

Decision of the European Ombudsman on complaint 754/2003/GG against the European Commission

Decision

Case 754/2003/GG - Opened on 23/05/2003 - Decision on 31/10/2003

Strasbourg, 31 October 2003

Dear Mr C.,

On 21 April 2003, you submitted a complaint against the European Commission to the European Ombudsman. This complaint concerned a contract entered into by the Irish Sea Fisheries Board and the European Commission's Directorate-General XIV (Fisheries) by which the Board undertook to carry out research into "The Physical Interaction between Grey Seals and Fishing Gear".

On 23 May 2003, I forwarded the complaint to the President of the European Commission.

On 3 June 2003, you wrote to inform me that you had asked the Commission for a copy of a letter you had sent to it in 1997.

The Commission sent its opinion on 25 June 2003. I forwarded it to you on 1 July 2003 with an invitation to make observations. On 12 July, 11 and 17 August 2003 you sent me your observations on the Commission's opinion.

On 8 September 2003, I wrote to the Commission in order to ask for access to its file. The inspection of the file was carried out on 8 October 2003. A copy of the report on this inspection was sent to you and to the Commission on 16 October 2003.

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

THE COMPLAINT

Background

The present complaint follows two previous complaints (836/2002/GG and 1574/2002/GG) that were lodged in 2002.

The facts underlying these previous complaints were as follows:



The complainant used to work for the Irish Sea Fisheries Board (the “Board”), an Irish authority. The Board had entered into a contract (reference number PEM/93/06) with the European Commission’s Directorate-General (“DG”) XIV (Fisheries) by which it had undertaken to carry out research into “The Physical Interaction between Grey Seals and Fishing Gear”. The complainant was the responsible scientist on this research contract.

According to Article 3 (“Reports and documents”) of the contract, the tasks carried out by the contractor in performance of this contract were to be the subject of reports drawn up in accordance with Annex III. The latter detailed in particular how the final report had to be set out and specified that the draft (final) report had to be submitted to the Commission by a certain date. Annex III further stipulated: “The Commission will then either notify its acceptance to the Contractor or will send him its comments. Within one month of receiving any comments from the Commission, the Contractor will send the Commission the definitive report, which will either take account of these comments or will put forward alternative points of view. (...)”

The draft final report was accepted by the Commission in April 1997. According to the complainant, some weeks later the Board had received instructions from its parent civil service authority, the Department of the Marine & Natural Resources, to carry out substantial changes to the draft. Since the complainant had been unwilling to do so, he had considered that his position had become untenable and had resigned from the Board.

About a year later, the report was published. According to the complainant, it had been very substantially altered. The main findings of the draft final report had been either deleted, negated or diluted. The complainant considered that these changes were not allowed under the contract. He claimed that no explanation for what happened had yet been offered.

On 8 May 2002, the complainant turned to the Ombudsman (complaint 836/2002/GG). In his decision of 27 May 2002, the Ombudsman informed the complainant that he was unable to deal with this complaint on the grounds that the complainant had not yet made the appropriate prior approaches to the Commission.

The complainant then wrote to the Director-General of DG Fisheries at the European Commission on 13 June 2002 asking for explanations. By the time he decided to renew his complaint to the Ombudsman in September 2002, the complainant had received neither a reply nor an acknowledgement of receipt regarding this letter.

In his new complaint (1574/2002/GG), the complainant in substance criticised (1) the fact that the Commission had allowed the Board to make substantial changes to the report as compared to the draft report that had been accepted by the Commission and (2) the Commission’s failure to reply to his letter of 13 June 2002 asking for an explanation as to why these changes had been allowed.

In its opinion on this complaint, the Commission noted that it was not common but that it was not unknown for a final report to differ from a draft final report, although the latter had been accepted by the Commission. In the Commission’s view, it was after all the responsibility and



duty of the contractor (i.e., the Board) to deliver the final report in the form it saw as appropriate. The Commission noted that it did not wish to intervene in such a process.

In his decision on complaint 1574/2002/GG, the Ombudsman came to the conclusion that the Commission's view according to which it was the responsibility and duty of the contractor to deliver the final report in the form it saw as appropriate appeared to be reasonable and that no maladministration could therefore be found with regard to this aspect of the complaint. The Ombudsman did however make a critical remark in so far as the Commission's failure to reply to the complainant's letter was concerned.

The new complaint

In a letter submitted in April 2003, the complainant asked the Ombudsman to reconsider his decision on complaint 1574/2002/GG in so far as the main issue was concerned. The complainant's letter was therefore treated as a new complaint.

