

Decision of the European Ombudsman on complaint 2144/2002/GG against the European Commission

Decision

Case 2144/2002/GG - Opened on 16/12/2002 - Decision on 11/11/2003

Strasbourg, 11 November 2003

Dear Dr. B.,

On 11 December 2002, you made a complaint to the European Ombudsman concerning the European Commission's alleged failure to pay the final instalment due under 'Force' project E/92/1608/2/Q-FPC.

On 16 December 2002, the Ombudsman forwarded the complaint to the President of the Commission.

By letter of 3 March 2003, you submitted further information in relation to your complaint.

The Commission sent its opinion on 18 March 2003. The Ombudsman forwarded it to you on 21 March 2003 with an invitation to make observations, which you sent on 27 April 2003.

On 10 June 2003, I wrote to the Commission in order to ask for further information in relation to your complaint. A copy of your letters of 3 March 2003 and 27 April 2003 were forwarded to the Commission. You were informed accordingly by a letter sent the same day. The Commission sent its reply on 7 August 2003. I forwarded it to you on 13 August 2003 with an invitation to make observations by 30 September 2003. No observations appear to have been received from you.

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

THE COMPLAINT

In 1994, ASS – Arbeits- und sozialwissenschaftliche Systemberatung, a German consultancy firm represented by the complainant, entered into a contract with the Commission for the provision of consultancy services within the framework of the 'Force' Programme (Project D/93B/1/3120/Q-FPC). In a complaint (780/2000/GG) lodged in June 2000, the complainant alleged that part of the remuneration due under this contract had still not been paid. As a result



of the Ombudsman's inquiry into this complaint, the Commission proposed to pay the complainant a sum of € 7 403 plus a further sum of € 3 422,62 as interest on account of the delay that had occurred. The complainant accepted this proposal. On 27 November 2001, the Ombudsman therefore closed the case as having been settled by the Commission. (1)

In December 2002, the complainant submitted a further complaint to the Ombudsman which concerned another project under the 'Force' Programme (reference E/92/1608/2/Q-FPC) for which she had been the co-ordinator. According to the complainant, the same problem had occurred with regard to this project as in the above-mentioned case.

The complainant thus alleged that the Commission had failed to pay the last instalment due under the said project.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The 'Force' programme had officially terminated in 1995. The files relating to this programme had then been entrusted to S.A. Agenor, the technical assistance office ("TAO") of the Commission for the implementation of the 'Leonardo da Vinci' programme with a view to closing the remaining projects. However, by the time this technical assistance office was closed in February 1999, a certain number of files including the complainant's had still not been closed.

Project E/92/1608/Q-FPC consisted of two contracts for which the complainant had been the co-ordinator:

- The first contract (contract E/92/1608/1/Q-FPC) had run from 7 September 1992 until 6 September 1993, and the contractor had been a company called Telesincro.
- The second contract (contract E/92/1608/2/Q-FPC) had run from 1 January 1994 until 30 November 1994. As a result of difficulties experienced by Telesincro (restructuring of the company; strikes), a change of contractor had been carried out after the TAO had given its consent. The new contractor had been a company called Aniel. Only this second contract was concerned by the present complaint.

The Commission's services had evaluated the final report for the project that had been submitted to the TAO by the complainant. According to this evaluation, the project was weak and the evaluator had called into doubt the seriousness of the transnational character of the project, of the partners, of the work carried out and of the budgetary allocations. The Commission's services had also carried out a financial evaluation that was based on the data provided in the final report and on an audit carried out at the seat of the contractor on 23 March 1996. For the first contractual period, the financial evaluation had led to the conclusion that € 30 367 should be claimed back. For the second contractual period, the balance still to be paid by the Commission amounted to € 2 972.



In a letter sent on 28 January 2003, the Commission's services had informed the complainant of the results and the conclusions of the evaluation. At the same time, the Commission's services had sent a letter to Telesincro, explaining the calculation that had been carried out and the conclusion that a sum of € 30 367 should be claimed back in so far as contract E/92/1608/1/Q-FPC was concerned. The Commission's services had further written to Aniel, explaining the calculation that had been carried out and the conclusion that a sum of € 2 972 remained to be paid by the Commission in so far as contract E/92/1608/2/Q-FPC was concerned. The complainant, Telesincro and Aniel had been asked to submit any further claims or any further information relating to these contracts to the Commission within 30 days of receipt of the letter from the Commission. The Commission had furthermore informed the addressees that claims or documents that were received after the expiry of this deadline would not be taken into account.

