commission's decision. In accordance with the case-law of the Community courts, for an applicant to be directly concerned by a Community measure addressed to another person, which is a condition of admissibility of an action for annulment brought by a natural or legal person, the contested Community measure must directly affect the legal situation of the applicant and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (5) . The Commission's decision not to consider eligible certain expenditure presented by the Italian authorities had no direct effect on the legal situation of the complainant in terms of the Community jurisprudence. By analogy to an action for annulment hypothetically brought by the complainant before the Court of First Instance, which would have been inadmissible, the Commission took the view that the complainant's complaint should have been considered as inadmissible.

On the basis of the information in the possession of the Commission, it appeared that the project had been suspended between January 1992 and July 1996. The Commission took the view that the reasons invoked by the Italian authorities could not be considered as relevant under Article 12 of Council Regulation (EEC) 2083/93. On the basis of the supporting documents in its possession, it appeared that the suspension of the execution of the project was due to the refusal by the region of Campania to accept certain modifications made to the plan by the city of Naples. As a consequence of this refusal, and of the unavailability of certain plots of land concerned by the project, the execution of the project had been suspended. Following this suspension and the interruption of payments, the company which was executing the project forwarded an extra-judicial act to the contractor. The latter subsequently took the city of Naples to court. The legal proceedings invoked by the Italian authorities had therefore been the consequence of the suspension of the works and not its origin, as required by the Regulation.

As regards the alleged undue delay of its decision on the request for an extension of time for demanding the final payment, the Commission pointed out that it took its decision on the basis of the documents which had been forwarded to it by the Italian authorities. The request made by the Italian authorities on 29 March 1995 did not contain enough supporting documents to allow the institution to decide whether the request was well-founded. In this letter, the Italian authorities promised to submit a detailed report to the Commission in order to justify their request. On 11 November 1998, the Commission asked the Italian authorities to forward all relevant documentation concerning the judicial proceedings before the end of December. Nevertheless, the Italian authorities did not send the requested documentation until 15 February and 22 June 2000 respectively. On 31 January 2001, the Commission informed the Italian authorities of its intention to close the financial intervention on the basis of the certified expenses declared before 31 March 1995. The Italian authorities sent further information on 8



March 2001 and asked for the final payment. Since there were no elements which could have justified a different position by the Commission, the institution confirmed its position by letter of 22 March 2001.

As regards the alleged infringement of the procedure foreseen by Article 3 of the Commission's decision C(88)0166041 of 16 February 1988, the institution underlined that the decision to close the financial intervention for the project in question had not been based on Article 3 of the decision granting the financing. The relevant legal basis in this case was Article 12 of Council Regulation (EEC) No 2083/93.

The complainant's observations

In his observations on the Commission's opinion, the complainant basically maintained his position.

In the complainant's view, the Commission's interpretation of Article 12 of Council Regulation (EEC) No 2083/93 was wrong. According to the complainant, the Commission should have accepted the request for an extension of time made by the Italian authorities. The complainant also took the view that Article 12 of Regulation (EEC) No 2083/93 should not apply in the present case since it had entered into force after the approval of the project concerned.

The complainant furthermore stressed that Article 12 of Regulation (EEC) No 2083/93 did not foresee the possibility to ask for the total or partial reimbursement of the financing, but foresees only the possibility to *"automatically release those portions of the sums committed for the granting of assistance in respect of projects decided on by the Commission before 1 January 1989 under the ERDF which have not been the subject of a request for final payment to the Commission by 31 March 1995"*.

THE DECISION

1 Preliminary remarks

1.1 In its opinion, the Commission submitted that the complainant's request for annulment of its decision of 29 January 2001 was without object, since the complainant had not been directly concerned by the Commission's decision. The Commission referred to the case law of the Community courts according to which one of the conditions of admissibility for an action for annulment brought by a natural or legal person is that the contested Community measure must directly affect the legal situation of the applicant and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (6). By analogy to an action for annulment hypothetically brought by the complainant before the Court of First Instance, which would have been inadmissible, the Commission took the view that the complainant's complaint made to the Ombudsman should have been considered as inadmissible.

