

## **Draft recommendation to the European Commission in complaint 511/99/GG**

Recommendation

**Case 511/99/GG - Opened on 20/05/1999 - Recommendation on 26/10/2000 - Decision on 26/04/2001**

(Made in accordance with Article 3 (6) of the Statute of the Ombudsman. (1) )

### **SUMMARY**

The complaint in this case concerns the Commission's handling of an application for financial assistance for a development project in Chile. The application had been made by the complainant, a German association, in the interest of a third party, S.e.V. In a contract signed in June 1997, the Commission had agreed to provide € 70 443 towards the costs of the project. However, no payment was ever made. Only in December 1998 was the complainant informed in writing of the reason why the Commission had decided not to release these funds. According to the Commission, a body closely linked to the complainant, (the "Friends") still owed it money that it refused to pay back. The Commission therefore set off the amount it had agreed to provide for the said development project against these debts. The Ombudsman proposed, as a friendly solution, that the Commission should consider indemnifying the association S.e.V. for the damages that the latter had suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997. The Commission refuses to accept this proposal, relying on the alleged liability of the complainant for the debts of the Friends. The Ombudsman therefore makes a draft recommendation that the Commission should consider indemnifying the association S.e.V. for the damages that the latter had suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997.

### **THE COMPLAINT**

On 10 May 1999, a German foundation, lodged a complaint with the European Ombudsman concerning the way in which the European Commission had handled an application for funds for a development project in Chile. In 1995, Mrs G. approached, on behalf of S.e.V., a charitable association from Germany ("the association"), the European Commission with a view to obtaining co-funding for a development project in Chile (a centre for mentally handicapped children). In a hand-written note on that letter, the official in charge at the Commission pointed out that the association (which had been in existence for only a year) was not yet eligible for aid.



He suggested, however, that the association might obtain a grant via another NGO that fulfilled the relevant criteria. The complainant subsequently accepted to step in and to submit the application in its own name. This application was sent to the Commission in July 1996. In June 1997, a contract was concluded between the Commission and the complainant in which the Commission agreed to contribute € 70 443 towards the costs of the project. On the basis of this contract, the association began to implement its project. However, no payment was made by the Commission despite several reminders. The complainant subsequently turned to a Member of the European Parliament for help who wrote to the Commission. In its reply to the MEP of 17 June 1998, the Commission took the view that the relevant sum could not be released before the complainant had paid back various sums that the Commission had granted to the "Friends". After having learnt of the Commission's attitude, the complainant contacted the Commission on several occasions in order to obtain the release of the funds. However, in a letter dated 15 December 1998, the Commission informed the complainant that it would not make the requested payment. The Commission confirmed that it did not have any objections against the project as such. It took the view, however, that it had itself claims against the complainant which could be set off against the relevant sum. According to the Commission, these claims resulted from contracts for other development projects which it had entered into with the "Friends". The Commission considered that the complainant was liable for these debts of the "Friends" which appeared to be in liquidation or had already been wound up. The complainant claimed that the Commission should release the funds concerned. In its view, the Commission had, in June 1997, given a binding promise to release the relevant amount of money. It also claimed that the Commission had known that it was only acting as a trustee for the association. The complainant took the view that claims against a third party could not therefore be set off against the sum at stake. In this context, the complainant claimed that it was not the legal successor of the "Friends" which in its view were a separate legal entity. The complainant further claimed that the refusal of the Commission to pay out the amount agreed on had brought the association to the brink of bankruptcy and, as a consequence, threatened the continuation of the project in Chile.

