

Decision of the European Ombudsman on complaint 2013/2003/JMA against the European Commission

Decision

Case 2013/2003/JMA - Opened on 02/12/2003 - Decision on 11/11/2004

Strasbourg, 11 November 2004

Dear Mr B.,

On 1 October 2003, you submitted your observations on the opinion sent by the European Commission regarding a complaint you had lodged with the European Ombudsman (reference 842/2003/JMA). That complaint concerned the alleged failure on the part of the Commission to pay a grant to one of your constituents, the firm "Farming and Wildlife Advisory Group Limited" (FWAG). Your observations included a new issue that was not part of your original complaint. The decision closing 842/2003/JMA announced that the new issue raised in your observations had been registered as a new complaint (reference 2013/2003/JMA).

On 2 December 2003, I forwarded complaint 2013/2003/JMA to the President of the Commission with a request for comments. I received the Commission's opinion on 24 February 2004, which I forwarded to you with an invitation to make observations. On 18 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 that it has taken to deal with your complaint.

THE COMPLAINT

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

On 30 April 2003, the complainant lodged a complaint with the Ombudsman against the Commission on behalf of one of his constituents, the firm "Farming and Wildlife Advisory Group Limited" (FWAG). The complaint was registered under file number 842/2003/JMA. It concerned the alleged failure on the part of the Commission to pay a grant of 59 598 EUR to the FWAG for the organisation of a seminar-conference on "Multifunctional Agriculture - a European Model", which the institution had agreed to subsidise (file no 2001/01-18). The complainant claimed that the Commission should make the payment of the grant awarded to the FWAG increased by the amount of the legal interest accrued since 1 January 2002, and that its services should



apologise to his constituent.

The Ombudsman opened an inquiry and asked the Commission to submit an opinion on the complaint. In its opinion of 27 August 2003, the Commission explained that the date at which the payment was due and interest started to accrue was 29 August 2002, but that some technical problems had delayed the payment. The Commission apologised for the inconvenience caused to the FWAG by its handling of the case, and informed the Ombudsman that its services had in fact transferred the amount of the grant to the FWAG on 1 July 2003, and the accrued interest on 21 August 2003.

On the basis of the available information, the Ombudsman concluded on 4 November 2003 that the Commission had settled the case.

However, in his observations on the Commission's opinion dated 1 October 2003, the complainant had expressed his dissatisfaction at the limited reference contained in the Commission's opinion to "technical problems" as the cause for the late payment of the grant. The complainant requested a more elaborate explanation of the nature and timing of the technical problems and of the reasons why the promises of prompt payment which had been regularly made to the FWAG were not fulfilled.

The Ombudsman considered the complainant's request for additional explanations should be dealt with as a new complaint under file number 2013/2003/JMA.

The complainant alleges, in summary, that the Commission failed to furnish, an adequate explanation of (i) the nature and timing of the technical problems referred to in the institution's opinion 27 August 2003, and (ii) the reasons why the promises of prompt payment which had been regularly made to the FWAG were not fulfilled.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission referred to the factual background of the case. It then made some preliminary procedural remarks concerning the admissibility of the complaint. The institution argued that the complainant had not originally asked the institution to explain the reasons for the late payment of the grant, and considered that the new complaint infringes the general principle of "*non bis in idem*" (1) . In the Commission's view, the connected claims should have been raised at once from the beginning.

As regards the substantive issues, the Commission explained that its opinion had not elaborated on the remark that a series of technical problems were the reason for the delay in payment because: (i) no questions had been asked in this respect; (ii) the original complaint was focused on the payment of the main capital with the relevant interest, together with a request for apologies; and (iii) a number of documents which had surfaced in the course of the Ombudsman's inquiry showed that both the complainant and the FWAG were already well acquainted with the reasons for the delay.



As regards the sequence of events relating to the present case, the Commission explained that the grant agreement signed by the FWAG on 24 September 2001 had been approved by the Commission on 16 October 2001. On 24 October 2001, the FWAG had sent a copy of its Bank guarantee, and requested that the advance payment for an amount of 35 579 EUR should be made. Whereupon, it had emerged that the FWAG did not have an account in EUR available, as required by the agreement, but only one in Pounds Sterling.