In this new complaint, the complainant submitted that the final report was a censored version of the draft final report. In order to support this view, the complainant noted in particular that the draft final report had concluded that 17 tons of fish damaged by seals had been sampled whereas the corresponding conclusion in the final report had merely stated that damage to fish could be ascribed to large predators such as seals or conger eels. According to the complainant, there had been no scientific evidence to suggest that any animal other than seals had caused this damage and the evidence that seals were the cause of the damage had been more than reasonable. The complainant argued that the message of the draft final report would have been controversial, and that this was the reason why its conclusions had been changed in the final report.

The complainant submitted a substantial number of documents to support his case. Some of these new documents had been obtained from the Commission following a request for access to copies of all correspondence that had been exchanged between the Commission and the Board in relation to the contract between April 1997 and the date of the Commission's acceptance of the final report in 1998. For the first time, the complainant also provided copies of the draft final report and the final report themselves.

From these documents, the following facts emerge:

In a letter to the Commission dated 2 June 1993 regarding the study to be carried out, the complainant noted: "Misinterpretation of these data by protectionist groups, based on their historical performance, is quite possible". The Board's programme for the study noted that it was hoped "that the causative agents of damaged fish in gillnets and tangle nets will be clearly established".

On 28 March 1994, the European Parliament's Committee on Agriculture, Fisheries and Rural Development submitted a report on the interactions between seals and fisheries (A3-0186/94). The corresponding motion for a resolution called for research to be carried out about the operational interactions between marine mammals and fisheries, requested "that an impartial structure, free of pressure from vested interest groups, be established to determine a scientific



framework for addressing marine mammal/fisheries interactions in European waters” and congratulated the Commission for having recently approved the research project concerned by the present complaint. The European Parliament adopted this resolution on 6 May 1994. (1)

The explanatory statement included in the said report contains the following statements: “Evidence exists which suggests that protectionist NGO values have influenced scientific research in the field of marine mammal/fisheries interactions over the past two decades. (...) The fisheries case has been largely ignored and research effort has focused almost exclusively on the effects of fisheries on marine mammals, not the other way around. This effectively amounts to a form of scientific censorship. (...) Nowhere else has this censorship been more dramatically demonstrated than in the field of seal/fisheries interactions. (...)”.

On 16 December 1996, the complainant asked for an extension of the time for submitting the final report from the end of 1996 until the end of February 1997. In its reply of 14 January 1997, the Commission noted that it had accepted this request and that the draft final report had to be submitted “no later than end February 1997”.

When submitting the draft final report to the Commission on 4 March 1997, the complainant noted that “some minor modifications” might still be necessary. In a fax dated 21 May 1997, the complainant explained that there was a “number of typographical and grammatical errors” in the draft final report and that he would like to amend these in the final report. In a letter of 20 August 1997, the complainant informed the Commission that he would “not now be making any amendments to the Draft Final Report, which was accepted by the Commission five months ago”.

In a letter to the Board of 15 December 1997, the Commission pointed out that the draft final report had been approved and accepted by the Commission as satisfactory. The Commission noted, however, that it was still waiting for the final cost statement which was necessary to enable it to make the final payment and to close the financial file for the project.

On 7 January 1998, the Board stated in reply that it hoped to be able to complete the final cost statement by mid-February. The Board further noted that it was making “the corrections to the final report mentioned in our fax of the 21st of May last”.

In its reply of 9 January 1998, the Commission took note of the Board’s statement that the final cost statement for the project would be sent the following month.

On 1 April 1998, the Board submitted the final cost statement to the Commission.

On 28 April 1998, the Board sent the “definitive final report” regarding the project to the Commission.

The complainant also submitted a form with the heading “Certificat de dépôt et attestation de service fait d’une étude ou enquête effectuée pour la Commission”. This form contained administrative information relating to the study prepared by the Board. The stamp and signature



of the Commission service concerned (“Bureau Enregistrement des Etudes”) are dated 17 June 1997. Section G of the form concerns the question as to whether the results of the study could be spread outside the Commission. The answer “yes” (“oui”) is indicated.

In his new complaint, the complainant thus in substance alleged that (1) the Commission had been negligent in not seeking reasons or explanations for the changes made by the Board and that (2) the changes that had been made should not have been allowed.

The complainant expressed the hope that he would receive an apology for what had occurred and assurances that efforts would be made to ensure that the like would not happen again.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

While it might be argued that the Commission should not have accepted an ill-based and unjustified scientific conclusion, this could not be equated with maladministration.

