

Decision of the European Ombudsman on complaint 759/2003/IP against the European Commission

Decision

Case 759/2003/IP - Opened on 21/05/2003 - Decision on 19/05/2004

Strasbourg, 19 May 2004

Dear Mr M.,

On 28 April 2003, you made a complaint to the European Ombudsman, on behalf of the *Fundação Luso-Americana para o Desenvolvimento* (Luso-American Development Foundation - hereinafter "the Foundation") concerning the Commission's rejection of the proposal made by the Foundation following Call for proposals EuropeAid/113172, Operations in developing countries (PVD) cofinanced with European Development NGOs (B7-6000).

On 21 May 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 10 July 2003 and I forwarded it to you with an invitation to make observations, which you sent on 28 August 2003.

In the light of these observations, it appeared that it was necessary to conduct further inquiries. On 10 November 2003, I therefore wrote to the Commission, asking the institution to comment on your observations. On 6 January 2004, I received the Commission's reply which I forwarded to you with an invitation to make observations. On 1 March 2004, I received your observations.

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

THE COMPLAINT

According to the complainant, the relevant facts are as follows:

On 17 July 1998, the Council adopted Regulation (EC) No 1658/98 on co-financing operations with European non-governmental development organisations (NGOs) in fields of interest to the developing countries (1). Article 3 (1) provides that "the agents of co-operation eligible for co-financing under this Regulation shall be NGOs satisfying the following conditions: (i) they must be constituted as autonomous non-profit-making organisations in a Member State in accordance with the law of that State; (ii) they must have their headquarters in a Member State and the headquarters must be the main centre for decisions relating to the co-financed



operations; (iii) the majority of their funding must originate in Europe".

The Foundation submitted an application in the framework of Call for proposals EuropeAid/113172, for a project concerning the Rehabilitation of the Productive Sector in Angola through the Training of Staff and Instructors/2° Edition - PFQA II, Angola.

By letter of 22 January 2003, signed by the Chairman of the Evaluation Committee, the Commission informed the Foundation that its application did not comply with one or more eligibility criteria and was therefore not admitted.

The Commission put forward that the Foundation was set up in 1985 in the framework of the Co-operation and Defence Agreement between the governments of Portugal and of the USA. Its Board of Trustees, which lays down the general policy of the Foundation and oversees its activities, is composed of 9 members, including the Ambassador of the USA to Portugal and a member designated by the American Embassy, the other 7 members being designated by the Portuguese Prime Minister. On this basis, the Commission took the view that the Foundation did not qualify as a non-governmental organisation. Furthermore, the Commission stated that it was also questionable whether the majority of the Foundation's financial resources originated within the EU and whether the Foundation had the capacity to mobilise private financial resources within Europe.

On 24 February 2003, the Foundation, through its Secretary General, wrote to the Commission to dispute the Commission's decision to reject its application. The Foundation made the following points:

As regards the autonomy of the Foundation, it referred to Article 3 (1) of Regulation 1658/98, which stipulates that those organisations that benefit from co-financing should be "...autonomous non-profit-making organisations in a Member State in accordance with the law of that State". Although the Foundation admitted that the Commission's statements regarding the creation and composition of the Board of Trustees were true, it stressed that in accordance with Portuguese Decree Law n° 168/85 of 20 May 1985, the Luso-American Development Foundation is a private organisation, notwithstanding its public origin, and that it is governed by private law, that it is financially autonomous and that its actions are subordinated only to the rules of private law. The relevant Decree Law was implemented by Law n° 66/98 of 14 October 1998. Under the terms of this law, the only bodies which can be considered as Non-Governmental Organisations of co-operation for development are those ruled by private law and which are non-profit-making. The Foundation has been recognised as an NGO and is registered as such. The Commission's conclusion that the Foundation is not an NGO, based on its public origins and on the methods of designation of the members of the Board of Trustees, could not be accepted.

As regards the origin of its financial resources, the Foundation pointed out that the argument invoked by the Commission for the ineligibility of the Foundation, i.e. that the majority of its financial resources did not originate within the European Union and that its capacity to mobilise private resources had not been proved, was erroneous. Funds originating only from the



Portuguese Government between 1985 and 1991 made up the Foundation's capital assets. Since that date, the Foundation has been functioning with income generated by its founding capital. Furthermore, from the beginning of its activity, the Foundation's capacity to mobilise other financial resources has been well known and the development of programmes in financial partnership with other organisations in the form of matching grants is part of the Foundation's work.

