

Decision of the European Ombudsman closing his inquiry into complaint 177/2008/RT against the European Commission

Decision

Case 177/2008/RT - Opened on 29/01/2008 - Decision on 17/11/2009

THE BACKGROUND TO THE COMPLAINT

1. In December 2005, the complainant, *Transparency International Latvia -Delna* , signed a grant agreement with the European Commission concerning the implementation of a project entitled " *Remember, know and vote smart! Knowledge based vote: Education and awareness-raising campaign for the Parliament elections 2006* " ('the Project'). The value of the grant was EUR 146 290.40. The Commission pre-financed the Project by making an advanced partial payment of the grant in the amount of EUR 102 403.28.
2. The Project ended on 31 December 2006. On 16 March 2007, the complainant submitted to the Commission the final report on the implementation of the Project ('the Report') and requested payment of the remainder of the grant.
3. On 23 July 2007, by registered letter, the Commission requested clarification regarding the complainant's Report.
4. On 2 August 2007, the complainant sent the required information.
5. On 22 August 2007, the Commission acknowledged receipt of the above information. The complainant sent further clarifications on 30 August 2007.
6. During the period September to December 2007, the complainant telephoned and sent e-mails to the Commission requesting information about the status of its file.
7. On 16 and 23 October 2007, the Commission sent the complainant two short e-mails, informing it about the status of its file.
8. On 12 December 2007, the complainant sent a letter to the Commission, stating that " *since the Commission has not sent any official written reply within 45 working days from the date*



specified by the agreement, [it]considered that the report was approved on 24 October 2007. However, the final payment of EUR33 671.28 has not been received. " The complainant also pointed out that it had advanced the resources for the Project but that, " as an NGO, it was not able to advance such an amount of money to the Commission indefinitely ".

9. The Commission did not reply to that letter. On 17 March 2008, it informed the complainant as follows: " *The Commission has completed its analysis of your final financial statement, and the request for payment of the balance based upon the supporting documents [the complainant] provided. This analysis has established a balance in favour of the Commission ... "*

10. Subsequently, the Commission launched a recovery procedure for the amount of EUR 13 441.60 from the sum previously provided as pre-financing.

THE SUBJECT MATTER OF THE INQUIRY

11. In its original complaint to the Ombudsman, the complainant submitted the following allegations and claim:

(i) The Commission failed to explain its delay in making the "balance payment" for the Project.

(ii) The Commission failed to answer its [the complainant's] letter dated 12 December 2007.

(iii) The Commission should pay it the amount due, that is, EUR 33 671.28.

12. In its further observations, the complainant submitted a new allegation and a new claim:

(iv) The Commission failed to fulfil its obligations to strengthen civil society in the Member States and, by possibly having to pay interest for late payment, failed to respect the principle of sound financial management.

(v) The complainant claimed that " upon receipt of the payment, it will request late payment interest in accordance with the provisions of the grant agreement ".

13. Given that the Ombudsman can only deal with allegations or claims if complainants have made prior administrative approaches to the institutions in relation to them, he cannot deal with the complainant's new allegation (iv) and new claim (v). The complainant could submit a new complaint in this respect, after making the appropriate prior administrative approaches to the Commission.

THE INQUIRY

14. The complaint was forwarded to the Commission, with a request for an opinion on its content to be submitted by 30 April 2008. On 26 June 2009, the Commission sent its opinion,



which was forwarded to the complainant, with an invitation to submit observations. The complainant sent its observations on 8 July 2008.

15. On 17 September 2008, in accordance with Article 3(5) of his Statute, the Ombudsman made a friendly solution proposal to the Commission. On 24 October 2008, the Commission requested an extension of time to send its reply, which was granted, giving it until 30 November 2008 to reply. The Commission's reply was forwarded to the complainant with an invitation to submit observations by 31 January 2009.

16. The complainant made several requests for extensions of the deadline within which it could submit its observations, namely, on 26 January, 26 March, 1st April and 1st July 2009, respectively. In its last e-mail of 1 July 2009, the complainant stated that he would contact the Ombudsman's services " *within one week or so* " concerning the submission of its observations. To date, the complainant has not sent its observations. On 8 September and 28 September 2009, the Ombudsman's services endeavoured to contact the complainant by e-mail and by telephone, in order to verify whether it still wished to submit observations on the Commission's reply to the friendly solution. This contact proved to be impossible.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. The Commission's alleged failure to explain its delay in making payment for the balance due for the Project and the related claim

Arguments presented to the Ombudsman

17. The complainant alleged that the Commission failed to explain its delay in making the payment due for the balance of the Project. The complainant claimed that the Commission should pay it the amount due, namely, EUR 33 671.28.

