

Decision of the European Ombudsman on complaint 1256/2003/JMA against the European Commission

Decision

Case 1256/2003/JMA - Opened on 29/09/2003 - Decision on 06/05/2004

Strasbourg, 6 May 2004

Dear Ms G., Dear Mr C.,

On 7 July 2003, you lodged a complaint with the European Ombudsman against the European Commission, on behalf of the firm Vlerick BAN. Your complaint concerns the Commission's decision of 11 June 2002 to refuse your request for a final payment of € 62,500 pertaining to the institution's subsidy No. SI2.13604 for the establishment of a Business Angels Network.

On 29 September 2003, I forwarded the complaint to the President of the Commission. On 18 December 2003, the Commission sent its opinion, which I forwarded to you with an invitation to make observations. No observations appear to have been received from you.

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

THE COMPLAINT

The complainants asked the Ombudsman to review the final decision taken by the Commission on 11 June 2002 whereby Vlerick BAN (henceforth Vlerick) received only part of the initially approved subsidy No. SI2.13604 concerning the establishment of a Business Angels Network. The complainants argued that the decision was not properly reasoned.

According to the complainants, the project had been fully implemented as initially foreseen. As evidence of the high reputation of their firm, they referred to a report on "The evaluation of the Commission Programme of Business Angels Network in the EU (Evaluation of the BAN programme)", of 19 May 2003, in which Vlerick had been evaluated as being "a good model for others to learn from across a wider Europe" (page 87).

In their complaint to the Ombudsman, the complainants included a number of exchanges with the Commission concerning the implementation of the project. They referred in particular to the contents of a letter from the responsible services in DG TREN dated 11 June 2002, which described the reasons why the Commission justified its position. The letter informed the



complainants that their request for a final payment of € 62,500 could not be accepted, because of the large contribution to the project already made by the Flemish authorities. The Commission noted that according to a contract between Vlerick and the Flemish government, the complainants' firm was entitled to receive a subsidy amounting to 50% of actual costs incurred, with a maximum contribution of € 210,709, during a three-year period between 18 May 1999 and 18 May 2002.

The complainants were confident that the Commission could reconsider their request with a view to having the full amount reimbursed.

In summary, the complainants alleged that the Commission's decision to refuse their request for a final payment of € 62,500 lacked proper reasoning.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first described the factual background of the case. The institution explained that as part of the measures in support of individual private investors ("Business Angels" programme), a grant agreement was awarded to Vlerick. The aim of the assistance was the establishment of a network of "business angels" in Flanders. According to the contract, the Commission would pay for part of the costs, up to a maximum ceiling of € 125,000.

In September 1998, and following the application submitted by Vlerick, the Commission agreed to provide Community assistance. The total budget for the measure came to € 269,993. The grant agreement with the Commission was signed on 17 June 1999 for an initial period of 18 months, which was later extended to two years, until 15 June 2001. It was foreseen that the Flemish authorities would provide part of the funding during a three-year period. Vlerick obtained additional assistance from the Flemish authorities for € 210,709.

At the start of the operation, the Commission made an advance payment of € 62,500. When the operation was completed, Vlerick submitted a request for a final payment of € 62,500. In order to assess the real costs of the project and calculate its final contribution, the Commission had first to determine the amount of assistance given by the Flemish authorities while the Community was financing the project.

The grant agreement as well as Article 109 of the Financial Regulation required that the grant must not result in a profit for the beneficiary. The Commission concluded that the amount of € 62,500 requested by the contractor exceeded the maximum allowed on the basis of the non-profit rule. The institution pointed out that the contractor had twice amended its final financial report (August 2001 and November 2001). When the operation was completed, Vlerick submitted an initial financial report in which the contribution of the Flemish authorities came to € 184,187. In response to the objections raised by the Commission, Vlerick presented a second final financial report in which the income from the Flemish authorities had dropped to € 110,605.

In the Commission's opinion, the second statement was neither credible nor substantiated,



since it meant that the income from the Flemish authorities amounted to € 100,104 for the third and final year, whilst for the first two years it was only € 110,605. The Commission pointed out that, in fact, the expenditure incurred by Vlerick for this operation was linear in nature as most of it was spent on paying the salaries of permanent staff.