The complainant's observations *The complainant's further letter of 3 March 2003*

On 3 March 2003, that is to say shortly before the Commission sent its opinion on the complaint, the complainant sent a further letter to the Ombudsman, enclosing the Commission's letters of 28 January to herself, Telesincro and Aniel, her reply of 3 March 2003, a note on the situation of the project and several other documents.

In her letter to the Ombudsman, the complainant observed that the contractor of the second project phase (contract E/92/1608/2/Q-FPC), Aniel, had not yet paid the final amount of money that was due to her. According to the complainant, this was due inter alia to the fact that the Commission had failed to complete its accounts and the audit report. The complainant took the view that substantially higher costs could be claimed than had been mentioned in the Commission's calculation concerning the contract (contract E/92/1608/2/Q-FPC). In her view, the Universidad Autónoma de Barcelona (UAB) alone had provided own funds amounting to € 33 927. The complainant therefore considered it possible that the amount still to be paid by the Commission was higher than € 2 972, and she asked for this point to be clarified. According to the complainant, the original contract was not in her hands, and she could thus only rely on her memory when putting the total costs at around € 105 144 and the EU's contribution at € 65 000 (61,82 %). The complainant therefore asked for a copy of the contract (contract E/92/1608/2/Q-FPC).

According to the complainant, Aniel had omitted to forward EU money to its project partners although the EU contribution had only been obtained thanks to the work of these partners. In the complainant's view, the Commission should see to it that the project partners were paid as soon as possible.

The complainant's observations on the Commission's opinion

On 21 March 2003, the Ombudsman forwarded the Commission's opinion to the complainant for her observations. He also acknowledged receipt of the complainant's letter of 3 March 2003 and advised her that her request to receive a copy of contract E/92/1608/2/Q-FPC should be addressed directly to the Commission.

In her observations on the Commission's opinion, the complainant made the following further comments:



There had been constant contact with the TAO and the national support body in Spain, Fondo Formación, both during the first and the second contractual period. The French partner, the Chambre de Commerce de Grenoble, had failed to comply with its contractual obligations. This had however been known to the TAO. The complainant had never received any instructions in reply to questions as to how she should proceed in such circumstances. At no time had the TAO expressed doubts as to the contents of the projects and the seriousness of its transnational character. Nor had the Commission so far communicated this result of its appraisal of the project. The project team had therefore been unaware of any such requirements and been unable to react. In these circumstances, the contents of the project should be considered as being acceptable. It was nevertheless to be welcomed that the project was to be closed now. However, the amounts still due to the complainant should be paid out. Documents attesting the underlying work of the complainant could be submitted upon request.

The complainant asked the Ombudsman to forward her letter of 3 March 2003 to the Commission.

Further inquiries

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

Request for further information

The Ombudsman therefore asked the Commission to provide him with more specific information on how it had reacted to the further claims and information that the complainant and Aniel had (or may have) submitted in reply to the Commission's letters to them of 28 January 2003 and what decision it had taken in this respect. A copy of the complainant's letter of 3 March 2003 and of the complainant's observations of 27 April 2003 were forwarded to the Commission.

The Commission's reply

In its reply, the Commission made the following comments:

The complainant had not submitted any new elements that could have modified the financial evaluation that had been carried out by the Commission's services. The account of the costs incurred by the Universidad Autónoma de Barcelona was already on the Commission's file and had been taken into account in the final calculation. As regards the costs incurred by project partners, it had to be stressed that the Commission's contractual relationship, at least in so far as the financial aspects of the project were concerned, was only with the contractor. It was therefore not the Commission's task to ask the project partners for accounts of any additional costs they may have incurred. It was the responsibility of the contractor and the co-ordinator to gather all the necessary elements and to submit them to the Commission together with the final report.

