

Decision of the European Ombudsman on complaint 1513/2003/JMA against the European Commission

Decision

Case 1513/2003/JMA - Opened on 27/10/2003 - Decision on 10/12/2004

Strasbourg, 10 December 2004

Dear Mr C.,

On 11 August 2003, you lodged a complaint with the European Ombudsman against the European Commission, on behalf of the environmental organisation, "Asociación Amigos de Doñana". Your complaint concerned the Commission's alleged failure to respond to your requests in connection with the project VEN/B7/6201/IB/96-03, entitled "Conservation and sustainable development of the Orinoco delta in Venezuela (Venezuela)", financed by the Europe Aid Co-operation Office.

On 27 October 2003, I forwarded your complaint to the President of the Commission. I received the Commission's opinion on 3 February 2004, and forwarded it to you with an invitation to make observations. On 19 March 2004, you sent me your observations on the Commission's opinion.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

The facts of the case are, in summary, as follows:

The Commission's Europe Aid Co-operation Office granted the complainant Community funding for the implementation of a project entitled "Conservation and sustainable development of the Orinoco delta in Venezuela" (reference of the contract: VEN/B7/6201/IB/96-03).

On 16 August 2001, the complainant sent the Commission a number of reports regarding the implementation of the project. The documents included a summary of the final report, a financial statement, a biodiversity report on the Orinoco delta and an anthropological study. The complainant also enclosed with his letter a table detailing the project's expenditures, on the basis of which he requested the payment of EUR 106 126.50. He also asked the Commission to



allow his bank to cancel the letter of guarantee which it had issued on his behalf for an amount of EUR 50 085.55.

In his complaint to the Ombudsman, the complainant enclosed a copy of the fax sent by the Commission on 10 July 2002, in which the institution requested a reply to the queries made in a previous letter dated 29 May 2002. The letter identified a number of flaws in the reports submitted by the complainant. As regards the payment of the grant, the Commission informed the complainant that he did not have the right to receive any additional assistance, since the actual expenditure of the project was less than the amount already advanced. The letter also noted that the final report made reference to planned activities which had not yet been implemented.

The complainant replied to the Commission's arguments in a letter dated 15 July 2002, in which he stressed that the payment necessary for the completion of the fifth and last stage of the project was still outstanding. He referred to a number of difficulties which he had encountered in carrying out the project, in particular as regards the exchange rate fluctuations which took place since the grant was approved, and the ensuing losses he suffered as a result. In his view, the contract did not require him to advance the funds necessary for the implementation of the fifth and last stage of the project, and therefore the Commission should have advanced these funds upon receipt of the final report. In support of his belief, the complainant referred to the provisions of Annex IV of the contract, in particular Articles 4 and 5. He also pointed out that the Commission had not complied with the deadlines set in the contract for the payment of the four previous instalments.

In his complaint to the Ombudsman, the complainant alleged, in summary, that, the Commission failed to:

(i) reply to his requests for the release of the financial guarantee issued by his bank for an amount of EUR 50 085.55, which he had deposited with the institution prior to the implementation of the project; and,

(ii) complete the final payment of the project for an outstanding amount of EUR 106 126.50.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first described the factual background of the case. It explained that its services had signed a grant agreement with the complainant, on behalf of the environmental group "Asociación Amigos de Doñana", for the implementation of a project entitled VEN/B7/6201/IB/96-03 "Conservation and sustainable development of the Orinoco delta in Venezuela". The contract, which entered into force on 1 July 1997, had an initial duration of 36 months, so that it should have been completed by 1 July 2000. Upon entry into force of the contract, the complainant provided a bank guarantee for an amount equal to the first instalment.

On 15 June 2000 the complainant requested a 12-month extension of the project, which the



Commission granted. The new date for the completion of the contract became 30 June 2001. In his request, the complainant acknowledged that all actions related to the project had to be completed by that deadline. Furthermore, the Commission drew the complainant's attention to this point in its decision approving the extension.

