

Decision of the European Ombudsman on complaint 1347/2003/JMA against the European Commission

Decision

Case 1347/2003/JMA - Opened on 29/09/2003 - Decision on 22/09/2004

Strasbourg, 22 September 2004

Dear Mr X.,

On 20 July 2003, you lodged a complaint with the European Ombudsman against the European Commission on behalf of the Y. Your complaint concerns the Commission's unilateral change of the conditions under which you had been invited to become a member of a technical committee for the evaluation of a Community funded programme.

On 29 September 2003, I forwarded the complaint to the President of the Commission. On 19 November 2003, I received the Commission's opinion, which I forwarded to you with an invitation to submit your observations. I received your observations on the Commission's opinion on 28 January 2004.

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

THE COMPLAINT

According to the complainant, the facts of the case are, in summary, as follows:

On 3 April 2003, the Commission invited the complainant to become a member of a technical committee for the evaluation of a Community funded programme. This body was entrusted with the task of evaluating the proposals received by the Commission in the context of one of its programmes. Following a number of discussions with the responsible Commission services, the complainant received a contract from the Commission for EUR 450 per day addressed to him as a representative of his consulting firm. Having duly filled out the contract and returned it to the Commission, the complainant took part in the work of the panel from 22 April to 26 April 2002.

In the course of the evaluation, the Commission services raised a number of problems concerning the nature of the complainant's contract, which prevented him at the time from submitting an invoice for both his services and travel expenses. These problems concerned the nature of his status, since it appeared unclear whether he worked as a representative of a legal



person, or rather as a natural person. Whereas in the first case the daily allowance had been set at EUR 450 per day, as a natural person the entitlement was reduced to EUR 250 per day. Following the discussion, the Commission decided to send him a new contract in which he was to be hired as a natural person, and therefore his daily allowance was reduced to EUR 250.

The complainant underlined that he had carried out a previous evaluation for the Commission, for which he had been offered a company-type contract. The complainant, therefore, unsuccessfully sought to maintain identical status for the new evaluation. This possibility was, however, not accepted by the Commission on the grounds that he was the account holder of his consulting firm, for which he worked as a self-employed consultant. The company is listed by its national Chamber of Commerce.

Following a number of exchanges with the responsible Commission services, the complainant was informed that even though he was the owner of his consulting firm, he was in fact developing his work as a self-employed natural person and therefore did not have the same overheads as a regular firm. The complainant was informed that the first contract which had been forwarded to him had not been endorsed by the Commission, even though he had already completed his work. On 25 July 2002, the complainant received a different contract in which he appeared to be hired in a personal capacity, and thus the daily allowance to which he was entitled had been reduced to EUR 250.

The complainant took the view that the procedure was unacceptable and he thus wrote an e-mail to the Commission on 25 July 2002 contesting this change of the applicable contractual clauses. He explained that this type of working arrangement through a consulting firm appears to be very frequent in his country. In his view, the Commission's position would deprive most consulting engineers from that country of company status since they were established as personally owned companies. His e-mail to the responsible Commission services of 25 July 2002 remained unanswered.

In summary, the complainant alleges that the Commission failed to honour its initial proposal to which he had already agreed, granting him an allowance of EUR 450 per day. He also alleges that the institution failed to respond to his requests contesting the modification of the contract.

The complainant requested that the complaint be treated confidentially.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first set out the general background to the problem. The institution explained that under the relevant Framework Programme, a distinction was made between the participation of moral persons (or legal persons), and natural persons (or physical persons).

When an expert participates in an evaluation on behalf of a legal person, the company is reimbursed on the basis of a daily allowance of EUR 450. When an independent expert is



contracted directly on a personal basis, the foreseen reimbursement is EUR 250 per day. The latter rule is also applied to independent professionals considered as natural persons.

Before the beginning of the evaluation, each expert receives the standard forms to be filled out either by a natural or by a legal person. Each participant has to fill out the appropriate form as well as provide information on his/her legal status and professional situation. This information has subsequently to be submitted to the Commission, which in turn prepares, on the basis of that information, the appropriate type of contract.

A Commission internal note, dated 25 October 2001, clarified and confirmed the elements to take into account to distinguish between natural and legal persons in doubtful cases. The following elements are applied to verify whether the expert participates on behalf of a legal person: the office of the expert must be registered as a legal person in a local, regional or national register; the legal address of the moral person is different from the private address of the expert; the expert has a mandate to act on behalf of the legal person in view of signing the contract with the Commission; the expert and the legal person have different VAT numbers; the bank account of the expert is different from the bank account of the legal person; the invoice to be submitted to the Commission is delivered under the header of the expert's office and not in his personal name.