Furthermore, the Foundation considered the Commission's decision even more surprising since the same Foundation had been recently considered as an NGO by the Commission itself, when the latter had approved its application for the development of a similar programme, also in Angola, which had been successfully developed during the years 2000 and 2001. In the Foundation's view, it was therefore incomprehensible how, without any alteration of the Statute of the Foundation, the same was not considered an NGO anymore by the same European Commission which had recognised it as such before.

In his complaint to the Ombudsman, the complainant, who is the President of the Executive Council of the Foundation, alleged that the Commission's decision to reject the Foundation's application was manifestly wrong and that the reasons for ineligibility invoked by the institution were unfounded. The complainant also claimed that the Foundation should be recognised as an NGO, both for this complaint and for all future relations with the European Union.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made in summary the following comments:

The Foundation submitted an application for a project in Angola, in the framework of call for proposals EuropeAid/113172 "operations in Developing Countries co-financed with European Development non-governmental organisations (budget line B7/6000)".

The legal basis for projects regarding the above-mentioned budget line were Regulation (EC) n° 1658/98 of 17 July 1998 (2) and the General Conditions for the co-financing of development operations undertaken by European NGOs in developing countries (hereinafter "the general conditions"), which had entered into force on 7 January 2000. This legislation provided the conditions of eligibility allowing the Commission's services to ascertain whether the organisation concerned was well established and rooted in the European civil society and if it emanated from that same civil society and had enough support within European society in general. The application submitted by the Foundation had been analysed by the Commission's services in the light of that legislation. It resulted that it did not comply with the eligibility criteria established for that precise budget line. The Commission therefore communicated to the complainant the rejection of the Foundation's application by letter of 22 January 2003.

As concerns the reasons for the rejection of the application, the Commission took into account the autonomy and the financial resources of the Foundation as well as its capacity to mobilise private financial resources and possibly other support within Europe.



As regards the autonomy, the Foundation was set up in 1985 in the framework of the Co-operation and Defence Agreement between the Governments of Portugal and of the USA. Its Board of Trustees, which lays down the general policy of the Foundation and oversees its activities, is composed of a minimum of 7 and a maximum of 9 members. The names of two of them are proposed by the US Ambassador in Portugal, and the other 7 members are designated, as indicated on the Foundation's website, by the Prime Minister of Portugal. On the basis of the requirements of budget line B7-6000, the autonomy of the non-governmental organisation was an essential feature.

Furthermore, Article 3 of Regulation (EC) n° 1658/98, which foresees the criteria of eligibility of NGOs under this budget line, mentions the autonomy and the independence of NGOs as a priority. The text of the call for proposals also referred to this rule, as well as the general conditions. Furthermore, point 2.2 of the general conditions states that in determining whether an NGO is eligible for financing, account shall be taken of its adherence to the basic principles of Appendix 1 which refers, under point C, to the structure of NGOs. In accordance with this provision, EU Development NGOs must be rooted in EU civil society, must be a group of people, must be independent to pursue their own development objectives and must have a board representative of the EU Development NGO's constituency and must be independent in its actions.

On the basis of the way in which the Foundation was constituted and considering the membership of this organisation, namely the way in which the members of its Executive and Advisory Councils are designated, the Commission decided that the Foundation did not comply with the criterion of autonomy.

As regards the financial resources, Article 3 of Regulation (EC) n° 1658/98 establishes that in order to be eligible, the majority of the funding of the NGO must originate in Europe. This requirement was also recalled in the call for proposals.

In the Foundation's case, the funds transferred to the organisation by the Portuguese Government had been made available by the Government of the United States, as indicated in paragraph 1 and 2 of Article 4 of its bylaws. Since the Foundation's activities were funded by the revenues produced by this initial capital, as declared by the complainant himself, the Foundation did not comply with the condition that required that the majority of the funding of the NGO had to originate in Europe.

As regards the Foundation's capacity to mobilise private financial resources and possibly other support within Europe, this provision was also foreseen in the call for proposals and in Article 3 of Regulation (CE) n° 1658/58 which require that the organisations have to show a capacity to mobilise genuine solidarity on the part of the European public.