As regards the specific allegations made by the complainant, the Commission stated as follows:

(i) Late release of the bank guarantee provided by the complainant: The Commission explained that it decided not to issue a formal certificate releasing the bank's guarantee due to a number of uncertainties concerning the implementation of the project. The institution noted that the final report on the project submitted by the complainant raised questions involving funds already paid, but not yet utilised. Moreover, the complainant had requested additional funds for future actions at a time when the project and the contract should have been completed.

Nevertheless, since the complainant informed the Commission on 15 July 2002 that the guarantee had not expired, but was instead pending and generating interest, the institution contacted the guarantor by fax.

(ii) Decision to refuse any final payment and to issue a recovery order: The Commission's financial commitment for this project amounted to EUR 750 045. Four payments were made for a total contribution of EUR 643 918.50.

Even though the contract expired on 30 June 2001, the Commission only received the complainant's final report on 20 September 2001. Its services noticed that the report referred to activities to be carried out in the future, but which were to be financed out of the remaining fifth and last instalment. In its note of 29 May 2002, the Commission warned the complainant that a final report could not make reference to future activities beyond the contractually agreed implementing timeframe. Nor could the institution approve the final report or make the final payment, since the requirements laid down in the contract had not been met.

The complainant wrote to the Commission on 15 July 2002 stating that he understood that the final payment would be made following the presentation of the final report, so that he could subsequently complete the necessary activities and conclude the project. In the Commission's view, this interpretation was at odds with the terms of the contract. The institution pointed out that, in accordance with Article 4, the final report had to be submitted at the end of the project's implementing period, and once approved by its services, the payment of the balance was to be made. The institution added that, as defined in Article 7 of the General Conditions annexed to the contract, only costs incurred in conformity with the terms of the contract could be considered eligible.

As regards the Commission's decision to issue a recovery order, the institution argued that the final report showed that the declared expenses were less than the sums already advanced by the Commission. It also noted that, in a few instances, the expenses incurred under specific budget lines significantly exceeded the maximum amounts contractually agreed upon. Moreover, the complainant had requested the reimbursement of 34 580 EUR included in the



“contingencies” section of the project budget which was reserved for unforeseen circumstances, the use of which was conditional upon the Commission's express written approval.

The Commission also addressed two additional issues raised in the complaint: (i) the fluctuation of exchange rates; and (ii) the Commission's delay in making some of the payments. The institution took the view that these issues were not relevant to the claim for payment. It explained that unexpected fluctuation in exchange rates may make the implementation of the project more difficult, but cannot constitute grounds for an additional payment, since the total expenses which the complainant identified in his final report did not exceed the sums already paid. In addition, a one-year extension of the project timeframe for implementation had been granted, regardless of the very late request by the complainant, and also taking into account the delays that occurred in the payment of the third and fourth instalments, for which the Commission expressed its apologies. In conclusion, the Commission apologised for not having answered the complainant's letter of 15 July 2002, and for not having taken the necessary measures to release the bank guarantee at an earlier stage. The institution stated that no claim related to activities to be carried over beyond the contractually agreed implementing period could be accepted. It noted that the final report must cover all activities carried out and expenses incurred within the project implementation timeframe, and that the complainant's final report showed that the total expenses declared were less than the total amount already paid by the Commission, which constitutes grounds for a recovery order.

The complainant's observations

In his observations on the Commission's opinion, the complainant noted that thanks to the Ombudsman's intervention the bank guarantee had been released. He pointed out, however, that the Commission had not acted in this instance with due diligence.

The complainant disputed the Commission's interpretation of the nature of the expenses to be reimbursed. He stated that no contractual provision required that only expenditures carried out during the implementing period of the project should be reimbursed. In his view, the remaining funds should have been paid upon submission of the final report, so that the work necessary to complete the fifth and last stage of the project could have been carried out. He pointed out that the Commission only replied to his requests following the Ombudsman's intervention.