18. The complainant pointed out that, on 30 August 2007, it sent the Commission the required clarification concerning the Report. It further pointed out that, according to the relevant provisions of the grant agreement, if the Commission did not react to the complainant's clarification within 45 days from the date of that clarification, by asking for more clarification, or by informing it that the Report was rejected, the Report would be deemed to have been accepted by the Commission. That being the case, the Commission was to make the relevant payment on the balance due within the ensuing 45 days. In the complainant's view, the Commission did not follow any of the above procedure and, therefore, its failure to pay the complainant the balance within the period of 45 days, starting from 30 August 2007, constituted a delay.

19. Moreover, in its observations, the complainant emphasised that, despite its numerous requests for information between August 2007 and March 2008, the Commission did not inform



it officially about how the final Report assessment was progressing and whether its clarifications had been accepted for the purposes of the payment of the balance due. On the contrary, the complainant received informal e-mails from the Commission, dated 16 October and 23 October 2007, the wording of which led it to believe that the payment would be made shortly.

20. However, it was not until March 2008, that is, more than 6 months after the complainant submitted its clarifications regarding its Report, that the Commission officially informed it that the payment on the balance due could not be made and that, because some irregularities had been discovered in its Report, and in the execution of the Project, the Commission wanted to recover the monies which had been prepaid to the complainant.

21. In its opinion, the Commission stated that the initial examination of the file revealed that the complainant did not submit the supporting information for the Report in an appropriate format, and that some of the documents did not meet the standard required. Moreover, the Commission stated that the complainant made substantial changes to the Project, without informing it. The Commission, therefore, decided that the Project should be classified "*as high risk and it should be subject to a 100% control*". Subsequently, on 19 October 2007, the complainant's file was submitted for financial control, which ended on 10 December 2007.

22. In December 2007, during a telephone conversation with the complainant, the Programme Manager explained that "*work on the file was progressing but that no guarantee could be provided that the final analysis would be completed before the end of December 2007*".

23. The Commission concluded that during the period September to December 2007, "*the complainant [was] kept informed at regular intervals about the situation*" and that "*it [that is, the Commission] had repeatedly requested clarifications, but it did not receive full explanation and justification [from the complainant]*".

The Ombudsman's preliminary assessment leading to a friendly solution proposal

24. The Ombudsman first noted that Article II.15.4 of the grant agreement states that:

"... *On receipt of ... [the documents accompanying the request for payment] , the Commission shall have the period specified in Article I.4 [1] [45 days] in order to:*

-approve the final report on implementation of the action;

-ask the beneficiary for supporting documents or any additional information it deems necessary to allow the approval of the report;

-reject the report and ask for the submission of a new report. "

25. In a letter dated 23 July 2007, the Commission made its first request to the complainant for clarification of the Report. The request read as follows:



" *This request means that the time limit for payment for you is being suspended from the postmark date of this letter. The time limit will continue to run from the date on which we receive the information requested .* " (emphasis added)

26. The Ombudsman observed that the complainant submitted the required clarification. On 22 August 2007, by e-mail, the Commission asked for more clarification. Its e-mail read as follows:

" *Following your clarifications I am now going through the documents again. For January 2006, the amounts declared in the final report do not correspond with figures as in Attachment 8. I add herewith a scanned version of the documents. Could you please help me to sort this out?* "

27. The Ombudsman further observed that, on 30 August 2007, the complainant sent the requested clarification. On the same day, the Commission replied by e-mail as follows:

" *Thank you for this information, this helps me to understand the figures. I am looking forward to finalizing the calculations and draft [ing] the pre-information letter for payment.* "

28. In light of the above, and on the basis of the above-quoted Article II. 15.4 of the grant agreement, and the Commission's letter dated 23 July 2007, which clearly referred to the date on which the Commission received the information requested (see underlined text in point 25 above), the Ombudsman understands that the time limit of 45 days for the Commission to take the action referred to in that Article, namely, to ask the complainant for further clarification, or reject or approve the Report in writing, started to run on 30 August 2007. It thus expired on 24 October 2007.

29. In this respect, the Ombudsman noted a divergence of opinions between the complainant and the Commission as to whether or not, between 30 August and 24 October 2007, the Commission requested further clarification from the complainant. However, neither the complainant, nor the Commission provided the Ombudsman with written evidence of any such request. The Commission's e-mails, sent to the complainant on 16 October and 23 October 2007, copies of which were provided by the complainant, did not contain such requests.

