

Draft recommendation to the European Commission in complaint 1986/2002/OV

Recommendation

Case 1986/2002/OV - Opened on 09/12/2002 - Recommendation on 31/03/2004 - Decision on 14/10/2004

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

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complainant is the Director of the "International Institute for the Urban Environment" (IIUE, hereafter "the Institute") based in the Netherlands, and complains about the Commission's refusal to reimburse certain secretarial costs incurred by the Institute.

Since 1995, the Institute has undertaken secretarial activities on behalf of the European Network of Urban Forums for Sustainable Development (UFSD), which is managed by the DG Education and Culture (formerly DG X) of the European Commission. The complainant was one of the three founding members of this network and has arranged for these services on the basis of assurances from the European Commission that it would be reimbursed. In 1997, when payment of the costs was not forthcoming, the complainant contacted the responsible Commission official, who gave assurances that the payment would be made. The official stated that the annual contribution of 42,000 € requested by the complainant was both realistic and possible.

Despite these assurances, no payment was received. When the complainant repeated his concerns both in letters and at annual meetings of the network, the Commission asked the complainant to continue with the work and promised that the payment issue would be quickly resolved.

Due to a lack of response from DG X of the Commission, the complainant contacted in December 1998 a Member of the European Parliament, who intervened on his behalf by asking questions to the Commission. The complainant disagreed with the answers given by Commissioner OREJA. The complainant received no further reaction due to the European Parliament elections and the internal reorganisation of the Commission.



The complainant continued his efforts in 2000, but in a meeting with DG Education and Culture on 21 November 2000, it became clear to him that the Commission would not reimburse the costs the Institute had incurred. In a letter of 30 November 2000, the Commission informed the complainant that it would not accept the reimbursement of the secretarial work and that the matter was closed.

The responsibility for the network was then transferred to DG Environment and the complainant expected that the matter would finally be solved. In the summer of 2002, these expectations were disappointed.

On 8 November 2002, the complainant therefore lodged the present complaint with the Ombudsman, claiming the payment by the Commission of the costs that the Institute had incurred in providing the secretariat for the European Network of Urban Forums for Sustainable Development, totalling 171,789 €.

THE INQUIRY

The Commission's opinion

The Urban Forums for Sustainable Development Network (UFSD) was created in 1991 under the supervision of former DG X linking eight (later 19) cities, including Delft. It is part of a strategy for disseminating information from the European Institutions as close as possible to the citizens, including also the "Info-Points Europe" and Information Centres for Rural Areas ("Carrefours"). When the Commission's services were reorganised on 1 January 2000, responsibility for the information networks set up by DG X passed to DG Education and Culture. Following further adjustments on 1 January 2001, this responsibility then passed to DG Press and Communication. The UFSD network was closed by a letter from DG Press and Communication to the original members in September 2001.

The Commission stated that, after having re-examined the whole set of documents provided by the complainant, its position did not differ from the reply given by Commissioner OREJA to written question E-0230/99. In the Final Report from DG Press, it is mentioned that *"in the absence of clear instructions from the Commission, one of the Forums, DELFT, started to assume a supervisory role. This was noticed by the Commission, but was never formally recognised and certainly never incorporated into the project as a whole. DELFT has complained that they were never paid for this supervisory role, but since the Commission never asked them to do this, they cannot expect to be paid"*.

The complainant was a very active member of the UFSD Network. However, the Commission had no (legal) basis to engage and pay the complainant for secretarial work. The agreement signed by the complainant stipulated the annual fixed subsidy, the tasks and conditions to be fulfilled and estimated the manpower needed as the equivalent of at least three full-time posts. As regards the complainant's claim that the work was carried out on the basis of assurances from the Commission, the Commission observed that it does not seem possible that the complainant could be unaware of the fact that the Commission always settles contractual matters in writing under the signature of a responsible official.



In the answer given by Commissioner OREJA, it is stated that the complainant had submitted a financial proposal to the administrative department of DG X for the management of the network. This proposal could not be taken into consideration, however, because the activities must be undertaken by the Commission itself. The complainant was informed orally of this and not in writing, as frequent oral contacts took place with all networks.

From the reconstitution of the history of the Commission's financial support to the complainant, it appears that from 1996 to 2001, the complainant received an annual fixed subsidy of 10,000 €, which was the only commitment made by the Commission. There are no established rights enabling the complainant to justify his demand for 171,689 €, which was submitted for the first time on 4 July 1997. This demand would in any case be exorbitant for co-ordination tasks for an experimental and small-scale network.