1.2 Article 195 of the Treaty empowers the European Ombudsman to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community



institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

As regards the present case, the Ombudsman took the decision to open an inquiry into the complaint since, after careful examination of the complaint, he considered that all the criteria of admissibility were met. Article 195 does not require that the complainant should be directly affected by the contested decision in order to be able to complain to the Ombudsman.

1.3 As regards the decision below, the Ombudsman considers that it appears to be preferable to deal first with the second allegation made by the complainant, concerning the alleged undue delay by the Commission, before dealing with the substantive aspect of the Commission's decision contested by the complainant.

2 The alleged undue delay by the Commission when handling the request by the Italian government for an extension of the time to carry out the construction of a sewerage system in Naples

2.1 The complainant alleged that the Commission had unduly delayed its decision on the request made by the Italian government on 29 March 1995 more than five years after it had been introduced. It is undisputed that the Commission decided on this request only in 2001.

2.2 In its opinion, the Commission explained which actions it had taken from the date of the request made by the Italian authorities to its final decision. According to the Commission, the request made by the Italian authorities on 29 March 1995 did not contain enough supporting documents to allow the institution to decide whether the request was well-founded. The Italian authorities promised to submit a detailed report to the Commission in order to justify their request. On 11 November 1998, the Commission invited them to forward all relevant documentation concerning the judicial proceedings before the end of December. Nevertheless, the Italian authorities did not send the requested documentation until 15 February and 22 June 2000 respectively. On 31 January 2001, the Commission informed the Italian authorities of its intention to close the project, since on the basis of the information provided by the latter, the institution could not accept the request for an extension of time for carrying out the project in question. The Italian authorities sent further information on 8 March 2001 and asked for the final payment. Since there were no elements which could have justified a different position by the Commission, the institution confirmed its position by letter of 22 March 2001.

2.3 In view of the above, the Ombudsman considers that the Commission has given a reasonable explanation for the length of time elapsed between the request made by the Italian authorities and its final decision.

2.4 The Ombudsman therefore finds no maladministration in relation to this aspect of the case.

3 The Commission's recovery order

3.1 The complainant alleged that the Commission's decision to recover EUR 9 752 501,87 following its refusal to postpone the financing was manifestly wrong. The request was made in accordance with article 12 of Regulation (EEC) n° 2083/93 of 20 July 1993.

3.2 In its opinion, the Commission stressed that the "judicial reasons" invoked by the Italian



authorities could not be considered as relevant under Article 12 of Council Regulation (EEC) 2083/93. On the basis of the supporting documents in the Commission's possession, it appeared that the suspension of the execution of the project was due to the refusal by the region of Campania to accept certain modifications made to the plan by the city of Naples. As a consequence of this refusal and to the unavailability of certain plots of land related to the project, the execution of the project had been suspended. Following this suspension and the interruption of payments, the company which was executing the project forwarded an extra-judicial act to the contractor. The latter subsequently took the city of Naples to court. The legal proceedings invoked by the Italian authorities had therefore been the consequence of the suspension of the works and not its origin, as required by the Regulation.

3.3 The purpose of Regulation (EEC) No 2083/93, which was the legal basis of the Commission's decision in the present case, appeared to be to wind up all projects decided on by the Commission before 1 January 1989 under the ERDF and still pending by 31 March 1995, unless the exception of Article 12 applied. Article 12 of Regulation Council Regulation (EEC) No 2083/93 foresees that *"[t]hose portions of the sums committed for the granting of assistance in respect of projects decided on by the Commission before 1 January 1989 under the ERDF which have not been the subject of a request for final payment to the Commission by 31 March 1995 shall be automatically released by the Commission by 30 September 1995 at the latest, without prejudice to those projects which are subject to suspension for judicial reasons"* .

3.4 The Ombudsman notes that the Commission had taken its decision concerning this case before 1 January 1989 and was still pending on 31 March 1995. It therefore appears that the Commission's decision to base its decision on Regulation (EEC) No 2083/93 was correct. Furthermore, it should be noted that the Italian authorities themselves based their request for the postponement of the deadline for demanding the final payment on Regulation (EEC) No 2083/93.

3.5 In his observations, the complainant took the view that Article 12 of Regulation (EEC) No 2083/93 should not apply in the present case since it had entered into force after the approval of the project concerned.