As was explained in the Commission's response to complaint 1574/2002/GG, the Commission's main parameter leading to acceptance or rejection of a report, be it draft or final, was whether the terms of the contract had been observed. This had been the case with the present contract. Wherever the Commission saw deficiencies in the scientific analysis of the results of the work carried out under the contract, appropriate comment would be made to and modification would be requested of the contractor. However, this had not been the case for this contract either in the draft report or in the final report. If the contractor wished to alter conclusions resulting from the scientific analysis in its final report it should be and was entitled to do so.

As regards *contractual aspects*, perusal of a copy of the contract and added annexes did not reveal any capacity for the Commission “to prevent what happened from occurring” (2). As regards *procedural aspects*, it was not common but it was not unknown for a final report to differ from an associated draft final report, even though the latter had been accepted by the Commission. It was, after all, the responsibility and duty of the contractor to deliver the final report in a form which it saw as appropriate. The Commission did not wish to intervene in such a process.

The Commission had no capacity to reject a final report because it considered it to be scientifically incorrect or for any other reason other than failure to comply with the conditions of the contract.

Otherwise, the lengthy supporting documents provided by the complainant referred to possible or purported interactions between various administrative or governmental bodies within Ireland over which the Commission had no influence, as well as to differences in interpretation of data between the complainant and the person who drafted the ultimate final report and the report of the European Parliament, the resolutions of which were not binding upon the Commission.



The complainant's observations

In his observations, the complainant maintained his complaint and made the following further comments:

The Commission official in charge of the project had been informed by telephone on numerous occasions between May 1997 and September 1997 how the project had been interfered with. In a letter to this official sent on 3 November 1997, (3) the complainant had pointed out that he had discovered that the Ministry “wished to exercise editorial control over the final report before it was published”.

In his letter of 11 August 2003, the complainant concluded by saying that he had originally sought an apology and assurances that the like would not happen again, but that he now wished to see the original draft final report published with an official explanation as to why this was being done. At the very least he was seeking to be exonerated for refusing to be a party to scientific censorship and to have his reputation restored.

In his subsequent letter of 17 August 2003, however, the complainant explained that upon reflection he wished to await the outcome of the Ombudsman's inquiry first.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. By letter of 8 September 2003, the Ombudsman therefore asked the Commission to grant him access to its file.

On 8 October 2003, the Ombudsman's services inspected the Commission's file. The Commission officials in charge of the file explained that when a file concerning a study was closed, not all the documents were kept. That was why the file did not contain the draft final report that had been superseded by the final report. The Commission officials also expressed the view that there must have been telephone conversations between the Commission and the contractor in which the Commission had asked for the submission of the final report. However, no record of any such telephone conversation had been put on the file.

The Commission's file inspected by the Ombudsman's services contained a manuscript note that was dated “18 March” and that appears to have been drawn up by Mr O., who at that time worked in DG Fisheries. Although this note does not explicitly indicate its subject-matter, it appears likely that its contents refer to the draft final report. (4) This notes gives the impression that its author considered that the results of that report were controversial.

THE DECISION

1 Preliminary remark

1.1 The present complaint concerns a contract (reference number PEM/93/06) between the Irish Sea Fisheries Board (an Irish authority) and the European Commission's Directorate-General (DG) XIV (Fisheries) by which the Commission undertook to provide part of the cost of research into “The Physical Interaction between Grey Seals and Fishing Gear”. The complainant, who was working for the Board at the time and who was the responsible scientist on this research



contract, alleges that the draft final report was substantially changed due to the interference of another Irish authority, the then Department of the Marine & Natural Resources, after it had been accepted by the Commission.

1.2 The European Ombudsman is unable to deal with complaints directed at institutions or bodies other than institutions or bodies of the European Community. He would therefore be unable to deal with any complaints against Irish authorities. The present complaint, however, is directed at the Commission, and the present decision therefore only deals with the allegations against the European Commission.

2 The allegation that the Commission should not have allowed the changes that were made by the Board

2.1 The complainant alleges that the Commission should not have allowed the changes that were made by the Board. According to him, the main findings of the draft final report that had been submitted in March 1997 were either deleted, negated or diluted in the final report that was submitted by the Board in April 1998.

2.2 The Commission takes the view that it is the contractor's responsibility to deliver the final report in the form which it considers appropriate and that the Commission does not wish to intervene in such a process. While it might be argued that the Commission should not have accepted an ill-based and unjustified scientific conclusion, this could not be equated with maladministration. According to the Commission, perusal of the contract did not reveal a requirement such as the one alleged by the complainant.

2.3 The Ombudsman notes that the Commission does not dispute the complainant's allegation that substantial changes were made to the draft final report that the Commission had accepted.