If the expert does not satisfy these conditions, a contract as a natural person is then proposed.

As regards the facts of the case, the Commission explained that the complainant had already been invited as an independent expert on behalf of the Commission to a previous evaluation panel. At that time, the responsible services, acting in good faith, offered the complainant a contract for a legal person, according to the information which they received from the complainant concerning his legal status and professional situation.

On 11 March 2002, the Commission invited the complainant to a new evaluation panel. The institution sent him the materials to be filled out, which included a form for natural persons and another one for legal entities. On 12 March 2002, the complainant sent back a completed form for experts participating as an organisation or company to which he attached his bank details form. Since the name of the account holder on the form did not correspond to a company's name but to a personal bank account, the Commission services referred this problem to the complainant.

On 20 March 2002, and following a request for clarification from the Commission, the complainant forwarded additional information. With this question apparently settled in good faith, the Commission sent a formal invitation to him with a proposed contract on 3 April 2002. The contract had been drafted on the basis of the information that the complainant had provided. Accordingly, the institution initially considered that the complainant was taking part in the evaluation panel on behalf of a legal person, and not as a natural person. The proposed contract did not include any details on the bank account of the complainant, since this information needed further clarification.



On 22 April 2003, the first day of the evaluation, the complainant returned his copy of the contract duly filled out to the Commission. He also furnished additional details on his firm's bank account. It appeared that the name of the account holder was his own. The responsible Commission official reminded the complainant that he had to submit a financial identification form with the name of the company that he was working for and the corresponding bank account number. Since the complainant had simply deleted his own name as account holder and replaced it by the name of a technical office, the Commission services requested further clarification. As a result of this situation, the contract was not put to the signature of the Commission with the rest of the experts' contracts, until the information concerning the complainant's legal status, the bank account holder and his professional situation were sorted out. The complainant accepted, at his own responsibility, to carry out his work as an expert without a signed contract until this question had been resolved, and gave confirmation that, before the end of the evaluation's session, all clarifying documents would be submitted.

On 26 April 2002, the complainant's wife faxed a number of supporting documents. According to the new information, the complainant was registered as an independent professional. His national administration authorised him to sign a Professional Register as an independent consultant (natural person), but not as a legal person. Furthermore, the certificate of the Chamber of Commerce clearly stated that the complainant was "*(.../...) in possession of a trade license for technical consulting (.../...)*" but did not certify that a company was registered as a legal person. Also, the bank account of his office seemed to be his private bank account and there was no indication that he enjoyed the status of a legal person.

In the absence of acceptable justifications, his status as a legal person remained unjustified and therefore, the Commission could only offer him a contract as a natural person in order to regularise his situation. The responsible services informed the complainant of this decision.

Meanwhile, the complainant requested the intervention of the Representation of his national Chamber of Commerce in Brussels. A representative in Brussels of this organisation confirmed to the Commission that the relevant national regulations made a distinction between the Register of enterprises (legal persons) and the Register of independent professionals (natural persons). In numerous exchanges with the complainant, the Commission confirmed its willingness to revise the decision if clear information on his legal status, bank account and his professional situation were to be provided.

On 15 May 2002, the complainant sent further documents to sustain his designation as a legal person. The analysis of the additional elements submitted by both the national Chamber of Commerce in Brussels and the complainant were carefully examined by the Commission, which confirmed its initial decision.

On 25 July 2002, the complainant sent a message to the attention of the Commission's Research DG, reiterating his request. By an official letter of 2 August 2002, the Commission services replied to his message.

The Commission argued that the decision to propose a contract to the complainant as a natural



person (as opposed to a legal entity), entitled to a daily allowance of EUR 250 was made after he failed to supply its services with adequate information concerning his status as a legal person, despite having had numerous opportunities to do so, and was based on the supporting documents which he provided. In the absence of a reaction from the complainant until now, the Commission stands by its initial decision.

The complainant's observations

In his observations on the Commission's opinion, the complainant stated, in summary, that whereas the evaluation of the Commission stressed the issue of a legal versus a natural person, this was not the case during the first preparatory stage of the contract and even during the evaluation phase. The complainant noted that all the papers he had to submit mentioned "natural persons" on one side and "companies" or "organisations" on the other. With respect to his professional situation, the complainant expressed no doubt that he was representing a company.