## THE INQUIRY

**The Commission's opinion** In its opinion, the Commission made the following comments: The Commission had claims for repayment amounting to a total of € 210 000 against the "Friends" due to the fact that two projects had not been properly accounted for by the latter. Both projects had originally been submitted to the Commission by the complainant itself acting on its own behalf, on the understanding however, that the yet to be established "Friends" would then be responsible for the implementation of these projects. Accordingly, the grant agreements had later been concluded with the "Friends", the same person acting for both the complainant and the "Friends". Recovery orders for the sums to be retrieved which had been issued against the "Friends" in 1995 had been unsuccessful. It appeared that the "Friends" did not have any assets. The complainant itself refused to accept responsibility for the financial commitments of the "Friends" despite the fact that in accordance with its statutes, the proceeds of the activities of the "Friends" had been regularly transferred to the complainant. The complainant had established the "Friends" in order to assist it in its activities. Staff and members of both were interlinked, the "Friends" using the same business address as the complainant, including telephone number and logo. **The complainant's observations** In its observations, the complainant maintained its complaint. It also submitted two new claims which may be



summarised as follows: (1) The Commission should not have made a grant to the complainant (which was only acting for S. e.V.) in 1997 if it believed that it had a claim for the repayment of certain sums against the complainant. (2) The Commission should not have waited for 18 months before informing the complainant of the reasons for not releasing the funds which it had agreed to pay to the complainant. The complainant argued that it was the association which was faced with bankruptcy that now had to suffer for the claims which the Commission alleged to have against the complainant. It claimed that the Commission had knowingly let the association go towards its doom.

## **FURTHER INQUIRIES**

Having received the complainant's observations on the opinion of the Commission, the Ombudsman considered that it was appropriate to examine the new allegations put forward by the complainant in the context of the present investigation. The Ombudsman therefore wrote to the Commission on 3 December 1999 in order to ask the latter to submit an opinion on the complainant's new allegations. In its opinion of 3 February 2000, the Commission made the following comments: The Commission did not know the Verein S. e.V. and had neither negotiated the project with nor awarded the grant to it. All negotiations had been conducted with the complainant. In its relations with the complainant, the Commission had been guided by the principle that, by itself, the fact that the parties were in dispute over one project did not exclude continuing the ongoing business relationship in other cases, as long as the Commission could assume to deal with an honest business partner, with whom an acceptable understanding could be reached. The Commission had only hardened its stand once it had become clear that this trust had been misplaced in the case of the complainant. The Commission had refused from the start, in numerous contacts, to release the Chile grant, exactly because there had been an obvious link with the other projects. In fact, the parties had been discussing the litigious accounts since the fall of 1997. A joint meeting had been held on 1 July 1998. A subsequent request for information addressed to the complainant had been answered unsatisfactorily in November 1998. The Commission regretted that the Verein S. e.V. had fallen prey to the business morale of the complainant. However, the Commission had neither established nor favoured the association's contacts with the complainant. In its observations on this opinion, the complainant claimed that the Commission had had knowledge of the fact that the application had been lodged in the interest of the association. The complainant continued to believe that the Commission should either not have entered into the relevant obligation or release the funds since the claims against the "Friends" had nothing to do with the project concerned and had also been known when the Commission had agreed to make the grant for the project in Chile. It also insisted that it had only been 18 months after the contract had been signed that the Commission had explained its position to the complainant in writing.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

**The Ombudsman's analysis of the issues in dispute** After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims. The Ombudsman acknowledged that the complainant's first claim according to which the Commission should have released the money it had agreed to provide raised the difficult issue as to whether the complainant was liable for the