After the Commission made several attempts to clarify the financial aspects of the operation, Vlerick did not provide an acceptable explanation of the income received from the Flemish authorities over a two-year period. In view of this situation, the Commission performed a calculation over time of the contribution from the Flemish authorities. In the absence of a convincing explanation from the complainant, and since the grant from the Flemish authorities amounted to € 210,709, the Commission chose a figure representing two thirds of that total amount (€ 140,473).

The Commission explained that, as regards the expenditure incurred during the two-year term of the grant agreement, the revised financial report showed that the level of declared expenditure came to € 368,372. As regards income, and taking into account the amended figures for the subsidy given by the Flemish authorities during the two years that the Commission funded the project, the Commission came to a figure of € 273,241.

On the basis of the conclusions regarding income and expenditure, the Commission estimated the final amount of its contribution at € 95,131 which corresponded to the difference between € 368,372 of declared expenditure and € 273,241 of income. Taking into account that the institution had already made an advance payment of € 62,500, it decided that the rest of its assistance could not exceed € 32,631, which was the final amount paid to Vlerick.

In the Commission's view, its services proceeded correctly in applying the non-profit rule to Vlerick, as set out in the Financial Regulations. It would have been in breach of these rules for its services to agree to the request made by the contractor for an additional amount of € 29,869, in order to arrive at the initial ceiling of € 125,000. The Commission considered that it had shown the necessary flexibility to ensure that the operation carried out by Vlerick achieves its objectives.

The complainant's observations

The Ombudsman has not received any observations from the complainant.

THE DECISION

1 Alleged lack of proper reasoning of the Commission's decision of 11 June 2002

1.1 The complainant alleges that the Commission's decision of 11 June 2002 to refuse their request for a final payment of € 62,500 pertaining to the institution's subsidy No. SI2.13604 for the establishment of a Business Angels Network lacked proper reasoning.

1.2 The Commission argues that the grant agreement as well as Article 109 of the Financial Regulation required that the grant must not result in a profit for the beneficiary (the “non-profit rule”). According to the Commission, the final payment requested by the complainants for an amount of € 62,500 exceeded the maximum allowed on the basis of the non-profit rule.



Again according to the Commission, it calculated the final amount of its contribution on the basis of its assessment of the project's income and expenditure, including a calculation over time of the subsidy received by the complainant's firm from the Flemish authorities. The Commission's contribution amounted to € 95,131 which corresponds to the difference between € 368,372 of declared expenditure and € 273,241 of income received for the operation conducted by the complainants over the two-year term of the grant agreement with the Commission. Taking into account that the institution had already made an advance payment of € 62,500, it decided that the rest of its assistance could not exceed € 32,631.

1.3 According to Article 195 of the EC Treaty, the European Ombudsman is empowered to receive complaints "concerning instances of maladministration in the activities of the Community institutions or bodies". The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it (1) . Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

1.4 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. The Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

1.5 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration.

This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

1.6 The Ombudsman has carefully examined the contract between the Commission and the complainant's firm dated 17 June 1999 (Grant Agreement No. SI2. 13604).

The financial aspects of the operation are detailed in Article 3 of the contract. The maximum amount of Community assistance to be provided by the Commission was € 125,000, as set out in Article 3 (2). This figure, however, may be reduced under certain conditions, such as those referred to in Article 3 (4) which states that,

"The beneficiary agrees that the grant may in no circumstances give rise to profits and that it must be restricted to the amount required to balance revenue and expenditure for the operation".



The Ombudsman notes that the above provision appears to reflect the principle embodied in Article 109 (2) of the Financial Regulations (2) , which stipulates that,

"The grant may not have the purpose or effect of producing a profit for the beneficiary".

The Ombudsman therefore considers that the Commission was entitled to seek to limit its contribution by reference to the "non-profit rule".

1.7 The Ombudsman also notes that the Commission informed the complainants of the reasons why it did not accept their annual apportionment of the total subsidy that they had received from the Flemish authorities during a three year period and that the Commission performed its own calculation, on the basis of equal apportionment of the subsidy to each of three years. On the basis of the information supplied by the complainants and the Commission during the inquiry, the Ombudsman considers that the position taken by the Commission in relation to this issue does not appear to be unreasonable and that the Commission appears to have informed the complainants adequately of the reasons for its position.

In these circumstances, and bearing in mind that the scope of the Ombudsman's review is limited in such cases, the Ombudsman has concluded that the inquiry has not revealed an instance of maladministration.

2 Conclusion

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

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) See the European Ombudsman's Annual Report 1997, p. 22.

(2) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities; OJ L 248 , 16/09/2002, p.1.