

Decision of the European Ombudsman on complaint 278/2003/JMA against the European Commission

Decision

Case 278/2003/JMA - Opened on 18/03/2003 - Decision on 02/12/2004

Strasbourg, 2 December 2004

Dear Mr X.,

On 6 February 2003, you lodged a complaint with the European Ombudsman against the European Commission on behalf of the organisation Y. Your complaint concerned the Commission's decision of 12 August 2002 refusing to provide financial assistance to Y in the framework of the Community action programme for the promotion of non-governmental organisations (NGOs).

You had sent a previous complaint to the Ombudsman concerning the same subject matter on 23 December 2002, which was declared inadmissible on 10 February 2003.

On 18 March 2003, I forwarded your new complaint to the President of the European Commission. The Commission sent its opinion on 12 June 2003, and I forwarded it to you with an invitation to make observations. You sent me your observations on 24 and 30 July, 30 September and 21 October 2003. I requested further information from the Commission on 18 February 2004. I received the Commission's second opinion on 14 April 2004 and forwarded it to you. You sent me your observations on the Commission's second opinion on 29 May 2004.

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

THE COMPLAINT

On 23 December 2002, the complainant had first lodged a complaint with the Ombudsman against the Commission, on behalf of the organisation Y.

The facts of that case were, in summary, as follows:

Y submitted a request for financial assistance in the framework of the Call for Submissions of Proposals pertaining to a Community action programme for the promotion of NGOs. On 8 April 2002, the Commission acknowledged receipt of the complainant's request. On 12 June 2002,



the institution informed the complainant that following a first screening of all applications, Y had met the admissibility criteria set out in the Notice to the Action Programme. On 12 August 2002, however, the Commission notified the complainant that his application had not been selected on the grounds that some doubts regarding the legal standing of Y had arisen. In its letter, the Commission stated that there appeared to be some uncertainty concerning the nature of Y's relationship with another organisation named Z. The Commission argued that the national public prosecutor had begun an inquiry into allegations that Y forged and illegally amended its statutes, as a result of which he had brought the matter to the attention of the responsible criminal court.

On 30 August 2002, the President of Y wrote to the Commission and explained the legal status of Y and its co-operation agreement with Z. He emphatically refuted the accusations concerning both the validity of the organisation's by-laws and the falsification of a public document. He described the legal structure of Y as certified under the relevant national law. On the basis of that information, he asked the Commission to reconsider its decision to refuse Y's request for financial assistance in 2002.

In a letter to the complainant dated 7 October 2002, the Commission informed him that the preliminary selection of beneficiaries had been concluded and the list of beneficiaries established. The institution noted that the 2002 period was closed and therefore, there appeared to be no reason for any further discussion.

The complainant alleged that the Commission failed to identify the source of the allegations and to take account of his arguments before making its final decision. He also argued that the Commission's reasoning found no legal basis in the Call for Submissions of Proposals of the Action Programme.

As regards the alleged uncertainty surrounding the relationship between Y and Z, the complainant pointed out that the Commission was well aware of the nature of the co-operation agreement between the two organisations.

In the complainant's view, the inquiry pursued by the national public prosecutor, came as a result of a slander campaign launched by a former Y employee who had been laid off. The complainant underlined that the legal proceedings involving his organisation had been brought to a close by the judge in charge of the inquiry on 7 October 2002. The magistrate concluded that there was no incriminating evidence against the complainant.

In view of the available information, the Ombudsman considered that the complaint had not been preceded by the appropriate administrative approaches to the institution concerned as required by Art. 2 (4) of his Statute. Accordingly, the Ombudsman declared the complaint inadmissible.

On 6 February 2003, the complainant forwarded additional information, including correspondence with the Commission services regarding the subject matter of his complaint. Taking into consideration this new evidence, the Ombudsman decided to register the



complainant's letter as a new complaint and started a new inquiry.

On 4 June 2003, a third party requested access to all the documents pertaining to the complaint. Since the complainant had not requested that his complaint be treated confidentially, the Ombudsman granted the request for access on 16 June 2003 in accordance with Article 14 (4) of the Decision of the European Ombudsman adopting implementing provisions (1) . Having been informed of the Ombudsman's decision by letter of 23 June 2003, the complainant then requested that his complaint be classified as confidential. In conformity with Article 10 (1) of his implementing provisions (2) , the Ombudsman declared the complaint confidential.