The Commission did not have any contractual link with the project partners. It was therefore unable to make payments to any person other than the one foreseen in the contract, that is to say the contractor (Aniel). The Commission was therefore not in a position to pay the complainant out of the sum that was due from the Commission.

A copy of the contract that had been signed by the BAT (acting on behalf of the Commission)



and Aniel had been sent to the complainant. The audit report, however, could not be transmitted to the complainant. Although the latter had been the co-ordinator of the project, it was for the contractor to shoulder the financial charges of the project and the corresponding obligations as to controlling and monitoring. The complainant remained a third party in so far as the contract was concerned. Given that the file had still not been closed and that the complainant had financial claims against the contractor, there was a risk that disclosure of the audit report could harm the commercial interests of the contractor. Disclosure of this document was thus not possible in conformity with Article 4 (2), first indent of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2) .

The contracts would therefore be closed on the basis of the amounts that had already been communicated to the complainant and the contractors in January 2003. The complainant had been informed accordingly.

The complainant's observations

A copy of this reply was forwarded to the complainant. No observations were received from the complainant.

THE DECISION

1 Introductory remarks

1.1 The complainant, who works for a German consultancy firm, was the co-ordinator of a project under the 'Force' programme. The main contractor under the relevant contract (E/92/1608/2/Q-FPC) with the European Commission was a company called Aniel. In December 2002, the complainant lodged a complaint against the Commission concerning this contract. In her letter to the Ombudsman of 3 March 2003 and in her observations on the Commission's opinion, however, the complainant also seemed to suggest that Aniel or other contractors had failed to pay her sums of money that were due to her.

1.2 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.

1.3 The Ombudsman's inquiry into the present complaint thus deals exclusively with possible maladministration on the part of the European Commission.

1.4 The complaint against the Commission concerns the latter's alleged failure to pay money due under the relevant contract. During the Ombudsman's inquiry, the complainant asked the Commission to provide her with a copy of the contract and of the report on the audit that had been carried out. In its reply to a request for further information made by the Ombudsman, the Commission noted that it had sent the complainant a copy of the contract and explained why in its view no access could be granted to the audit report. Given that the complainant has not indicated to the Ombudsman that her complaint also covers this refusal to grant access to the audit report, the Ombudsman's inquiry has not dealt with this matter.



2 Failure to pay money due under contract

2.1 The complainant alleged that the Commission had failed to pay sums due under contract E/92/2/1608/Q-FPC.

2.2 In its opinion, the Commission accepted that there was an amount still outstanding under the above-mentioned contract. According to the Commission's calculation, the relevant sum amounted to € 2 972. The Commission had informed Aniel and the complainant accordingly by letters sent on 28 January 2003 and had asked them to submit any further claims or any further information relating to this contract within 30 days of receipt of the letter from the Commission. The Commission had furthermore informed the addressees that claims or documents that were received after the expiry of this deadline would not be taken into account.

2.3 The complainant subsequently made further submissions, both directly to the Commission and in a letter to the Ombudsman of 3 March 2003, a copy of which was forwarded to the Commission. The Ombudsman thereupon asked the Commission to inform him how it had dealt with these further submissions. In its reply, the Commission explained the reasons why it considered that the complainant had not submitted any new elements that could have modified the financial evaluation that had been carried out by the Commission's services. The Commission also stressed that its contractual relationship was only with the contractor. The Commission was therefore not in a position to pay the complainant out of the sum that was due from the Commission to the contractor. In the Commission's view, it was not the Commission's task to ask the project partners for accounts of any additional costs they may have incurred. According to the Commission, it was the responsibility of the contractor and the co-ordinator to gather all the necessary elements and to submit them to the Commission together with the final report. The Commission confirmed that on the basis of the information that had been submitted to it, the sum that still had to be paid to the contractor amounted to € 2 972.

2.4 The Ombudsman considers that the arguments that have been submitted by the Commission to support its case appear to be reasonable.

2.5 In these circumstances, there appears to be no maladministration on the part of the Commission.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) The decision in this case is available on the Ombudsman's website (



<http://www.ombudsman.europa.eu> [Link]).

(2) OJ 2001 No. L 145, p. 43.