2.4 However, the Ombudsman considers, as he already set out in his decision on complaint 1574/2002/GG, that the Commission's view according to which it was the responsibility and duty of the contractor to deliver the final report in the form it saw as appropriate appears to be reasonable.

2.5 In these circumstances, there appears to be no maladministration on the part of the Commission in so far as this allegation is concerned.

3 Alleged negligence on the part of the Commission by not seeking reasons or explanations for the changes made by the Board

3.1 The complainant alleges that the Commission was negligent in not seeking reasons or explanations for the changes made by the Board.

3.2 The Commission points out that its main parameter leading to acceptance or rejection of a report, be it draft or final, is whether the terms of the contract are observed. This was the case with the present contract. Wherever the Commission sees deficiencies in the scientific analysis of the results of the work carried out during the contract, appropriate comment will be made to and modification will be requested of the contractor. However, this was not the case for this contract either in the draft report or in the final report. If the contractor wished to alter conclusions resulting from the scientific analysis in its final report it should be and was entitled



to do so.

3.3 The Ombudsman considers that it is good administrative practice to act consistently. (5)

3.4 In the present case, the Commission examined and accepted the draft final report in April 1997. In the light of the provisions of the relevant contract, this meant that the Board did not have to carry out any further work in relation to this study apart from submitting a final cost statement.

3.5 The Ombudsman considers that two different aspects can be distinguished in so far as the Commission's obligation to act consistently is concerned.

3.6 First, if the Commission considered that the contractor still had to provide the final report, one would have expected the Commission to have sent reminders to the Board asking for the final report to be submitted. However, the reminders the Commission did send only refer to the final cost statement, but not the report. This is all the more noteworthy since the (extended) deadline by which the final report should have been submitted (end of February 1997), had long since expired. Even if there should have been (unrecorded) telephone conversations between the Commission and the contractor, the Ombudsman finds it hard to believe that the Commission should have failed to send a written reminder but simply waited until the final report was submitted in April 1998, more than a year after it had accepted the draft final report.

3.7 Second, the Commission stresses that where it sees deficiencies in the scientific analysis of the results of the work carried out under a contract, these deficiencies will be pointed out to the contractor. This means that the Commission examines a report to ascertain as to whether there are any such deficiencies and does not limit itself to rubber-stamping the report submitted to it. It further emerges from the evidence submitted to the Ombudsman that the Commission was aware of the fact (a) that the contents of the draft final study were potentially controversial, (b) that the Irish Ministry wished to exercise editorial control over the final report before it was published, (c) that the final report was handed in more than a year after the Commission had approved the draft final report and (d) that this final report contained substantial changes as compared to the draft final report. In the light of these circumstances, one would have expected that the Commission should have carefully examined the final report. However, there is nothing to indicate that the Commission carried out any such examination after it had received the final report in April 1998.

3.8 In these circumstances, the Ombudsman takes the view that the the Commission should have examined the substantially modified final report submitted to it in April 1998, more than a year after it had accepted the draft final report. By neglecting to do so, the Commission failed to comply with the requirement to act consistently. This was an instance of maladministration and the Ombudsman makes a critical remark below.

4 The complainant's claims

4.1 In his complaint, the complainant expressed the hope that he would receive an apology for what had occurred and assurances that efforts would be made to ensure that the like would not happen again. In his letter of 11 August 2003, the complainant concluded by saying that he had



originally sought an apology and assurances that the like would not happen again, but that he now wished to see the original draft final report published with an official explanation as to why this was being done. At the very least he was seeking to be exonerated for refusing to be a party to scientific censorship and to have his reputation restored.

4.2 In his letter of 17 August 2003, however, the complainant explained that upon reflection he wished to await the outcome of the Ombudsman's inquiry first.

4.3 In these circumstances, the Ombudsman considers that there is no need to deal with the claims originally submitted by the complainant.

5 Conclusion

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

The Ombudsman takes the view that the the Commission should have examined the substantially modified final report submitted to it in April 1998, more than a year after it had accepted the draft final report. By neglecting to do so, the Commission failed to comply with the requirement to act consistently. This was 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.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1994 no C 205, p. 553.

(2) The reference here is to the text of complaint 1574/2002/GG.

(3) A copy of this letter, which the complainant had obtained from the Commission further to a request for access to documents, was submitted to the Ombudsman.

(4) The note refers to the "EU logo on the cover". The draft final report that had been submitted on 4 March 1997 does indeed show the EU logo on its cover.

(5) Cf. Article 10 (1) of the European Code of Good Administrative Behaviour, available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).