3.6 The complainant thus seems to suggest that the Commission's approach in the present case is based on a retroactive application of Regulation 2083/93. However, Article 12 of this regulation was adopted precisely for cases such as the present one where the Commission's decision to grant financial assistance had been taken before 1989. It should furthermore be noted that Regulation 2083/93 was adopted on 20 July 1993, nearly two years before the expiry of the deadline of 31 March 1995 set out in its Article 12. The Ombudsman therefore considers that the complainant has not shown why Article 12 of Regulation 2083/93 should not be applicable in the present case.

3.7 On the basis of the information acquired during the present inquiry, the Ombudsman considers that the Commission's view that the exception foreseen in Article 12 of the above-mentioned Regulation was not applicable in the present case appears to be reasonable.



3.8 In these circumstances, the Ombudsman considers the Commission's view that it was unable to make any further payments to the Italian government (notably as regards the last instalment of EUR 4 131 655,19) to be reasonable.

3.9 As regards the recovery order, the Ombudsman notes that the Commission asked for the restitution of those sums for which the Italian authorities had failed to present an invoice of payment before 31 March 1995. These amounted to EUR 9 752 501,87. This amount appears to have been obtained by deducting 13.3 billion LIT, corresponding to 50% of the costs that had been duly declared, from the sum that had already been paid by the Commission (32 billion LIT).

The Ombudsman notes that Decision C(88)0166041 foresaw that the EU should bear 50 % of the costs of the project, up to a maximum of 40 billion LIT. The complainant's demand that the Commission should annul its recovery order would effectively mean that the EU should bear more than 50 % of the costs that had been declared by 31 March 1995. The Ombudsman considers that the complainant has not submitted sufficient evidence to show that this would indeed be the most reasonable interpretation of Article 12 of Regulation (EEC) No 2083/93.

It should also be noted in this context that the Italian government, which was the Commission's counterpart in this case, did not object to the Commission's interpretation.

3.10 The Ombudsman considers that the Commission interpretation of Regulation (EEC) No 2083/93 appeared to be reasonable and that the institution had not exceeded its legal authority when deciding to ask for the restitution of EUR 9 752 501,87.

3.11 The Ombudsman therefore finds no maladministration in relation to this aspect of the case.

4 The alleged infringement by the Commission of Decision C(88)0166041

4.1 In his complaint, the complainant alleged that the Commission had infringed the procedure foreseen by Article 3 of Commission's decision of 16 February 1988 concerning the ERDF project n. 870503006.

4.2 The Commission underlined that the relevant decision had been based only on Article 12 of Regulation (EEC) No 2083/93 and not on Article 3 of the Commission's decision C(88)0166041 of 16 February 1988.

4.3 In view of the conclusion reached in point 3.5 of the present decision that the Commission's decision to base its decision on Regulation (EEC) No 2083/93 had not been incorrect, the Ombudsman finds no maladministration in relation to this aspect of the case.

5 The complainant's claims

5.1 The complainant claimed that the Commission should annul the recovery order and pay the amount of EUR 13 884 157,06, i.e the sum of EUR 9 752 501,87 the reimbursement of which the Commission had asked, and the sum of EUR 4 131 655,19 corresponding to the last instalment that had been cancelled by the institution.

5.2 In view of the Ombudsman's findings regarding the complainant's allegations (see points 3.7



and 3.10), the Ombudsman considers that the complainant's claims cannot be sustained.

5.3 It should be noted, however, that the present decision only deals with those aspects of the case related to the funding provided by the Commission to the Italian government with regard to the relevant project. It thus not deal with any claims the complainant may have against the Italian government under national law.

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.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Council Regulation (EEC) No 2083/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 as regards the European Regional Development Fund, OJ L 193 of 31 July 1993, p.13.

(2) Decision C(88)0166041 further foresaw that the EU should bear 50% of the costs of the project.

(3) Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund, OJ L 169 of 28 June 1984, p. 1.

(4) Case C-291/89 *Interhotel/Commission* [1991] ECR I p. 2257.

(5) Case C-386/96 *Dreyfus/Commission* [1998] ECR I p.2309.

(6) Case C-386/96 *Dreyfus/Commission* [1998] ECR I p. 2309.