debts of the "Friends". Since this issue ultimately had to be determined by a court that had jurisdiction in the matter, the Ombudsman came to the provisional conclusion that no maladministration appeared to exist in that regard. However, the Ombudsman took a different view with regard to the second allegation of the complainant according to which the Commission should not have entered into the relevant contract if it believed that it had a claim for the repayment of certain sums against the complainant. The Ombudsman noted that all the facts on which the Commission relied in order to justify its position according to which the complainant was liable to pay the debts that the "Friends" had incurred against the Commission appeared to have been known at the time when the contract was signed in June 1997. The Commission also knew at the time that the complainant refused to accept liability for these debts. Finally, the Commission knew or must have known that the financial assistance promised in the contract was to benefit not the complainant, but S. e.V. and its project in Chile. The Ombudsman's provisional conclusion, therefore, was that in view of the circumstances, the decision of the Commission to enter into the contract could be an instance of maladministration. With regard to the complainant's claim that the Commission should not have waited for 18 months before informing it of the reasons for not releasing the funds which it had agreed to pay, the Ombudsman noted that it appeared that the complainant was only informed in writing of these reasons in December 1998. The Ombudsman's provisional conclusion, therefore, was that the fact that the Commission only explained the reasons why it did not fulfil an obligation it had taken upon itself nearly a year (or even more) after the relevant contract had been concluded could be a further instance of maladministration. **The possibility of a friendly solution** On 8 June 2000, S. e.V. sent a letter to the Ombudsman in which it tried to describe and quantify the damage that it had suffered due to the Commission's behaviour. On 5 July 2000, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman invited the Commission to consider indemnifying the association S. e.V. for the damages that the latter has suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997. In its reply of 3 October 2000, the Commission took the view that S. e.V. had turned to the complainant as an intermediary on its own initiative, and without any instigation on the part of the Commission. The Commission claimed that at the time of the signature of the contract, it had still assumed that it would come to an honourable understanding with the complainant and had learnt only one year later that it had fallen prey to the complainant's dishonest business practices. According to the Commission, the real problem stemmed from the fact that the complainant had not transferred to S. e.V. "the funds received under the compensation". The Commission added that it could not accept to favour through taxpayer's money irregularities of the complainant and even increase the damage that it had suffered from the latter. In the view of the Commission, the result of the Ombudsman's proposal "to fully indemnify" S. e.V. would oblige the Commission to pay the subsidy a second time. This the Commission considered to be unacceptable.

## THE DECISION

**1 Refusal to release the funds** 1.1 The complainant claims that the Commission ought to release the sum of € 70 443 it had agreed to provide, in a contract concluded in June 1997, for a development project in Chile. 1.2 The Commission replies that it was entitled to withhold this payment since it had claims amounting to € 210 000 against the "Friends" for which the



complainant was liable and against which the amount claimed by the complainant could be set off. 1.3 In order to support its view that the complainant may be held liable for the debts of the "Friends", the Commission refers to several factors indicating a close relationship between the complainant and the "Friends", for example the fact that staff and members of both were interlinked and that the "Friends" used the same business address as the complainant, including telephone number and logo. 1.4 The Ombudsman is not in a position to determine whether the complainant should indeed be regarded as liable for the claims of the Commission against the "Friends". This issue can ultimately only be decided by a court that has jurisdiction in this matter. However, the arguments put forward by the Commission do not appear to be without merit at first sight. No instance of maladministration can thus be found with regard to this aspect of the complaint. **2 Entering into contract despite the existence of claims against the complainant** 2.1 The complainant claims that the Commission should not have entered into the relevant contract with the complainant (which was only acting for S. e.V.) in 1997 if it believed that it had a claim for the repayment of certain sums against the complainant. 2.2 The Commission replies that it did not know the Verein S. e.V. and had neither negotiated the project with nor awarded the grant to it. All negotiations had been conducted with the complainant. In its relations with the complainant, the Commission had been guided by the principle that, by itself, the fact that the parties were in dispute over one project did not exclude continuing the ongoing business relationship in other cases, as long as the Commission could assume to deal with an honest business partner, with whom an acceptable understanding could be reached. The Commission had only hardened its stand once it had become clear that this trust had been misplaced in the case of the complainant. 2.3 The Ombudsman notes that all the facts on which the Commission relied in order to justify its position according to which the complainant was liable to pay the debts that the "Friends" had incurred against the Commission appear to have been known at the time when the contract was signed in June 1997. 2.4 In the view of the Ombudsman, the Commission could not, at the time when the relevant contract was concluded in June 1997, be under any doubt that the complainant did not accept the Commission's view that it was liable for the debts of the "Friends". The Commission itself pointed out that recovery orders against the "Friends" had been issued already in October 1995 (i.e. long before the contract was concluded) but that it had not been possible to retrieve the amounts concerned. In addition to that, the complainant had clarified, in a letter to the Commission dated 28 February 1997, that the application for a grant had been submitted by itself and not by the "Friends". In this letter, the complainant had also stressed that the "Friends" were in the process of being wound up and were "completely separate" from the complainant. It had furthermore urged the Commission clearly to distinguish between these two bodies. The Commission could thus hardly assume that the complainant would be ready to cover the debts incurred by the "Friends". 2.5 Even more importantly, the documents submitted by the complainant show that the Commission, contrary to what it claimed in the present proceedings, knew or must have known that the funds should ultimately benefit not the complainant but the association S. e.V. and its work. The latter had written to the Commission on 15 September 1995 in order to inquire whether it could submit an application for a grant for the project concerned. The Commission had replied that this was not possible but that the association might turn to another NGO that could submit the application. The complainant had then agreed to step in and submit the application in its name. The documents submitted by the complainant show that this had been discussed with the Commission. Indeed, the name of the association is



