

Decision of the European Ombudsman on complaint 1505/2005/JMA against the European Commission

Decision

Case 1505/2005/JMA - Opened on 29/04/2005 - Decision on 30/07/2007

Strasbourg, 30 July 2007

Dear Mr L.,

On 5 April 2005 you submitted a complaint to the European Ombudsman against the European Commission, concerning its decision of 3 March 2005 not to pursue your allegations involving fraudulent use of a grant given by the institution to a regional association in Spain (reference 98/034208).

On 29 April 2005, I informed the President of the Commission of your complaint and asked him to submit an opinion on it by 31 July 2005. On 5 August 2005, the Commission sent its opinion in French. On 2 September 2005, the Commission sent a translation of its opinion into Spanish, which was forwarded to you on 20 September 2005, with an invitation to make observations.

On 20 October 2005, you sent your written observations to me.

On 19 June 2006, I requested additional information from the Commission. On 2 August 2006, the Commission sent its second opinion, which I forwarded to you on 12 September 2006, with an invitation to make observations, if you so wished. I received no observations from you on the Commission's second opinion.

On 13 February 2007, the Commission sent additional information to me. I forwarded this information to you on 8 March 2007. On 13 April 2007, 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 facts of the case are, in summary, as follows:

The complainant had written to the Court of Auditors of the European Communities alleging that a regional association from the region of Cantabria, in Spain ("the association"), with which the



European Commission had signed a grant agreement (reference 98/034208), was making fraudulent use of Community funds. On 25 February 2004, the Court of Auditors informed the complainant that it had passed all the information on to the European Anti-Fraud Office ("OLAF"), so that this body could properly investigate the allegations. On 1 March 2004, the complainant submitted a complaint to both OLAF and the Commission, concerning this problem.

On 19 May 2004, OLAF informed the complainant that it had carried out an investigation regarding the object of his complaint, and that, as a result of that investigation, its services had concluded that part of the Community assistance granted to the organisation should be recovered. OLAF noted in its letter that any further action should be undertaken by the Commission services responsible for the granting of the funds, namely, the Directorate-General for Education and Culture ("DG EAC"). The complainant forwarded OLAF's letter to the Commission on 31 May 2004, requesting that action should be taken against the association. The Commission replied on 22 June 2004, informing the complainant that the responsible services were pursuing the matter and that he would be informed of the results of the inquiry, as soon as possible.

On 3 March 2005, the Commission informed the complainant that it had reviewed the financial aspects of the project, in particular the supporting evidence submitted by the association regarding all expenditure incurred in carrying out the project. Having analysed that evidence, the Commission had concluded that its first financial assessment of the project, carried out on 21 September 1999 and approved on 18 October 1999, was correct and that no irregularities took place in the implementation of the grant agreement. The Commission therefore decided not to re-open this file, and therefore not to take action against the association.

On 5 April 2005, the complainant lodged a complaint with the European Ombudsman against the Commission. In his view, the Commission's decision of 3 March 2005 not to pursue the allegations he had made against the association contradicted the findings made by OLAF in its investigation. He also noted that the Commission's decision did not appear to take into account the above findings.

The allegation on which the Ombudsman asked the Commission to submit an opinion was the following:

Even though OLAF had informed the complainant on 19 May 2004 that, as a result of his complaint of 1 March 2004 regarding fraudulent use of a grant given by the Commission to a regional association (reference 98/034208), it had recommended that the financial assistance should be reimbursed, the Commission decided, on 3 March 2005, to ignore this recommendation and clear the association of any wrongdoing.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission explained that, on the basis of the Community action programme Raphaël (1) in the field of cultural heritage, its services signed a grant agreement (reference



98/034208) for EUR 40 000 with the association. The project was aimed at supporting a project on audiovisual heritage (2) .

On 20 October 1999, on the basis of the declared expenditure, and having deducted ineligible costs, the Commission made a single payment to the organisation for EUR 18 085.93.

On 26 February 2001, the Court of Auditors, after having received a complaint against the association lodged by the complainant, forwarded it to OLAF. In view of the content of the complaint and the allegations made therein, OLAF decided, on 22 March 2001, to open an inquiry.

On 21 March and 30 June 2003, OLAF sent two registered letters to the association in order to carry out an on-site inspection of the association's premises. Both letters were returned undelivered by the Spanish Postal Service. As a result, OLAF had to suspend its inspection, not having therefore access to the original supporting documents. On 16 December 2003, OLAF reached the conclusion that, not having had the opportunity to verify the supporting document explaining the use of the Community funds by the association, it had to assume that an infringement of the grant agreement had occurred. OLAF added that the Community funds should be reimbursed and that it would inform the Commission so that appropriate measures could be adopted by the responsible services. By letter of 19 May 2004, OLAF informed the complainant of the findings of its inquiry.