The Foundation appeared to be, on the contrary, totally dependent on the funds originating from public sources. It had not shown any capacity to mobilise private funds. This capacity should be confirmed by the existence, among the Foundation's own financial resources, of funds of private



origin. The fact that the Foundation entered into partnerships with other organisations by providing matching funds for specific programmes or projects did not prove that it had that capacity of mobilising private funds. Any possible private funds mobilised and invested in those programmes or projects were indeed made available by the partner organisations and not by the Foundation.

On this basis, it emerged that the Foundation furthermore did not comply with the condition according to which it had to show the capacity to mobilise private financial resources and possibly other support within Europe and it was therefore ineligible.

The application submitted by the Foundation was ineligible according to the rules of budget line B7/6000.

The complainant's observations

In his observations on the Commission's opinion, the complainant stated that the Commission had only provided a formal reply, without dealing with the specific points raised in the complaint made on 28 April 2003.

The Foundation was, in accordance with the Portuguese Decree Law n° 168/85 of 20 May 1985, a private organisation, and it is governed by private law. The complainant took the view that the Commission had completely disregarded the Portuguese law when dealing with the application submitted by the Foundation. Furthermore, the complainant expressed his surprise at the Commission's attitude in the present case, since on previous occasions the Foundation had been considered suitable to be a Member of the European Centre of Foundations. Furthermore, he underlined that the decision of the Commission not to consider the Foundation as a suitable candidate for programme EuropeAid/113172 was manifestly contrary to the stand taken by the same institution in 1999, when the Foundation had been awarded a contract for a project which was carried out in Angola (project ANG/3210-98/04).

The Foundation had therefore had a legitimate expectation that the Commission would, as in the past, consider it a suitable candidate. In view of the fact that there had been no changes in the structure of the Foundation, the Commission's behaviour appeared not to be consistent with its previous position.

As regards the autonomy of the Foundation, the complainant underlined that the Foundation carried out its activity autonomously and that its actions were subordinated only to the rules of private law.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. On 10 November 2003, the Ombudsman therefore wrote to the Commission. In his letter, he asked the institution to comment on (i) the complainant's argument that the Foundation was constituted as an autonomous non-profit-organisation in Portugal in accordance with the law of that Member State and on (ii) the complainant's argument that the Commission's behaviour in the present case did not appear to be consistent with its previous decision to award the Foundation a contract for project ANG/3210-98/04.



The Commission's further opinion

In its reply, the Commission made the following comments:

As regards the first point on which the Commission had been requested to comment, it had never contested the fact that the Foundation had been constituted as an NGO according to Portuguese national law. However, it considered that the recognition as a non-profit-organisation under a Member State's legislation was only one of the criteria to be taken into account. To ascertain whether the NGO was in compliance with the conditions required, other criteria had to be considered. To be eligible, an EU Development NGO had to (i) prove its capacity to mobilise genuine solidarity on the part of the European public for its activities in developing countries; (ii) to be rooted in EU civil society; (iii) to be a group of people; (iv) to be independent to pursue its own development objectives and have a board which was representative of the NGO's constituency and independent in its action.

The complainant had disregarded (3) the reasons invoked by the institution in point 2.A of its opinion to explain why it had considered that the Foundation was not eligible.

Concerning the financial resources and with a view to determining the real autonomy and roots in the EU civil society of the NGO concerned, it was required that the majority of its funding originated in Europe and that the NGO showed its capacity to mobilise private financial resources and/or other support within Europe. As stated in the call for proposals, an NGO applying for co-financing must provide a significant financial contribution from private sources in the EU or other European countries. On the basis of the documentation provided by the complainant, it appeared that the Foundation did not comply with these conditions. Its financial resources basically originated in the United States, in the framework of a bilateral agreement between the governments of Portugal and of the United States. Besides that, and also according to the documentation provided by the Foundation, the organisation depended on funds originating in public sources, thus lacking the capacity to mobilise private financial resources and other support in Europe. The argument put forward by the Foundation in its observations that it had mobilised some funds from Portuguese private banks for some specific projects only showed that these funds should be considered as matching funds for specific projects and programmes and not actually as funding of the Foundation's own financial resources.

Furthermore, having been established not by the Portuguese civil society but by the governments of Portugal and of the United States in the framework of a bilateral agreement and being dependent, as far as its financial resources were concerned, on public sources of non-European origin, the Foundation did not comply with the conditions which applied to the specific call for tenders.