mentioned in both the application itself and the short cover letter sent by the complainant to the Commission on 17 July 1996. 2.6 The Ombudsman considers that the Commission thus knew or must have known that any decision on its part not to release the funds it had agreed to provide would affect the interests of S. e.V. The Commission also knew or must have known that the complainant was not ready to pay the debts of the "Friends". The Commission should therefore not have entered into the relevant contract if it did not have the intention of releasing the funds concerned. Besides, the same conclusion would have to be drawn if the Commission had entered into the contract without ascertaining the legal position beforehand. The Commission should in any event have avoided that its dispute with the complainant over the debts of the "Friends" could cause damage to the association and the project in Chile against which the Commission does not seem to have had any objections. 2.7 The Ombudsman concludes from these considerations that in view of the circumstances the decision of the Commission to enter into the contract was not compatible with good administrative practice and thus constituted an instance of maladministration. In his proposal for a friendly solution, the Ombudsman suggested that the Commission should consider indemnifying S. e.V. for the damage it had suffered. The Commission rejected this proposal, arguing inter alia that this would oblige it to pay the full subsidy a second time. The Ombudsman would like to point out that this interpretation is erroneous, since he only suggested that S. e.V. be compensated for the damage it had actually suffered. Given that in view of the position adopted by the Commission in the present case it does not appear possible to achieve a friendly solution, the Ombudsman considers it appropriate to make the draft recommendation set out below. **3 Delay in informing the complainant** 3.1 The complainant claims that the Commission should not have waited for 18 months before informing it of the reasons for not releasing the funds which it had agreed to pay. 3.2 The Commission replies that it refused from the start, in numerous contacts, to release the Chile grant, and that the parties had been discussing the litigious accounts since the fall of 1997. 3.3 The Ombudsman notes that according to the evidence submitted to him it was only in its letter of 17 June 1998 to the MEP that the Commission first explained in writing that it did not intend to release the grant before the debts of the "Friends" had been paid. Moreover, the first document in which the complainant itself was informed of the Commission's position appeared to be the letter of 15 December 1998. The Commission has produced no evidence that would have shown that the complainant had been informed of this position prior to those dates. In the Ombudsman's view, it cannot be considered to be good administrative practice for the Commission to explain the reasons why it did not fulfil an obligation it had taken upon itself nearly a year (or even more) after the relevant contract had been concluded. This fact therefore constitutes a further instance of maladministration. **4 Conclusion** The Ombudsman therefore considers that the Commission's approach in the present case gave rise to two instances of maladministration. Since a friendly solution is not possible, the Ombudsman makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman: **The draft recommendation** The European Commission should consider indemnifying the association S. e.V. for the damages that the latter has suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997. The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion before 31 January 2001. The



detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented. Strasbourg, 26 October 2000 Jacob SÖDERMAN

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/15.