In summary, the complainant alleges (i) that the Commission's decision of 12 August 2002 is not based on the provisions of the Call for Submissions of Proposals setting out the legal basis of the action programme, and (ii) that he was not given the opportunity to be heard before the decision was taken. He therefore claims that the Commission should reconsider its position and grant the complainant the requested assistance.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first described the factual and legal aspects of the case. It explained that Y's request for financial assistance was made in the framework of a Community action programme promoting NGOs.

The complainant's organisation had previously received assistance from similar programmes. In the course of a routine audit involving a previous grant, a problem regarding the organisational structure of Y was discovered. The Commission then decided to suspend both further assistance to the organisation as of the year 2000, and to request the reimbursement of part of the funds already granted. At that time, the Commission became aware of a number of internal legal problems affecting Y, which reaffirmed its position not to award further grants to this organisation. From the point of view of the work performed by Y, however, the Commission stressed that it had always been satisfactory.

The Commission noted that it had never sought to become involved in Y's internal problems. Accordingly, in all its correspondence, the institution had never passed judgement on these matters.

As for the complainant's allegation that the Commission's decision was not based on the legal provisions governing the 2002 Call for proposals, the institution argued that decisions on grants are consistent with the provisions laid down in the pertinent legal decision, the relevant call for proposals, and the information dossier published with it. However, when entering into a legal obligation, the Commission must also be satisfied with the legal and financial standing of the beneficiary, as well as of his/her overall integrity, as a matter of sound financial management. In the case of Y, the Commission considered that there were sufficient grounds to assume that these general conditions were not met, since the organisation's structure and internal decision-making process were unclear. It stated that the decision not to grant financial



assistance until confidence in the organisation would be restored was taken on a risk-management basis, in full consultation and agreement with the Internal Audit Capability unit of the responsible DG.

The Commission rejected the allegation that it had breached the complainant's rights of defence. The institution explained that it has the prerogative to decide on the allocation of grants on the basis of all the information available. Within the framework of the NGO's funding programme, meetings with beneficiaries to discuss the outcome of their application are not foreseen. The information dossier published with each call for proposals explicitly states that the Commission's decision on the grants is final. This policy is consistent with the notion that Community grants are to be considered gifts which should be employed to achieve a number of pre-determined objectives. However, further written clarification of the reasons for rejection may be given when requested.

In view of the Commission's serious concerns resulting from Y's internal legal problems, the institution considered that the potential beneficiary should have convincingly proved that no illegal situation existed and that its institutional stability had been restored. In the Commission's view, no such substantial evidence had been presented.

The Commission therefore concluded that it was not in a position to reconsider its decision and to grant the complainant the requested assistance.

The complainant's observations

The complainant argued that Y met all the criteria spelled out in both the Call for Submissions of Proposals and in the relevant decision. He insisted that the decision to reject Y's application for funding in 2002 had not been based on the criteria set out in any of the previous legal instruments, but rather on the concern of its services about Y's legal status. These reservations were unknown to the complainant who never had the opportunity to refute them.

As regards the Commission's claims regarding potential financial irregularities in the use of grants by Y during the 1998, 1999 and 2000 periods, the complainant found them ungrounded. He referred to the findings of the audit which the Commission carried out between September 2001 and April 2002 on the actions by Y. These controls did not find any irregularity, and subsequently, the institution had to withdraw its requests for the reimbursement of the 1998 grant and for the suspension of the 2000 and 2001 assistance. The complainant noted, however, that the grounds for the Commission's audit were unrelated to those given by the institution in support of its decision to reject the complainant's 2002 application.

The complainant rebutted the existence of any internal problems involving Y's structure. He added that the organisation has always enjoyed the support of its members, as illustrated by the resolution of its recent general assembly. The legal actions against Y were the result of a slander campaign orchestrated by a former employee.

The complainant noted that the legal action against Y was merely a preliminary inquiry launched by a national public prosecutor and, in no way connected to the nature of the statutes or the structure of the organisation. As regards this aspect, the Commission should have been well



aware of Y's legal structure, since it had maintained a regular working relationship with the organisation since 1996. The institution kept a wealth of information on Y including its official statutes, which had been certified by the national authorities.

In the complainant's view, the Commission's argument that the fact that serious allegations against Y were being pursued in court placed on him the burden to prove the soundness of his organisation, ignored fundamental legal principles and infringed his basic rights. The complainant underlined that everyone charged with a criminal offence shall be presumed innocent until proven guilty, as recognised in Article 11 (1) of the Universal Declaration of Human Rights, Article 14 (2) of the International Covenant on Civil and Political Rights, and Article 6 (2) of the European Convention on Human Rights.