The FWAG's request for an advance payment of 35 579 EUR had been formally approved on 30 October 2001, and then introduced in the accounting database system on 13 December 2001. Because of the high number of payments to be dealt with at the end of the year, priority had been given to payments linked to commitments made in 2000. Consequently, since the FWAG payment was linked to a 2001 commitment, it had been not processed before the end of 2001, and had thus been rescheduled for the following year.

At the beginning of budget year 2002, the Commission services had taken the necessary steps to transfer the credits committed in 2001 to the 2002 budget year. Upon the completion of these operations, the payment had been reintroduced in the accounting database system on 6 February 2002.

On 14 February 2002, however, the payment could not go through because the responsible service had discovered a discrepancy between the amount indicated in the agreement (35 759 EUR) and that requested as advance payment (35 579 EUR). The FWAG had been informed thereof. By letter dated 17 May 2002, the FWAG had acknowledged that its bank guarantee was incorrect due to an inversion of figures with the amount stated being 35 579 EUR as opposed to the correct amount of 35 759 EUR. The FWAG had therefore suggested that the lesser amount be transferred to its account. The Commission noted that the letter did not contain any additional remark or criticism.

On 31 January 2002, however, the Commission had received the project's technical report. No financial statement had been submitted at the time, even though the FWAG's accountant had undertaken to submit it at a later stage. The financial report was only received by the Commission on 7 October 2002. The institution noted that, in accordance with Article 5.1 of the agreement, both the technical and the financial reports had to be received by 30 April 2002, and that a late submission of the financial statement was to be penalised by 1% of the amount of the grant for each day's delay. Moreover, should the delay exceed two months, the beneficiary would give away its right to the grant and the Commission would be entitled to keep the Bank guarantee initially provided by the beneficiary. The institution underlined that because of this delay, it could not legally proceed with the requested payments.

The Commission services, however, considering that the penalty appeared to be excessive, had sought a remedy on their own initiative and asked the competent Director-General for a derogation from Article 5.1 of the agreement. This derogation had been granted on 20 December 2002. By virtue of this derogation, a supplement to the original agreement had been signed with the FWAG on 31 December 2002 without any reservation or remark being



formulated by the FWAG on this occasion.

In view of the exceptional circumstances surrounding the implementation of the project, in particular the imminent expiration of the agreement on 31 December 2002, the responsible Commission services had tried to enter a financial commitment in the budget for 2003, so that the remaining payment could be settled at the beginning of 2003. The financial unit had advised against this solution and indicated that this procedure could only be started in 2003.

Difficulties linked to the entry into force on 1 January 2003 of Regulation No. 1605/2002, the new Financial Regulation applicable to the General Budget of the European Communities, had prevented a smooth operation of the Commission's accounting system until the end of March 2003. Since Article 75.2 of the new Regulation required that prior to any financial commitment, a financial decision should be taken, the Commission services had had to make a financial decision concerning the approval of the 2003 commitment for the FWAG's payment, which had only been adopted at the end of April 2003.

On 16 May 2003, the date on which the first complaint to the Ombudsman on this matter had reached the Commission, its services had already taken measures to solve the situation and to explain it to both the FWAG and the complainant. In reply to the queries made by the complainant, the Commission had replied on 13 June 2003. As regards the request for information from the FWAG, the Commission had replied on 27 May and 19 August 2003. In these letters, the Commission had apologised for the situation and explained the details of the calculation of the interests which the FWAG were to be paid, which had been made in a way most favourable to the creditor. All these letters had preceded both the first opinion sent to the Ombudsman in the first complaint and the subsequent observations from the complainant.

As regards the allegation of unfulfilled promises of prompt payment made to the FWAG, the Commission underlined that, whilst its exchanges with the FWAG reflected a common concern to finalise the handling of the file as quickly as possible, they had not included any firm commitment for a specific date.