THE DECISION

1 Late release of the Bank guarantee

1.1 The complainant alleges that the Commission failed to reply to his requests for the release of the financial guarantee issued by his bank for an amount of EUR 50 085.55 EUR, which he had deposited with the institution prior to the implementation of the project. He made these requests in two separate letters to the Commission dated 16 August 2001 and 15 July 2002.

1.2 The Commission explains that it decided not to issue a formal certificate releasing the financial guarantee provided by the complainant due to a number of uncertainties concerning the implementation of the project. Nevertheless, since the complainant informed the Commission on 15 July 2002 that the guarantee had not expired, but was still pending and generating interest, the institution contacted the guarantor. The Commission also apologised for



not having answered the complainant's letter of 15 July 2002 and for not having taken the necessary measures to release the bank guarantee at an earlier stage.

1.3 The Ombudsman first points out that although the Commission's opinion does not explicitly state that it has released the financial guarantee issued by the complainant's bank, the complainant has confirmed in his observations that the guarantee has in fact now been released.

The Ombudsman recalls that, according to the Commission's own code of good administrative behaviour (1), a reply to a letter addressed to the Commission shall be sent within fifteen working days from the date of receipt of the letter from the responsible Commission department. The Ombudsman notes that the Commission has apologised for the delay which occurred in the present case. Furthermore, the Ombudsman considers that the Commission took appropriate action in response to this aspect of the complaint by taking the necessary steps to have the financial guarantee released, as requested by the complainant.

In these circumstances, the Ombudsman does not consider it necessary to inquire further into this aspect of the case.

1.4 The Ombudsman wishes to draw the Commission's attention, however, to the fact that, having reviewed the applicable rules of the contract concluded between the Commission and the complainant, the Ombudsman has found no provision concerning either the submission of a financial guarantee by the complainant or the conditions for its release. If the Commission wishes to continue the practice of requiring such guarantees, the Ombudsman suggests that it would be in the interests of good administration and good relations with citizens for the Commission to consider including in future contracts specific provisions concerning the guarantee and its eventual release. The Ombudsman will address a further remark to the Commission to this effect below.

2 The Commission's alleged failure to complete the final payment of the project

2.1 The complainant alleges that the Commission failed to complete the final payment of the project for an outstanding amount of EUR 106 126.50.

The complainant takes the view that once the final report had been forwarded to the Commission, he was entitled to receive the final payment. In his view, upon submission of the final report, the remaining funds should have been paid. The work necessary for the fifth and last stage of the project could have been carried out subsequently. He also points out that the contract did not require that only expenditure carried out during the project's implementing period should be reimbursed.

2.2 The Commission argues that the complainant's final report referred to activities to be carried out in the future and which were to be financed out of the fifth and last instalment. As its services had already explained to the complainant, the institution takes the position that a final report could not make reference to future activities beyond the contractually agreed implementing timeframe. Accordingly, the Commission could not approve the final report or make the final payment, since the requirements laid down in the contract had not been met.



The institution also notes that the final report showed that the expenses declared were less than the sums already paid by the Commission, and that the expenses incurred under specific budget lines significantly exceeded the maximum amounts contractually agreed upon, including the use of amounts reserved for unforeseen circumstances, the use of which is conditional upon the Commission's express written approval.

2.3 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 (2) . 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.

2.4 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.

2.5 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.

2.6 As part of the evidence furnished in the course of his inquiry, the Ombudsman has carefully examined the legal basis for the Commission's action in this case, namely the contract signed between the Commission and the environmental organisation, "Asociación Amigos de Doñana" (reference VEN/B7/6201/IB/96-03) dated 1 July 1997.