FURTHER INQUIRIES

In view of the observations submitted by the complainant, the Ombudsman wrote to the Commission on 18 February 2004. In his letter, the Ombudsman noted that the Commission appeared to have based its decision on the existence of a criminal inquiry against the complainant. In order to assess the reasoning given by the Commission, the Ombudsman requested further clarification concerning: (i) whether in this particular case, the Commission took properly into account, not only the need to protect the Community's financial interests, but also the complainant's right to be treated both fairly and with due respect to the presumption of innocence; and (ii), if in general cases involving on-going judicial or administrative inquiries regarding the legal and financial standing of potential beneficiaries of Community assistance, the institution has given any guidance or instructions to its departments on how to respect a fair balance between the interests of private persons and the general public interest.

The Commission's second opinion

In its second opinion, the Commission stressed that sound financial management is an essential principle in its management of the Community budget. Accordingly, an important concern is to minimise the risk that taxpayers' money is not well spent.

The Commission recalled that grants under the programme concerned are awarded on a yearly basis, once the institution has assessed the proposals. It explained that the award of grants is subject to the principles of transparency and equal treatment. These general principles were already spelled out in the "Vademecum on Grant Management" of 1999, and were subsequently included in the new Financial Regulation, which entered into force in January 2003. The Commission services must ensure the application of these principles.

The Commission underlined that everybody is innocent until proven guilty. In this case, however, because of the sources and the gravity of the allegations, the Commission felt compelled to take a cautious stance, leading to the decision not to include Y among the successful candidates. Under the circumstances, the Commission judged that it would not be sound financial management to grant a subsidy to this particular applicant where such clear doubts existed.



The Commission explained that, as mentioned in its opinion, a problem with the organisational structure of Y was discovered during a routine audit of the 1998 expenditure carried out in February 2001. The problem concerned the non transparent relationship between Y and Z, one of its founders. Much of the expenditure for Y's activities was actually incurred by Z which then billed Y for the corresponding amounts. This constituted sub-contracting which was not allowed without the permission of the Commission. After further audits and internal discussions, a decision was taken to try to find a pragmatic solution to the problem. As the work had been carried out and no intentional fraud seemed to have taken place, the Commission accepted the expenditure incurred by Z on behalf of Y, except for some personnel costs. This solution applied only to the past and did not constitute the Commission's approval to this non-transparent organisational structure.

In order to find out the real situation, the Commission has asked the European Anti-Fraud Office (OLAF) to investigate Y. OLAF is in the process of finalising its inquiry. At the end of this process, and on the basis of its findings, the Commission will decide whether to resume a normal relationship with the organisation.

In reply to the specific information requested by the Ombudsman, the Commission explained that it has not issued any general guidance for its services on how to behave in similar situations. It is the responsibility of the Authorising Officer by sub-delegation to make a judgement on a case by case basis. The Commission wishes to stress however that in the process of awarding grants, it has to evaluate all applications fairly and in respect of the principle of sound financial management. Therefore, in serious cases of allegations of fraud or mismanagement, the precautionary principle would apply as long as the situation is not clearly established.

The complainant's observations on the Commission's second opinion

In his observations on the Commission's second opinion, the complainant reaffirmed his previous arguments.

The complainant pointed out that the Commission has kept on repeating the same incriminating arguments against his organisation, regardless of the evidence he has furnished and which proves the inconsistency of these claims. He noted that the institution has used these arguments to reject a request by the complainant for financial assistance in 2002 and 2003, and most recently in 2004. Even though he has repeatedly requested to know the charges against him, and to be heard before a decision is taken, the institution has ignored his right of defence.

The complainant referred to the satisfactory relationship between the Commission and Y between 1996 and 2000. Y's sound financial management was illustrated by the findings of the Commission's audit of 28 January 2002 concerning the 1998, 1999 and 2000 periods. The audit concluded that no irregularity on the part of Y had been discovered despite the auditors' intensive scrutiny.

As regards the information requested by the Ombudsman in his letter to the Commission, the complainant believed that the institution had not provided any further details and therefore that it had failed to reply to the Ombudsman's requests.



THE DECISION

1 Alleged lack of legal basis for the Commission's decision

1.1 The complainant alleges that the Commission's decision of 12 August 2002 rejecting Y's request for financial assistance in 2002 under the Community action programme for the promotion of non-governmental organisations (NGOs) was not based on the provisions of the Call for Submissions of Proposals which set out the programme's legal basis and that he was not given the opportunity to be heard before the decision was taken.