On the basis of the above considerations, the Commission took the view that its services had correctly explained the reason for the delay to the FWAG, and had therefore acted properly.

The complainant's observations

In his observations on the Commission's opinion, the complainant found it most significant that the Commission had suggested that the complaint was inadmissible, with a view to avoiding answering it. In the complainant's view, the institution's continuing culture of cover-up and avoidance of responsibility was most evident and is a cause of great concern.

The complainant expressed the view that it would have been reasonable for the Commission to explain the problems which caused the delay, rather than hiding them, so that such a delay could be avoided in the future. The complainant took the view that individuals concerned should be severely reprimanded.



THE DECISION

1 Preliminary question

1.1 In its opinion, the Commission argues that the complainant did not originally ask the institution to explain the reasons for the late payment of the grant and that the new complaint infringes the general principle of *"non bis in idem"*. In the Commission's view, the connected claims should have been raised at once from the beginning.

1.2 The Ombudsman notes that the two complaints lodged by the complainant involved the same factual situation, namely the late payment of a Commission grant to the FWAG. However, whereas the allegations and claims made in the complainant's first complaint (reference 842/2003/JMA) were that the Commission should make the payment of the grant awarded to the FWAG plus interest, and that its services should apologise to his constituent, those of his second complaint (reference 2013/2003/JMA) concerned, instead, the Commission's alleged failure properly to explain its actions in this context.

1.3 In these circumstances, the Ombudsman considers that the inquiry into the present complaint does not re-open matters already dealt with in case 842/2003/JMA and, therefore, that the principle *"non bis in idem"* does not apply.

2 The Commission's alleged failure to provide an adequate explanation

2.1 The complainant alleges that the Commission failed to furnish an adequate explanation of (i) the nature and timing of the technical problems referred to in the institution's opinion of 27 August 2003 and (ii) of the reasons why the promises of prompt payment which had been regularly made to the FWAG had not been fulfilled.

2.2 The Commission in its opinion described in detail the sequence of events which led to the late payment of the FWAG's grant. In chronological order, the Commission referred, in summary, to the following problems: FWAG's lack of a bank account denominated in EUR; the Commission's decision to give priority to other payments at the end of 2001; the need to clarify a discrepancy in the amount of the advance payment requested by FWAG; late submission by FWAG of the financial report, which meant that the Commission could not legally proceed with the requested payments and that further administrative steps were needed; difficulties linked to the entry into force of the new Financial Regulation at the beginning of 2003.

2.3 The Ombudsman considers that the account given by the Commission constitutes a satisfactory response to the complainant's request for an adequate explanation of the nature and timing of the technical problems referred to in the institution's opinion of 27 August 2003 in case 842/2003/JMA.

2.4 As regards the allegation of unfulfilled promises of prompt payment made to the FWAG, the Commission denied that its exchanges with the FWAG included any firm commitment to a specific date to finalise the handling of the file.

2.5 The Ombudsman has carefully examined the correspondence between the Commission, the FWAG and the complainant. On the basis of the available information, the Ombudsman finds no evidence that the Commission misled the FWAG by making promises that it failed to fulfil.



2.6 In view of the above, the Ombudsman concludes that his inquiry has not revealed an instance of maladministration as regards the complainant's allegations in the present case. The Ombudsman recalls that the substantive allegation of late payment was dealt with in case 842/2003/JMA, which was closed as settled by the institution.

2.7 The Ombudsman recalls that, following the own initiative inquiry into late payment by the Commission (OI/5/99/(IJH)/GG), he is monitoring the situation with a view to considering whether it could be useful to undertake a further own-initiative inquiry into progress in combating the problem of late payment. The Ombudsman will make a further remark to this effect below.

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

The Ombudsman recalls that, following the own initiative inquiry into late payment by the Commission (OI/5/99/(IJH)/GG), he is monitoring the situation with a view to considering whether it could be useful to undertake a further own-initiative inquiry into progress in combating the problem of late payment.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) "No one shall be twice tried for the same offence"