

Draft recommendation to the European Commission in complaint 1613/2000/GG

Recommendation

Case 1613/2000/GG - Opened on 20/12/2000 - Recommendation on 20/12/2000 - Decision on 30/11/2001

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

SUMMARY

The complaint in this case concerns the way in which the European Commission has handled six applications for financial assistance with regard to projects in Africa made by Internationaler Hilfsfond e.V., a non-governmental organisation (NGO) from Germany which is supporting refugees, war victims and handicapped persons. The first three of these applications were submitted in 1993, the fourth in 1995, the fifth in 1996 and the sixth in 1997. The Commission rejected the first four applications, three of them in 1993 and the fourth in 1995. The remaining applications are still pending. The complainant claimed that the Commission (1) had failed to award the applications a fair and objective consideration and (2) had failed to decide on the last two applications within a reasonable time.

The Ombudsman came to the conclusion that the Commission appeared to have acted within the limits of its authority when it rejected the first four applications.

However, the Ombudsman took the view that the Commission's failure to decide on the last two applications lodged in 1996 and 1997 constituted an excessive delay. The Ombudsman had already come to this conclusion in his decision of 11 July 2000 on the first complaint lodged by the complainant in this matter (338/98/VK) and made a critical remark to that effect to the Commission.

More than a year later, the Commission has still not decided on these applications.

The Ombudsman therefore makes a draft recommendation that the Commission should decide on these applications as quickly as possible and at the latest by 31 October 2001.

THE COMPLAINT

Background



The complainant is a non-governmental organisation (NGO) from Germany which is supporting refugees, war victims and handicapped persons. Between 1993 and 1997, the complainant submitted six applications to the European Commission for financial assistance with regard to projects in Africa. The Commission rejected the first four applications, three of them in 1993 and the fourth in 1995. The fifth application that was made in December 1996 and the sixth one made in September 1997 are still pending before the Commission.

The reasons for rejecting the first four applications were set out in a letter addressed to the complainant by the Commission on 29 July 1996. In this letter, the Commission took the view that the complainant had failed to meet the following criteria: (1) All decisions relating to the relevant projects had to be taken at the seat of the body concerned; (2) the majority of the financial resources had to be of European origin and (3) when assessing the eligibility of an NGO, the following factors could be considered: Its ability to mobilise private solidarity and private funds within the EU for its projects, the nature and extent of its links to other NGOs and its administrative capacity. The Commission claimed that it had not been able clearly to distinguish the relevant fields of action, sources of financing and competencies of the complainant and two other NGOs. The Commission also argued that the operating costs of the complainant presented an unacceptable ratio as compared to the amounts passed on to the beneficiaries.

Complaint 338/98/VK

In March 1998, the complainant submitted a complaint to the Ombudsman (complaint 338/98) who opened an inquiry.

The complainant had made the following allegations:

- The material considered in the evaluation of the complainant's applications : The Commission had not assessed the complainant's applications properly since it has based itself exclusively on an opinion provided by DZI
- The right to be heard and access to the file : The Commission had not given the complainant full access to its file and had not heard its views on the question of its eligibility for funding
- The reasoning given to the complainant for the rejection of its applications : The Commission had failed to provide clear and consistent reasoning for the rejection of four of the projects
- Undue delay in dealing with the pending applications : The fact that the Commission had failed to decide on the last two applications constituted an excessive delay

On 11 July 2000, the Ombudsman decided on the complaint. The Ombudsman rejected allegation (1) since in his view the Commission had had "written and oral contact with several different sources other than the DZI". With regard to allegation (2), the Ombudsman argued that the complainant had failed to make an application for access to documents in accordance with Commission Decision 94/90 on access to Commission documents (2) . The Ombudsman went on to conclude that there had been no violation of the right to be heard either. As regards allegation (3), the Ombudsman took the view that the Commission had provided the complainant with clear reasoning only three years after the first application had been made. A critical remark was made in that context. Finally, under (4), the Ombudsman considered the delay to be excessive. A critical remark was made in this regard as well.

Complaint 1160/2000/GG



The complainant's lawyer wrote to the Ombudsman on 25 July 2000 in order to express the view that the Ombudsman should have found that there was maladministration in so far as the first two allegations were concerned. He also argued that with regard to the two applications that were still pending, the Ombudsman should have made an effort in order to achieve a friendly settlement.

The letter of 25 July 2000 was registered as a new complaint (complaint 1160/2000/GG). The Ombudsman carefully examined the arguments put forward in the said letter. On 19 October 2000, he informed the complainant that in so far as the issue of access to the file and the right to be heard were concerned, he had decided to open a new inquiry into these issues. This case is still pending.