In light of OLAF's recommendations, the Commission initiated a recovery procedure on the basis of a presumed infringement of Article 7 of the grant agreement. The association was informed, by letter dated 18 May 2004, of the Commission's decision, and was invited to submit its observations within the following two weeks.

On 3 June 2004, the association wrote to the Commission, explaining that they had received no communication from OLAF. On 7 and 30 June 2004, the association sent all the required documents concerning the expenses incurred in the framework of the grant agreement. After having examined the supporting evidence, the Commission concluded that no irregularities appeared to have taken place in the implementation of the grant agreement. Accordingly, it decided not to pursue its recovery procedure against the association. By letter of 3 March 2005, the three parties concerned, namely, OLAF, the association and the complainant, were informed of the Commission's conclusions. The Commission's opinion annexed copies of the correspondence between OLAF and the Commission with both the association and the complainant.

The Commission underlined the fact that OLAF's findings were based on the absence of any response on the part of the association. The documents submitted by the latter, once the Commission started its own investigation, showed, however, that the conditions for the grant agreement had been met. Therefore, that there was no legal basis for the recovery of the sum paid to the association , that is, EUR 18 085.93.

Even though the Commission considered that the association had complied with all relevant



procedures, and had taken all necessary measures, its services decided to carry out an audit of the project in order to dispel any possible doubt. In the course of this procedure, all the original documents were to be reviewed. In the Commission's view, this audit would enable it to clarify any potential misunderstanding. The Commission explained that the association had, by letter dated 20 June 2005, accepted the Commission's proposal and announced its intention to bring a legal action for defamation against the complainant.

The Commission concluded by underlying that its services had acted properly, and undertook to inform the complainant of the results of the audit as soon as they were available.

The complainant's observations

In his observations on the Commission's opinion, the complainant repeated the arguments of his complaint. He welcomed, however, the Commission's initiative to carry out an audit regarding the project in question. In the complainant's view, this procedure should shed new light on the problem.

FURTHER INQUIRIES

In view of the available information, the Ombudsman wrote to the Commission on 19 June 2006, requesting additional information as to whether the audit mentioned in its opinion had been completed. If so, the Ombudsman requested a copy of the audit report, in addition to information in relation to the follow-up which the Commission intended to give to its findings.

The Commission's second opinion

In its second opinion, the Commission explained that a professional auditing firm had carried out an audit of the association on 17 and 18 January 2006. Moreover, on 10 April 2006, a first draft of the audit report had been sent for comments to the association. The association submitted its observations on the draft report on 10 April 2006. The Commission noted that its services were, at the time of writing, reviewing all available information, including the conclusion reached by the auditor. The Commission considered that, probably, it would be able to inform the Ombudsman of the findings of the audit in the course of October 2006.

The complainant's observations to the Commission's second opinion

The Ombudsman did not receive observations from the complainant on the Commission's second opinion.

Additional information submitted by the Commission

On 13 February 2007, the Commission sent the Ombudsman a copy of the "Executive Summary" and the "Conclusions" of the audit of Contract No 98/034208 carried out, on 17 and 18 January 2006, at the offices of the association by a professional auditing firm. The Commission apologised for the delay in completing the report. The Commission noted that, as laid down in Section V which included the conclusions of the audit, it appeared that no irregularities had been committed by the association in the implementation of the grant agreement. Therefore, no Community funds appeared to have been improperly spent and therefore no request for reimbursement of any amount already paid was made.

The complainant's observations on the Commission's additional information

In his observations on the additional information submitted by the Commission, the complainant underlined that the Court of Auditors and OLAF had already taken a position on this matter,



which the Commission refused to implement. In his view, the Commission had not acted properly by failing to take action against the association.

THE DECISION

1 Commission's investigation of an alleged fraud

1.1 The complainant first states that the European Anti-Fraud Office ("OLAF") had informed him on 19 May 2004 that, as a result of his complaint of 1 March 2004 regarding fraudulent use of a grant (reference 98/034208) awarded by the Commission to a regional association from the region of Cantabria, in Spain ("the association"), it had recommended that the financial assistance should be reimbursed. He then goes on to allege that, notwithstanding OLAF's recommendation, the Commission decided, on 3 March 2005, to ignore this recommendation and to exonerate the association of any wrongdoing.