The Ombudsman notes that, under Article 3 of the contract, the project had to be completed within a 36-month period, effective from 1 July 1997, the date on which the Commission signed the contract. Accordingly, the project was due to be completed by 1 July 2000. As laid down in Article 5, the complainant had to submit a final report upon completion of the project. The institution granted a 12-month extension of the contract, so that the new deadline for the completion of the project became 30 June 2001. It appears that, in accordance with Article 18 of the General Conditions applicable to financing contracts for the protection of tropical forests which were annexed to the contract and constituted an integral part of it (Article 2.b), the project had to be completed by the time at which the final report was submitted.



The Ombudsman notes that, as set out in Article 14.2 of the General Conditions, the final report should refer to the use made by the beneficiary of all the assistance granted by the Community. Since the final report had to be submitted upon completion of the project on the date set in the contract, and it had to reflect all the assistance granted by the Community, it appears that the beneficiary had no right to claim reimbursement for activities carried out beyond the implementing period and after the final report had been submitted.

In accordance with Article 4 of the contract, the final payment was due within 60 days of the Commission's approval of both the final report and a statement of expenditure. This payment should cover the outstanding balance and thus complete the Community's financial contribution, as laid down in Article 4.6 of the General conditions.

If the contractor did not fulfil his contractual obligations, Article 19 of the General Conditions enabled the Commission to suspend, or indeed terminate, the contract. The consequences of such action were spelled out in Article 19.1:

"In this case [the Commission] may suspend its financial contribution, either partially or its entirety. In addition, it may [. .] request the reimbursement of all, or part, of the funds already advanced."

2.7 In view of the available evidence, it appears undisputed that the complainant failed to submit his final report by the date the contract had to be concluded, namely by 30 June 2001, and that he only did so on 20 September 2001. It also appears that, at that time, the project had not yet been completed. The Commission has also stated, without being refuted, that the expenses declared by the complainant were less than the sums already paid, and that the expenses incurred exceeded, in some cases, the amounts contractually agreed upon.

The Ombudsman notes that the Commission took the view that those actions constituted a breach of the complainant's obligations under the contract, and therefore, that the institution had the right to trigger the application of Article 19 of the contract's General conditions, and terminate the contract. Accordingly, the Commission considered that it was entitled to suspend the final payment.

2.8 In view of the above legal provisions, the Ombudsman believes that the Commission has been able to provide a coherent and reasonable account of why it was entitled to terminate the contract.

2.9 In reaching this conclusion, the Ombudsman is mindful of the fact that the complainant has also argued that the Commission did not handle the contract properly, since its services did not take into account the fluctuation of exchange rates, and failed to make the intermediate payments by the time set in the contract.

Having carefully examined these arguments in the light of the available information, the Ombudsman finds that the complainant's grievances might not be, in all cases, deprived of merit. Thus, the Ombudsman notes that the Commission acknowledged that delays took place



in the transfer of the third and fourth instalments to the project, and apologised for them. The Ombudsman also notes that the Commission accepted that exchange rate fluctuations occurred in the course of the project's implementation, but the Commission considers that this issue is not relevant to the complaint, since the total expenses which the complainant identified in the final report did not exceed the amount already paid by the Commission.

The Ombudsman considers that, even though the delays which the Commission has acknowledged in making some of the intermediate payments are regrettable, they do not appear to have contributed to the problems that subsequently arose, nor do they deprive the Commission of its contractual rights in respect of subsequent non-performance by the complainant. As regards the exchange rate issue, the Ombudsman considers that the Commission's position seems reasonable.

2.10 In view of the above, 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 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 European Commission. The Ombudsman therefore closes the case.

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

FURTHER REMARK

Having reviewed the applicable rules of the contract concluded between the Commission and the complainant, the Ombudsman has found no provision concerning either the submission of a financial guarantee by the complainant or the conditions for its release. If the Commission wishes to continue the practice of requiring such guarantees, the Ombudsman suggests that it would be in the interests of good administration and good relations with citizens for the Commission to consider including in future contracts specific provisions concerning the guarantee and its eventual release.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ L 308 of 8 December 2000, pp. 26-34.

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