At the same time, the Ombudsman informed the complainant that there were no grounds to open a new inquiry in so far as allegations (1), (3) and (4) were concerned. However, in so far as allegation (4) was concerned, the complainant was entitled to lodge a new complaint if the Commission should, notwithstanding the Ombudsman's critical remark, fail to complete its examination of the pending applications within a reasonable period.

Complaint 1613/2000/GG

On 5 December 2000, the complainant lodged a new complaint (1613/2000/GG) in which he made the following allegations:

(1) The Commission had failed to award the complainant's applications a fair and objective consideration

(2) The Commission had failed to decide on the last two applications submitted in 1996 and 1997 within a reasonable period

The complainant argued that the Commission had based its decision to reject the first four applications not on objective facts, but on the subjective opinions of organisations that had no legal mandate for their activities, especially the Deutsches Zentralinstitut für soziale Fragen (DZI). According to the complainant, the Commission had at the same time failed to take account of official sources (e.g. the German tax authorities) and of documents (accounting data, statements of KPMG, the complainant's accountants) submitted to it by the complainant.

THE INQUIRY

The complaint was sent to the Commission for its comments.

The opinion of the Commission

In its opinion, the Commission made the following comments:

Fair and objective consideration of the complainant's applications

When dealing with applications for cofinancing for aid and development projects, the Commission exercises its discretionary power in the selection of projects according to the budgetary resources available. In this context, the Commission takes its decisions strictly in accordance with the rules applying. It satisfies itself that the NGO and the project satisfy the



eligibility criteria set out in the 'General Conditions for the cofinancing of projects undertaken in developing countries by non-governmental organisations' and the Financial Regulation applicable to the general budget of the European Communities.

The Commission considered that the complainant's applications did not meet two main criteria, namely (1) the requirement for the NGO to be independent and autonomous and (2) the requirement for sound financial management (reliable and non-fraudulent management).

As regards the first criterion, NGOs had to be autonomous and non-profit making and had to have their headquarters in the EU. The headquarters had to be the effective centre for all decisions relating to the cofinanced operations. The majority of the funds had to originate in the EU. In the light of the information obtained by the Commission, it was apparent that the complainant had various functional and financial links with other organisations. The complainant had never been able to prove that it had become independent of its parent organisation in the USA, "Interaid International". This lack of clarity was aggravated by the fact that the complainant's manager, Dr. Koch, was at the same time acting for another German NGO, "Welthilfe e.V.", and was active in private business (as a consultant). The confused situation as regards the intermeshing of for-profit and non-profit interests in the relations between these persons and bodies did not allow the precise role of the complainant and the source of its funds to be determined.

As regards the second criterion, the relevant rules required good administrative and financial management capacity. This included the ability to ensure reliable and non-fraudulent management in the execution of projects. In 1993, when the information on the complainant was scrutinised by the Commission, its administrative management capacity was found to be inadequate. This was highlighted by the German NGO platform which had rejected a membership application by the complainant on the grounds that its operating costs were excessive, amounting to 37.7 % of its total revenues. Furthermore, the complainant, a medium-sized NGO located near Frankfurt, was financing a branch office in one of the most expensive areas of Brussels at a time when the budget for development activities in the developing countries was only ECU 1.5 million. Such a ratio was incompatible with the stated principles of sound financial management.

The principle of sound financial management presupposed an atmosphere of reciprocal trust between the Commission and the NGO. Such a relationship could not exist when the NGO sought to establish its eligibility by fraudulent means. In this case, the complainant had relied – improperly, seeking to deceive the Commission as to the nature and quality of its organisation – on the label of the DZI (a German organisation responsible for awarding a quality label to organisations which after detailed scrutiny were judged fit to receive it). However, a letter from DZI of 1 September 1993 in which the DZI declared categorically that there was no question of granting a quality label to the complainant, provided objective evidence that the label had been fraudulently misappropriated. This was clearly an act of bad faith, conflicting both with the ethical principles and need for reciprocal trust, and with the pertinent legal instruments. The Commission dealt with this fraud with the necessary severity.



Regarding the position of the German tax authorities, the Commission stressed that it was untrue to say that they are competent to determine the NGO's eligibility.

Handling of the last two applications

Regarding the last two applications still under consideration, the Commission did not deny that a particularly long period had elapsed since they were made. However, according to the case-law of the Court of Justice the question whether the duration of an administrative proceeding was reasonable had to be determined in relation to the particular circumstances of the case. The Commission stressed the many efforts it had made to try to establish the NGO's current eligibility. Despite these efforts, because of the complexity of the case and the complainant's conduct at the various meetings arranged with the Commission staff, its eligibility was still under consideration. In order to resolve the dispute, the Commission suggested that the complainant have itself audited by a firm of its choice.