The e-mail dated 16 October 2007, read as follows:

" *The file is undergoing at this moment the usual internal checks. You will be kept informed by e-mail and by normal mail as soon as this process has been finalised ...* ". (emphasis added)

The e-mail dated 23 October 2007, read as follows:

"*The proposed payment has been initiated in the Commission financial circuit. I am waiting for feedback from the financial verifiers before we can proceed to payment.* "

30. Moreover, in the Ombudsman's view, the Commission's e-mails quoted in paragraph 29 could certainly not be understood as informing the complainant that the Report was rejected, or



that it was required to provide further information.

31. In addition, the e-mail dated 16 October 2007, in which the Commission stated that the complainant's file was undergoing no more than "the usual" internal checks, could not reasonably be interpreted as giving rise to a further suspension of the period of 45 days, in accordance with Article II. 16.2 of the grant agreement [2] .

32. The third paragraph of Article II.16.2 provides that the Commission shall inform the beneficiary of any such suspension by registered letter, requiring a signature upon receipt or equivalent. An informal e-mail, such as the one dated 16 October 2007, cannot reasonably be considered to be the equivalent of a registered letter.

33. It would, therefore, appear that the Commission did not inform the complainant in writing that its Report was approved or rejected. Nor did it ask the complainant for more information within the 45 days of the contractual deadline, namely, by 24 October 2007. Furthermore, that deadline was not suspended.

34. As a result, it would appear that, on 24 October 2007, the complainant's final Report could be deemed to have been approved in accordance with the relevant provision of Article II. 15.4, which stipulates that:

"... Failing a written reply from the Commission within the time limit for scrutiny indicated above [45 days] , the report shall be deemed to have been approved. "

35. Article 1.4.3 of the grant agreement states that "[a] payment representing the balance of the grant determined in accordance with Article 11.17 shall be made to the beneficiary within 45 days following approval by the Commission of the technical implementation report accompanying the request for payment of the balance ". On the basis of this provision, it was not unreasonable for the complainant to expect the balance to be paid by the Commission within the period of the 45 days following 24 October 2007, namely, the date when the Report could be deemed to have been approved.

36. However, the Commission failed to inform the complainant by 24 October 2007 that its Report had been rejected, or that more clarification was needed. In so doing, it failed to prevent the complainant from considering that its Report could be deemed to have been approved. In addition, the Commission did not, after having received the complainant's last clarification on 30 August 2007, suspend the payment again, as it did on 23 July 2007. On the contrary, on 17 March 2008, it informed the complainant that the recovery would start.

37. In light of the above, the Ombudsman's preliminary finding was that the action taken by the Commission could be an instance of maladministration. In accordance with his Statute [3] , he, therefore, made a proposal for a friendly solution to the institution.

38. In this proposal, the Ombudsman agreed with the complainant's view, as stated in its letter to the Commission dated 12 December 2007, which regrettably remained unanswered, that it



was not unreasonable for a grant recipient to advance some monies for the execution of a project, in the belief that its Report would be approved and, that payment would, therefore, be effected.

39. The Ombudsman understood that, after receiving the pre-financing payment from the Commission, the complainant had to advance some funds in order to complete the Project. The complainant did not, however, specify in its complaint the exact figure of the amount advanced, nor did it submit proof of possible losses suffered as a result of the Commission's failure to inform it, before March 2008, that the final payment would not be made.

40. The Ombudsman noted, however, that the complainant's claim concerns payment of the balance of the total amount due, that is EUR 33 671.28. The Ombudsman pointed out in this respect that, (i) according to the relevant provision of Article II. 15.4 of the grant agreement "*approval of the report accompanying the request for payment shall not imply recognition of [its] regularity or of the authenticity, completeness and correctness of the declarations and information [it] contain [s]*", and, (ii) according to Article II. 17.5 of the grant agreement, "*if the action is not implemented or is implemented poorly, partially or late, the Commission may reduce the grant initially provided for in line with the actual implementation of the action on the terms laid down in this agreement.* "

41. The Ombudsman took the view, therefore, that it would be disproportionate, and against the principle of sound financial management, to ask the Commission, in light of his above preliminary finding of maladministration, to effect payment of the balance of the total amount due, if the complainant had committed irregularities in the execution of the Project.

42. In light of his preliminary conclusion that there could be an instance of maladministration in the present case, and in view of all the pertinent circumstances, the Ombudsman considered that the Commission and the complainant could find an appropriate solution to the complainant's claim by entering into direct contact with one another. Accordingly, he made a proposal for a friendly solution as follows:

The Commission could enter into direct contact with the complainant in order to find a solution to its claim, in light of the Ombudsman's preliminary finding of maladministration.