As regards the second point on which the Commission had been requested to comment on, it was incorrect to assume that because an NGO had been considered eligible under a specific programme it should then be accepted under any other programme managed by the Commission. Each programme had specific objectives and had its own legal basis and rules. Budget line B7-6000 was accessible only to European NGOs which had the exclusive right of



initiative to propose operations to be co-financed under this budget line. Under this co-financing programme, the Commission complements the main funding instruments for development co-operation. It was for this reason that the eligibility criteria were stricter than those of other co-operation instruments pursuing different objectives.

The complainant's further observations

In his observations, the complainant put forward that the tone of the language used by the Commission in its opinion, namely the use of the term "*escamotear*", was inappropriate and inadequate for any public administration. The Foundation had always addressed the Commission with courtesy and proper language. However, the Commission had not used the same standard in its reply.

As regards the substance of the reply, the complainant maintained his position concerning the nature of the Foundation. He furthermore noted that the Commission itself had recognised that the selection criteria followed in the case of project ANG/3210-98/04 and EuropeAid/113172 were different. The complainant took the view that, the two projects being of the same nature, the Commission should have given reasons as to why it had decided to apply different and stricter selection criteria in the present case.

THE DECISION

1 Preliminary remarks

1.1 In his observations on the Commission's further opinion, the complainant put forward that the tone of the language used by the Commission in its reply to the Ombudsman's letter of 10 November 2003, namely the use of the term "*escamotear*", was inappropriate and inadequate for a public administration.

1.3 Principles of good administration require that in their relations with the public and when dealing with complaints from citizens, the institutions use a proper language.

1.4 The Ombudsman agrees that, as pointed out by the complainant, the term "*escamotear*", used by the Commission in its reply to the Ombudsman's letter of 10 November 2003, does not appear to be appropriate since it has a pejorative connotation as regards the complainant's behaviour. It should be noted, however, that the Portuguese text is a translation of the original of the Commission's opinion which was drafted in English. In the English version, the Commission used the term "*disregard*", which would appear to be more neutral.

Although it is regrettable that the Portuguese translation was not consistent with the English original, the Ombudsman has no reason to assume that the Commission intended to cause offence in this case. In order to inform the complainant as fully as possible, a copy of the English version of the Commission's reply is enclosed with this decision.

1.5 In his observations on this reply, the complainant also noted that the Commission itself had recognised that the selection criteria followed in the case of project ANG/3210-98/04 and EuropeAid/113172 were different. The complainant therefore took the view that, the two projects being of the same nature, the Commission should have given reasons as to why it had decided



to apply different and stricter selection criteria in the present case.

Since this claim was not part of the original complaint, the Ombudsman considers that it would not be appropriate, in order not to delay the conclusion of his inquiries in the present case, to deal with this aspect of the case in the present inquiry. The complainant remains free to address his claim to the Commission and, in case he does not receive a satisfactory reply from the institution, to lodge a new complaint with the Ombudsman.

2 The Commission's decision to reject the Foundation's proposal

2.1 The Luso-American Development Foundation (the Foundation) submitted an application to the Commission, in the framework of Call for proposals EuropeAid/113172, for a project concerning the Rehabilitation of the Productive Sector in Angola through the Training of Staff and Instructors/2^o Edition - PFQA II, Angola.

By letter of 22 January 2003, the Commission informed the Foundation of its view that the application did not comply with one or more eligibility criteria laid down in the relevant legislation, that is to say Council Regulation (EC) No 1658/98 (4) , and was therefore not admitted.

In his complaint to the Ombudsman, the complainant alleged that the Commission's decision to reject the Foundation's application was manifestly wrong and that the reasons for ineligibility invoked by the institution were unfounded.

2.2 In his observations on the Commission's opinion, the complainant took the view that the Commission had disregarded Portuguese law when dealing with the application submitted by the Foundation. Furthermore, the complainant underlined that the decision of the Commission not to consider the Foundation as a suitable candidate for programme EuropeAid/113172 was in his view contrary to the stand taken by the same institution in 1999, when the Foundation had been awarded a contract for a project which was carried out in Angola (project ANG/3210-98/04).

2.3 In its opinion, the Commission explained that its decision had been taken in accordance with the eligibility criteria laid down in the relevant rules. The institution stressed that it had taken into account the autonomy, the financial resources of the Foundation and its capacity to mobilise private financial resources and possibly other support within Europe.

The Commission took the view that on the basis of the way in which the Foundation had been constituted and considering the membership of this organisation, the Foundation did not comply with the criteria of autonomy.