The complainant's observations

In its observations, the complainant maintained its complaint and made the following comments:

Already in 1990, the DZI informed the Commission that the complainant had separated from the American parent organisation and was now an independent association. The Commission itself (and more specifically, its Directorate-General VIII, now DG Development) had given the complainant a grant for victims of Chernobyl of ECU 103.000 in 1991. Professor Koch was not and had never been a member of "Interaid International". Nor had he ever received any remuneration from this organisation or had had any other kind of involvement. Professor Koch worked for "Welthilfe e.V.", a charity without links to the complainant, in an honorary capacity. There was at no time any intermeshing of for-profit and non-profit interests in the relationship between Professor Koch and the complainant on the one hand and "Welthilfe e.V." on the other hand. Professor Koch gave courses at the University of Antwerp, but the remuneration for this activity was minimal.

The statement of the German NGO Platform according to which the complainant's operating costs amounted to 37.7 % of total revenues was contradicted by KPMG, the complainant's auditors, which had calculated these costs to amount to 22 % of revenues in 1993. This information had been brought to the Commission's attention on various occasions. Rent for the complainant's office in Brussels was very moderate and the area was by no means one of the most expensive in Brussels (3) . Moreover, the complainant's budget dedicated to projects amounted to € 3.4 million (and not € 1.5 million as the Commission had claimed).

The complainant never claimed improperly to be in the possession of the DZI label and never attempted to deceive the Commission as to the nature and quality of its organisation.

It was striking that the Commission based itself on misleading sources such as the DZI whilst failing to take into account the documents emanating from the tax authorities.

In so far as the two pending applications were concerned, none of the circumstances and/or arguments put forward by the Commission justified the length of time that had lapsed. The Commission was wrong to claim that it had made "many efforts" to try to establish the complainant's eligibility. It was the complainant that had asked the Commission over and over



again to decide and that had presented documents and evidence.

The Commission's suggestion that the complainant should have itself audited was unsatisfactory. The complainant had proposed such an audit already in 1997 and released KPMG from their duty of confidentiality. However, nothing had happened. The complainant considered that the Commission was only interested in further delaying the case. In its view, the Commission should finally decide on the applications without further delay.

THE DECISION

1 Failure to consider the applications fairly and objectively

1.1 Between 1993 and 1997, the complainant, a non-governmental organisation (NGO) from Germany which is supporting refugees, war victims and handicapped persons, submitted to the Commission six applications for financial assistance with regard to projects in Africa. The Commission rejected the first four applications, three of them in 1993 and the fourth in 1995. The complainant claims that the Commission failed to award the applications a fair and objective consideration. It alleges in particular that the Commission based itself on misleading sources such as the 'Deutsches Zentralinstitut für soziale Fragen' (DZI) whilst failing to take into account other evidence submitted by the complainant, e.g. documents emanating from the German tax authorities.

1.2 The Commission takes the view that it considered the applications strictly in accordance with the applicable rules. It submits that the applications did not meet two main criteria, namely (1) the requirement for the NGO to be independent and autonomous and (2) the requirement for sound financial management (reliable and non-fraudulent management). In this context, the Commission claims that the complainant relied - improperly, seeking to deceive the Commission as to the nature and quality of its organisation - on the label of the DZI (a German organisation responsible for awarding a quality label to organisations which after detailed scrutiny are judged fit to receive it) although the DZI declared categorically that there was no question of granting a quality label to the complainant.

1.3 The Ombudsman notes that the Commission has put forward a number of specific points to support its view that the complainant was not eligible for aid. These points are disputed, also at great length, by the complainant. The Ombudsman considers that at least for some of these points, the complainant's criticisms do not appear to be without justification. For example, the Commission relies on a statement by the 'German NGO Platform' according to which the complainant's operating costs amounted to 37.7. % of its total revenues at the time. In the absence of further information as to the basis on which it was made, the probative value of this statement appears to be rather limited. At the same time, the Commission omits to take any account of the statements made by KPMG, the complainant's accountants, according to which the real percentage was much smaller.

1.4 However, the most serious argument on which the Commission relies is its claim that the complainant fraudulently relied on the label issued by the DZI. allegation. The Ombudsman notes that the complainant addressed a letter (4) to the Commission on 26 March 1993 in



relation to one of the first four applications lodged by the applicant. The letterhead used by the complainant comprises a box at the bottom which contains the following words: "Die Förderung des Internationalen Hilfsfonds e.V. wird vom DZI empfohlen" ('The DZI recommends furthering the Internationaler Hilfsfonds e.V.' [i.e., the complainant]). In its letter of 1 September 1993, the DZI informed the Commission as follows: "Von einer Empfehlung der Förderung des Vereins kann also keine Rede sein. Wir werden den Verein auffordern, auf den entsprechenden Hinweis auf seinem Briefpapier in Zukunft zu verzichten." ('There can be no question of a recommendation [by the DZI] to further the association [the complainant]. We will request the association to refrain from using the relevant phrase in its letterhead in the future.')