In the complainant's view, the Commission's decision conflicts with the findings reached by OLAF, following its prior investigation of the problem.

1.2 The Commission argues that, having double-checked the use of Community funds in this case and, taking account of the findings of an additional audit carried out by an independent auditor on 17 and 18 January 2006, it concluded that, in implementing the grant agreement, the association had committed no irregularities. Accordingly, the Commission takes the view that no Community funds were improperly spent by the association and therefore that no request for the reimbursement of any amount already paid should be made.

The Commission therefore considers that its services acted properly in reply to the complaint received against the association.

1.3 On the basis of the information made available in the course of the European Ombudsman's inquiry, it appears that, on 22 March 2001, in response to a complaint alleging the improper use of EU funds by the beneficiary of a Community grant, the Court of Auditors forwarded all materials to OLAF. Whereupon OLAF opened an inquiry on the use of those funds and unsuccessfully tried to contact the association's representative in order to arrange for an on-site inspection of all relevant documents.

The Ombudsman notes that OLAF appeared to base its conclusion that an infringement of the grant agreement may have occurred on the fact that its services did not receive a reply from the association to its request for an on-site inspection of all relevant documents.

1.4 The Ombudsman notes that, as set out in the Commission's letter to the association dated 18 May 2004, the decision to start a recovery procedure, foreseen in Article 7 of the grant agreement, resulted from the association's failure to provide OLAF with the financial information requested, in breach of Articles 5 and 6 of the grant agreement.

The Ombudsman also notes that, in reply to the Commission's request, the association stated that it had not received any communication from OLAF and that it had submitted all requested



evidence concerning its use of EU funds. Having reviewed that evidence, the Commission concluded, on 3 March 2005, that the conditions of the contract had been respected and therefore that no irregularities appeared to have taken place in the implementation of the grant agreement. Accordingly, the Commission took the view that there were no grounds to recover the sums already paid.

The Ombudsman points out that the financial information submitted by the association in support of its handling of the grant was annexed to the Commission's opinion, and was therefore forwarded to the complainant. The Ombudsman notes that he has received no information which might have called into question the content of the documents on the basis of which the Commission decided not to pursue a recovery action against the association.

1.5 The Ombudsman further notes that, in order to remove any possible doubts, the Commission requested an audit of the project from an independent auditor, who reviewed all the relevant documents. The independent auditor issued a final report exonerating the association of any financial or management wrongdoing. Section V of the report contained the conclusions of the audit, and included the following statements as regards the financial controls:

" Our audit was carried out in accordance with International Standards on Auditing and [i]ncluded such tests and controls as we considered necessary so as to achieve the audit objectives as set out in the Terms of Reference. Our sample resulted in testing of 100 % of the costs claimed for the Contract.

We planned and performed our audit in order to obtain reasonable assurance as to whether the expenses claimed by the Contractor were free of any material misstatement. The audit included examining evidence on a test basis in support of the expenditure claimed. We believe that our audit provides a reasonable basis for our opinion. (...)

[T]he expenditure claimed by [the association] properly reflects the eligible expenditure of the Project for the period, which was incurred by the Contractor in accordance with the contractual rules and obligations.

We recommend that the Commission should recover € Nil in respect of Contract No. 98 / Q3420S as calculated below. "

Section V of the report also included the following statements involving the management controls:

" [I]n our opinion the procedures and internal controls set up by [the association] provided for adequate financial management of the Project, operated satisfactorily and were in agreement with the legal/contractual basis of the Project. They also provided for the prevention and detection of errors, irregularities and fraud. "

The Ombudsman points out that the relevant sections of the above audit were sent by the Commission to the Ombudsman as additional information. This information was forwarded to



the complainant. The Ombudsman notes that he has received no information which might have called into question the conclusions reached in the above audit.

1.6 In light of the above findings, the Ombudsman takes the view that the Commission acted reasonably and in accordance with the applicable rules when deciding that it should not pursue a recovery action against the association for the EU funds received in the framework of a Community grant agreement. Further, the Ombudsman takes the view that the Commission adequately informed the complainant of the reasons for its position.

In these circumstances, the Ombudsman concludes 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) Decision No 2228/97/EC of the European Parliament and of the Council of 13 October 1997 establishing a Community action programme in the field of cultural heritage (the Raphael programme); OJ 1997 L 305, p. 31.

(2) "Muestra Internacional Audiovisual de Patrimonio Cultural" (MIPS).