The complainant argued that the Commission based its decision to reject Y's application for funding in 2002 on a number of allegations which were unknown to him, and that he never had the opportunity to refute.

In his observations, the complainant argues that the justification given by the Commission for the exclusion of Y, namely the existence of a legal action against the organisation which was pursued at the time before the national courts, was groundless since such action merely involved a preliminary inquiry carried out by a public prosecutor. The Commission should have been well aware of the sound legal structure of the organisation, having held a continuous working relationship with it since 1996.

1.2 The Commission argues that, when entering into a legal obligation, it must ensure, as a matter of sound financial management, the legal and financial standing of the beneficiary, as well as his/her overall integrity. The Commission takes the view that there were sufficient grounds to assume that these general conditions were not met in this case.

The Commission argues that it has the prerogative to decide independently, on the basis of all the information available, on the allocation of grants. Within the framework of the NGO funding programme, meetings with beneficiaries to discuss the outcome of their application are not foreseen. The information dossier published with each call for proposals explicitly states that the Commission's decision on the grants is final. This is in line with the notion that Community grants are to be considered gifts which should be employed to achieve a number of pre-determined objectives.

In view of the seriousness of the allegations which were being pursued at the time before the national courts, the Commission considers that the potential beneficiary should have convincingly proved that no illegal situations existed. In the institution's view, no such substantial evidence has been submitted.

In its second opinion, the Commission argues that because of the sources and the gravity of the allegations, it felt compelled to take a cautious stance, leading to the decision not to include Y among the successful candidates.

In reply to a request from the Ombudsman, the Commission stated that it has not issued any general guidance for its services on how to respect a fair balance between the interests of



private persons and the general public interest in cases involving on-going judicial or administrative inquiries regarding the legal and financial standing of potential beneficiaries of Community assistance. It is the responsibility of the Authorising Officer by sub-delegation to make a judgement on a case by case basis. The Commission wishes to stress however that in the process of awarding grants, it has to evaluate all applications fairly and in respect of the principle of sound financial management. Therefore, in serious cases of allegations of fraud or mismanagement, the precautionary principle would apply as long as the situation is not clearly established.

1.3 The Ombudsman notes that the Commission's reasoning to reject the complainant's application as stated in its letter of 12 August 2002 was as follows:

"I am sorry to have to tell you that your application was one of those, which was not successful in this process for the following reason:

With reference to the remaining uncertainty concerning Y's independence from Z, grave accusations of falsification of signature of a document and allegedly illegal amendments to the Statutes of the organisation now being pursued by a public prosecutor [...], the Commission will not reconsider an application from Y until it gets sufficient evidence of the legal standing of the organisation."

From the information submitted in the course of the inquiry, it appears that at the time the Commission was assessing the complainant's application, a preliminary inquiry into an alleged forgery on the part of the complainant's organisation was being pursued by a national public prosecutor. Moreover, the closing of the Commission's selection procedure took place before the magistrate responsible for the inquiry cleared the complainant's organisation on 7 October 2002.

1.4 The Ombudsman finds that in reviewing applications for Community funding, the Commission not only has to take into account the specific rules which govern that funding programme, but also any rule or principle which is binding upon it. As set out in Article 274 of the EC Treaty, one of the general rules applicable to any initiative involving the use of Community funds is the obligation of sound financial management.

The Ombudsman notes that the interpretation of the principle of sound financial management cannot be reduced to a purely accounting definition. According to the Community courts, its correct interpretation must include a concern for the practical consequences of the acts of financial management (3) .

1.5 In view of the above, the Ombudsman finds it reasonable that before requests for financial assistance are awarded, the Commission consider whether or not the legal and financial standing of potential beneficiaries as well as their overall integrity appear to be sufficiently reliable. The Ombudsman is not aware of any legal rule or principle that would prevent this.

1.6 The Ombudsman considers, however, that in taking measures to protect the Community's



financial interests the Commission should seek to strike a fair balance between the interests of private persons and the general public interest, so that potential beneficiaries of its financial assistance are treated both fairly and with due respect to the presumption of innocence (4) . The Ombudsman also points out that it is difficult to envisage how the Commission could strike a fair balance unless it communicates to an applicant for a grant any doubts that it may have as to the applicant's legal standing and is then prepared to listen and respond to information provided by the applicant in order to clarify those doubts.

1.7 In the present case, the Ombudsman notes that the only argument in support of the Commission's decision of 12 August 2002 was the existence of a criminal inquiry against the complainant. In its decision, the Commission did not refer to any type of supporting evidence, which may have given weight to its negative assessment of the complainant's application. The institution limited itself to taking account of the formal existence of a criminal inquiry and the allegations made thereupon, without seeking to verify that information.