1.5 The Ombudsman notes that the DZI appears to play (or to have played) an important role in the sector concerned. It is not unreasonable to assume that this information could influence the result of the examination of the complainant's applications by the Commission. The Ombudsman further notes that the complainant has offered no explanation for its behaviour although the Commission's opinion clearly invited it to do so (5). The Ombudsman concludes that by rejecting the complainant's applications on that basis, the Commission would appear to have acted within the limits of its legal authority.

1.6 In these circumstances, the Ombudsman concludes that there appears to have been no maladministration in so far as the complainant's first allegation is concerned.

2 Failure to decide on applications within a reasonable period

2.1 The complainant claims that the Commission failed to deal with its last two applications within a reasonable period. These applications were lodged in December 1996 and September 1997 and have still not been decided upon by the Commission.

2.2 The Commission does not deny that a particularly long period has elapsed since the applications were made. It refers, however, to the case-law of the Court of Justice according to which the question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of the case. The Commission claims that it has made many efforts to try to establish the complainant's current eligibility. According to the Commission, the complainant's eligibility is still under consideration despite these efforts, and that because of the complexity of the case and the complainant's conduct at the various meetings arranged with the Commission.

2.3 The Ombudsman would like to stress that already in his decision of 11 July 2000, he informed the Commission that he considered that there had been an excessive delay and that this constituted an instance of maladministration. A critical remark to that effect was made in the decision. The Ombudsman considered that there was no need for him to make a formal recommendation in that case since he assumed that the Commission would take heed of his critical remark, given that the applications had already been before the Commission for more than 3 ½ and nearly 3 years respectively at that time. The Commission did not react to this critical remark. It was only when receiving the Commission's opinion in the present case in early April 2001 that the Ombudsman became aware of the fact that the Commission appeared to have decided to disregard his critical remark.



2.4 It is a general principle of Community law that the administration must act within a reasonable time in adopting decisions following administrative proceedings (6) . It is also established case-law that the reasonableness of the relevant period must be appraised in the light of the circumstances specific to each case, and, in particular, the importance of the case for person concerned, its complexity and the conduct of the applicant and of the competent authorities (7) .

2.5 The Commission itself accepts that a particularly long period has elapsed since the applications were made. This period amounted to between 3 $\frac{1}{4}$ and 4 years when the complaint was made and has now grown to between 3 $\frac{3}{4}$ and 4 $\frac{1}{2}$ years. The Commission refers to the "many efforts" it claims to have made to try to establish the NGO's current eligibility, the complexity of the case and the complainant's conduct. However, no details are given in this context. The issue of the importance of the applications for the complainant is not even mentioned. The Ombudsman therefore considers that the Commission has been unable to show that despite the length of time that has lapsed, it has acted reasonably quickly. In these circumstances, the Ombudsman cannot but repeat the finding in his decision on complaint 338/98/VK that there has been excessive delay on the part of the Commission. This constitutes an instance of maladministration.

3 Conclusion

The Ombudsman therefore considers that the Commission's approach in the present case gave rise to an instance of maladministration. Given that the critical remark made in this respect in the decision on complaint 338/98/VK has been ignored by the Commission, the Ombudsman makes a draft recommendation to the Commission.

The Ombudsman therefore 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 decide on the two applications lodged by the complainant in 1996 and 1997 as soon as possible, and at the latest by 31 October 2001.

The Commission and the complainants 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 October 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, 19 July 2001

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, page 15.



(2) OJ 1994 L 46, p. 58.

(3) A document on the complainant's administrative costs between 1991 and 2000 drawn up by KPMG was submitted to the Ombudsman by the complainant.

(4) A copy of this letter was obtained by the Ombudsman in the course of his inquiries into complaint 338/98/VK.

(5) A copy of the DZI's letter of 1 September 1993 was attached to the opinion which was forwarded to the complainant. The words cited above were highlighted (presumably by the Commission) on this copy.

(6) See Joined Cases T-213/95 and T-18/96, *SCK and FNK v Commission* [1997] ECR II-1739, paragraph 56. This paragraph refers to proceedings relating to competition policy, but the relevant principle is not limited to this area. It may be noted that the Commission itself relies on this judgment to support its own view.

(7) Case C-185/95 P, *Baustahlgewebe GmbH v Commission* [1998] ECR I-8417 paragraph 29.