The complainant pointed out that he had in fact submitted a contract for a company, as mentioned in all the forms which were available to him. Taking into consideration that the contractual conditions he had accepted in good faith had been unilaterally modified once the work had started, he considered the situation unfair, and asked the Ombudsman to strive on his behalf for an acceptable solution.

THE DECISION

1 The Commission's handling of the contract

1.1 The complainant alleges that the Commission failed to honour its initial proposal to which he had already agreed, granting him a daily allowance of EUR 450.

The complainant believes that he was representing a company. He argues that he had in fact submitted a contract for a company, as mentioned in all the forms which were available to him. He explains that this type of working arrangement through a consulting firm is very frequent in his Member State. In his view, the Commission's position would lead to the exclusion of most consulting engineers from company status since they usually work through personally owned companies.

Taking into consideration that the contractual conditions he had accepted in good faith had been unilaterally modified once the work started, he considered the situation to be unfair.

1.2 The Commission argues that the decision to propose a contract to the complainant as a natural person (as opposed to a legal entity), reimbursed at EUR 250 per day, was only made after he failed to supply its services with adequate information concerning his status as a legal person.

According to the Commission's information, the complainant was registered as an independent professional. Thus, his national administration had given him authorisation to sign a Professional Register as an independent consultant (natural person), but not as a legal person. Furthermore, the certificate of the Chamber of Commerce stated that the complainant was



"(.../...) in possession of a trade license for technical consulting (.../...)" but did not certify that a company was registered as a legal person. Lastly, the bank account of his office was also his private bank account, and there was no indication that he held the status of a legal person.

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 different exchanges between the Commission services and the complainant. It appears that, on 11 March 2002, the Commission services e-mailed the complainant a number of documents to be filled out which included the following forms: a standard Bank details form, a form for natural persons and a form for legal persons.

The Ombudsman notes that the documents clearly identified their nature and their addressees. As regards the form for natural persons, the relevant document stated that it was a declaration confirming compliance with the status of a self-employed person, whereas the form for legal persons referred to the participation of an organisation and/or company.

It appears that, on the basis of the information submitted by each expert, the Commission tailored each individual contract.

1.7 As regards the complainant's legal status, it appears that the Commission based its assessment on a number of factors which its services had set out in a note dated 25 October 2001, and which included elements such as the registration as a legal person, its place of business, the establishment of a specific mandate, or the existence of a separate VAT and bank account numbers.



Having verified the information submitted by both the complainant and the national authorities, the Commission noted that the complainant was registered as an independent consultant, that his certificate from the Chamber of Commerce only stated that he was in possession of a trade license for technical consulting, and that his office had no bank account separate and independent from his personal one. On the basis of those elements, the institution concluded that the complainant had been unable to prove that his status was that of a legal person. As a result, the daily allowances for his work had to be those paid to physical or natural persons, namely EUR 250, instead of the EUR 450 per day which were foreseen for experts representing a legal person.

1.8 In view of the above, the Ombudsman considers that the Commission has provided 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.

In these circumstances, the Ombudsman has concluded that the inquiry has not revealed an instance of maladministration as regards this aspect of the case.

The Ombudsman wishes to stress that his conclusion only relates to the coherence and reasonableness of the justification provided by the Commission. It therefore bears no implication for the nature of the complainant's legal status. This is a matter which could only be dealt with by a court of competent jurisdiction, which would have the possibility to hear arguments concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

2 Alleged failure by the Commission to reply to the complainant

2.1 The complainant alleges that the Commission failed to respond to his request contesting the modification of the contract.

He explains that having received a new contract on 25 July 2002, he wrote an e-mail to the Commission on the same day contesting the change of the applicable contractual clauses. His e-mail to the responsible Commission services remained unanswered.

2.2 The Commission argues that its services replied to the complainant's e-mail of 25 July 2002 by an official letter dated 2 August 2002.

2.3 The Ombudsman notes that the Commission appears to have replied to the complainant's query in due time. The reply seemingly never reached the complainant for some unknown reason. The Commission's opinion, however, included a copy of the letter in one of its annexes. The complainant therefore had the opportunity to obtain a copy of that reply, since the Ombudsman forwarded all materials included in the Commission's opinion to him.

The Ombudsman has therefore concluded that there appears to be no maladministration as regards this aspect of the case.

3 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.