As regards the financial resources, the Commission sustained that the Foundation's activities were not funded by funds originating in Europe.

As regards the Foundation's capacity to mobilise private financial resources and possibly other support within Europe, the Foundation appeared to be totally dependent on the funds originating from public sources. Furthermore, it had not shown any capacity to mobilise private funds.



2.4 In its second opinion, the Commission stressed that it had never contested the fact that the Foundation had been constituted as an NGO according to the Portuguese national law. However, recognition as a non-profit-organisation under the Member State's legislation was only one of the criteria to be taken into account when deciding on the eligibility or ineligibility of an applicant. Furthermore, the fact that an NGO had been considered eligible under a specific programme, did not mean that it should then be accepted under any other programme managed by the Commission. Each programme had specific objectives and has its own legal basis and rules.

2.5 The relevant rules in this case are laid down in Council Regulation (EC) n° 1658/98 of 17 July 1998 and the General Conditions for the co-financing of development operations undertaken by European NGOs in developing countries, which entered into force on 7 January 2000.

In accordance with Article 3(1) of EC Council Regulation n° 1658/98, the agents of co-operation eligible for co-financing under this Regulation shall be NGOs satisfying the following conditions: (i) they must be constituted as autonomous non-profit-making organisations in a Member State in accordance with the law of that State; (ii) they must have their headquarters in a Member State and the headquarters must be the main centre for decisions relating to the co-financed operations; (iii) the majority of their funding must originate in Europe.

Furthermore, in accordance with the general conditions for the co-financing of development operations undertaken by European NGOs in developing countries, EU Development NGOs must be rooted in EU civil society, must be a group of people, must be independent to pursue their own development objectives, must have a board representative of the EU Development NGOs constituency and must be independent in its actions.

2.6 The Ombudsman notes that the Foundation was set up in 1985 in the framework of the Co-operation and Defence Agreement between the Governments of Portugal and of the USA. Its Board of Trustees, which lays down the general policy of the Foundation and oversees its activities, is composed of a minimum of 7 and a maximum of 9 members. The names of two of them are proposed by the US Ambassador in Portugal, and the other 7 members are designated by the Prime Minister of Portugal. In these circumstances, the Ombudsman takes the view that the Commission's decision not to consider the Foundation as an autonomous body in the sense of Article 3 (1) of EC Council Regulation n° 1658/98 appears to be reasonable. Since all criteria foreseen under a specific programme have to be fulfilled by the applicant to be eligible, the Ombudsman considers that, in view of the above, there is no need to check whether the complainant complied with the other criteria to which the Commission refers.

2.7 The Ombudsman also takes the view that the fact that an NGO has been considered eligible under a specific programme does not mean that it therefore has to be accepted under any other programme managed by the Commission. Eligibility has to be ascertained on the basis of the criteria laid down for each individual programme.



2.8 Furthermore, the Ombudsman notes that the complainant has not contested the fact that the Commission applied different and stricter selection criteria in the present case compared to others for which the Foundation had been selected.

2.9 In the light of the evidence and arguments submitted in the course of this inquiry, the Ombudsman thus takes the view that the Commission provided a coherent and reasonable explanation of its actions and its decision in this case.

2.10 The Ombudsman therefore finds that there is no evidence of maladministration by the European Commission in relation to this aspect of the case.

3 The complainant's claim

3.1 In his complaint, the complainant claimed that the Foundation should be recognised as an NGO, both for this case and for all future relations with the European Union.

3.2 As regards the complainant's claim that the Foundation should be considered as an NGO for this case, the Ombudsman considers that this claim cannot be sustained for the reasons set out above.

3.3 As regards the complainant's claim that the Foundation should be considered as an NGO for all future relations with the Union, the Ombudsman considers that, as stated in point 2.7, eligibility has to be ascertained on the basis of the criteria laid down for each individual programme.

3.4 On the basis of the above, the Ombudsman considers that the complainant's claim cannot be sustained.

4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ L 213, 30.7.1998, pp. 1-5.

(2) OJ L 213 of 30 July 1998, pp. 1-5.

(3) In the Portuguese version of the Commission's opinion, the term "disregard" was translated with the term "*escamotear*". This term could be translated as "*to hide something with fraudulent intention, with guilty mind*".



(4) OJ L 213 of 30 July 1998, pp. 1-5.