The arguments presented to the Ombudsman after his friendly solution proposal

43. The Commission rejected the Ombudsman's proposal for a friendly solution. In its reply, the Commission reiterated that the delay in communication with the complainant was partly the latter's fault, since it had been unable to provide all the necessary supporting financial documents in a timely and orderly manner.

44. The Commission also pointed out that, after a careful analysis of all the documents, it concluded that the complainant did not carry out all the measures stipulated in the agreement with the European Commission. The Commission, therefore, issued a recovery order for the sum of EUR 13 441.60, instead of making the final payment of EUR 33 671.28. The



Commission emphasised that it would not be appropriate to make a final payment, since irregularities were discovered in the manner in which the complainant executed the Project.

The Ombudsman's assessment after his friendly solution proposal

45. The Ombudsman notes that, after the Commission rejected his proposal for a friendly solution, the complainant informed him, by e-mails dated 26 January and 1st April 2009, respectively, that " *it entered into discussions/negotiations with the European Commission* " and that it was " *in the process of exploring the possibilities of convincing the European Commission to reconsider its initial position and to agree to negotiations on a friendly solution on in [its] complaint case* ". It confirmed this in the e-mail dated 14 October 2009.

46. The negotiations to which the complainant referred have not yet reached a conclusion. The Ombudsman assumes that this is why the complainant chose not to submit observations on the Commission's reply to his friendly solution. Nevertheless, it appears that, following the Ombudsman's proposal for a friendly solution, both parties accepted his suggestion and entered into direct contact in order to find an appropriate solution to the complainant's claim.

48. In light of the above, the Ombudsman takes the view that his intervention is no longer necessary. He, therefore, closes this aspect of the case, since no further inquiries are justified. He trusts that there will be a positive outcome to the parties' negotiations. The Ombudsman points out that the complainant can submit a new complaint, if it is not satisfied with the outcome of its negotiations with the Commission.

B. The Commission's alleged failure to reply to the complainant's letter dated 12 December 2007

Arguments presented to the Ombudsman

49. The complainant alleged that the Commission failed to reply to its letter dated 12 December 2007.

50. The Commission acknowledged and apologised for not replying to the complainant's letter dated 12 December 2007, but explained that " *the Commission did not consider it appropriate to send a holding reply because [at that time] a recovery was in preparation, which was subsequently notified [sic] to the complainant on 17 March 2008* ". (emphasis added)

The Ombudsman's assessment

51. The Ombudsman points out that, in accordance with the European Code of Good Administrative Behaviour, the holding reply should be sent within two weeks.

52. The Commission's Code of Good Administrative Behaviour stipulates that a reply to a letter addressed to the Commission shall be sent by the relevant Commission department within 15



working days from the date of receipt of the letter. If a reply cannot be sent within that deadline, a holding reply should be sent.

53. The Ombudsman cannot, therefore, accept the Commission's argument that, since it was preparing a recovery order, it did not consider necessary to send a holding letter for three months.

54. However, taking into account of the fact that the Commission apologised for not having sent such a holding reply, and of the subject matter of the pertinent unanswered letter, the Ombudsman considers that no further inquiries into the matter are justified.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

No further inquiries are justified.

The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 17 November 2009

[1] According to Article 1.4.3 of the grant agreement, " *the Commission shall have 45 days to approve or reject the final technical implementation report or to request additional supporting documents or information under the procedure laid down in Article II. 15.4...* ".

[2] Article II. 16.2 of the grant agreement reads as follows: " *The Commission may suspend the period for payment laid down in Article 1.4 at any time by notifying the beneficiary that his request for payment cannot be met, either because it does not comply with the provisions of the agreement, or because the appropriate supporting documents have not been produced or because there is a suspicion that some the expenses in the financial statement are not eligible and additional checks are being conducted.*

The Commission may also suspend its payment at any time if the beneficiary is found or presumed to have infringed the provisions of the grant agreement, in particular in wake of the audits and checks provided for in Article II. 19.

The Commission shall inform the beneficiary of any such suspension by registered letter with advice of delivery or equivalent.



Suspension shall take effect on the date when the notice is sent by the Commission. The remaining period shall start run again from the date when a properly constituted request for payment is registered, when the supporting documents requested are received, or at the end of the suspension period as notified by the Commission. "

[3] Article 3(5) of the Statute of the Ombudsman provides that " *as far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complainant* " .