The Ombudsman notes that, notwithstanding the invitation made to the complainant in the Commission's decision of 12 August 2002 to provide evidence on the legal standing of his organisation, once the complainant did so by letter dated 30 August 2002, the institution does not appear to have responded to that evidence and merely stated in its letter of 7 October 2002 that the beneficiaries of the 2002 Action Programme had already been established.

1.8 Having reviewed the facts of the case, the Ombudsman finds that the Commission has not been able to show that, in this instance, it struck a fair balance between the need to pursue sound financial management of its grants, and the complainant's right to be treated both fairly and with due respect to the presumption of innocence. By exclusively relying on the formal existence of a legal inquiry against the complainant without further verifying that information, the Commission did not treat the complainant fairly, in breach of Article 6 (2) of the European Code of Good Administrative Behaviour. This constitutes an instance of maladministration. A critical remark will be addressed to the Commission.

1.9 The Ombudsman wishes to draw the Commission's attention to the fact that similar types of problems could be averted if the institution were to take the initiative to provide its services with guidance or instructions on how to respect a fair balance between the interests of private persons and the general public interest in cases involving on-going judicial or administrative inquiries regarding the legal and financial standing of potential beneficiaries of Community assistance.

The Ombudsman will address a further remark to the Commission to this effect below.

2 Reconsideration of the assistance requested by the complainant

2.1 The complainant claims that the Commission should reconsider its position and grant Y the requested assistance.

2.2 The Commission argues that it is not in a position to reconsider its decision and to grant the complainant the requested assistance. The institution noted, in its exchanges with the complainant, that its 2002 budget period was closed and that Y's request could therefore not be



revisited.

2.3 The Ombudsman takes note of the Commission's statement that its 2002 budget period is closed, and therefore applications made at that time cannot be reviewed. As a result, the reconsideration of the complainant's request for financial assistance under the 2002 Community action programme for the promotion of non-governmental organisations (NGOs) does not seem feasible any longer.

In view of the above, the Ombudsman considers that the complainant's claim cannot be met as regards the 2002 budget. The Ombudsman points out, however, that he is not aware of anything to prevent the complainant from submitting an application for funding in respect of any grant round that is still open.

3 Conclusion

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

The Ombudsman considers that in taking measures to protect the Community's financial interests the Commission should seek to strike a fair balance between the interests of private persons and the general public interest, so that potential beneficiaries of its financial assistance are treated both fairly and with due respect to the presumption of innocence. The Ombudsman also points out that it is difficult to envisage how the Commission could strike a fair balance unless it communicates to an applicant for a grant any doubts that it may have as to the applicant's legal standing and is then prepared to listen and respond to information provided by the applicant in order to clarify those doubts.

Having reviewed the facts of the case, the Ombudsman finds that the Commission has not been able to show that, in this instance, it struck a fair balance between the need to pursue sound financial management of its grants, and the complainant's right to be treated both fairly and with due respect to the presumption of innocence. By exclusively relying on the formal existence of a legal inquiry against the complainant without further verifying that information, the Commission did not treat the complainant fairly, in breach of Article 6 (2) of the European Code of Good Administrative Behaviour. This constitutes an instance of maladministration.

Given that these aspects of the case concern 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.

FURTHER REMARK

The Ombudsman wishes to draw the Commission's attention to the fact that similar types of problems could be averted if the institution were to take the initiative to provide its services with guidance or instructions on how to respect a fair balance between the interests of private



persons and the general public interest in cases involving on-going judicial or administrative inquiries regarding the legal and financial standing of potential beneficiaries of Community assistance.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) *"Applications for access to the following documents shall be granted automatically, except in relation to complaints that are classified as confidential in accordance with Article 10.1 above: (b) complaints and documents annexed thereto by the complainant"* Adopted on 8 July 2002 and amended by decision of the Ombudsman of 5 April 2004, available on the Ombudsman's website: <http://www.ombudsman.europa.eu> [Link].

(2) *"If the complainant so requests, the Ombudsman classifies a complaint as confidential"* .

(3) Case T-105/99 *Conseil des communes et régions d'Europe (CCRE) v Commission* ECR [2000] II-4099, par. 73.

(4) See Article 6 (2) of the European Code of Good Administrative Behaviour, available on the Ombudsman's website: <http://www.ombudsman.europa.eu> [Link].