The Commission concluded that, having re-examined the file in depth, it had no reason to change its position for the following reasons:

- the specific task of providing the secretariat for the networks was not part of the contract and the contract has not been modified;
- this was in reality a task of the Commission which could not be and was not delegated. The same applies to the rural information centres ("Carrefours") and "Info-Points Europe" networks;
- there was no occasion for the complainant to misunderstand the position that the Commission had taken orally;
- the amount foreseen by the contract was in any case a fixed, inclusive payment.

The complainant's observations

The complainant sent three annexes, each containing detailed comments on the Commission's position. The complainant summarised his observations as follows:

The Commission's opinion confirms that the IIUE shared the secretariat with the Commission. Also, the complainant contests the Commission's argument that the task was not (at least partially) delegated. The complainant cannot understand how the Commission can interpret the IIUE as having undertaken the secretarial work on a voluntary basis when a proposal for reimbursement was discussed with Commission officials at bilateral meetings and during annual meetings of the Forum Network. The complainant sent regular correspondence to this effect to the officials involved. The complainant does not claim that the secretarial work should be reimbursed under the existing contract. Therefore the complainant entered into negotiations with the Commission to agree a separate contract for secretarial work, and submitted a proposal detailing activities and their related costs.

Upon receiving encouragement and specific requests from the Commission to continue the work until a contract would be finalised, the complainant agreed to do so. The complainant therefore cannot understand why the Commission did not state at the outset that this work could not be



reimbursed.

The complainant therefore strongly disagrees with the Commission's conclusion that "the interested party has had no occasion to misunderstand the Commission's oral and written positions". On the contrary, the Commission has had no occasion to misunderstand the complainant's position.

The fact that the Commission did not take action, over a period of years, either to conclude a contract with the complainant for its secretarial work, or inform it that such a contract was impossible, means unfortunately that the Commission is guilty of maladministration. The complainant therefore saw no reason to withdraw the claim for reimbursement for the expenses incurred.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinion and observations, the Ombudsman considered that there could be an instance of maladministration by the Commission. In accordance with Article 3(5) of the Statute (2), he therefore wrote to the President of the Commission on 28 November 2003 to propose a friendly solution on the basis of the following analysis of the issue in dispute between the complainant and the Commission:

1.1 The complainant claims that the Commission should reimburse the costs the Institute incurred in providing the secretariat for the European Network of Urban Forums for Sustainable Development (UFSD), totalling 171,689 €. Upon receiving encouragement and specific requests from the Commission to continue the work until a contract would be finalised, the complainant agreed to do so. The complainant cannot understand why the Commission did not state at the outset that this work could not be compensated.

1.2 The Commission observed that the secretarial and co-ordination task was not a part of the standard contract, which only provides for payment of an annual flat-rate subsidy. This was in reality a task of the Commission which could not be delegated. The initial contract has not been amended in any way which would allow payment for additional services. Also, the complainant has not had the occasion to misunderstand the Commission's oral and written positions.

1.3 The Ombudsman considers that the scope of the review that he can carry out in contractual cases is necessarily limited. The Ombudsman does not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact. The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified.



1.4 On the basis of a careful analysis of the documents in the file, the Ombudsman makes the following findings: Firstly, the complainant and the Commission agree that the secretarial costs are not covered by the original contract signed by the parties.

1.5 In a document entitled "Urban Forums for Sustainable Development - General Secretariat" (Besançon 1997), the complainant describes its role in the following terms: *"Since the beginning of the Forum network, the International Institute for the Urban Environment (the Delft Forum) has been involved in the day-to-day management of the network, acting as the unofficial link between the European Commission and the now twenty centres. As the network grows bigger and the role of secretariat becomes more important but also more demanding, both the European Commission and the Delft Forum want to conclude a more formal agreement for this secretariat work (...)"* .

1.6 It appears that such a formal agreement with the Commission was never signed. However, correspondence in the file shows that the complainant took steps towards the signing of such a contract. The complainant wrote on 4 July 1997 to Mr G. in DG X of the Commission explicitly asking for the conclusion of a such a formal agreement. In a second letter of 7 October 1997 to the same official in DG X, the complainant again asked for its co-ordinating role in the network to be formalised, *"as we are carrying out this role on an unofficial and unpaid basis which does not serve the best interests of the European Commission, the other Forums or ourselves"* .

1.7 It further appears that there were various oral exchanges with regard to this matter. In a memorandum established on 16 September 1998, the complainant observes that the oral commitment from DG X was never finalised in a technical assistance contract with the Commission. In a memorandum of 13 April 2000, the complainant again mentions that *"expectations were raised by officials from DG X that the secretariat function (...) would be covered by a specific contract. Despite numerous meetings a contract was never finalised. However, despite the absence of an official document, in the interests of all parties the IIUE agreed to manage, co-ordinate and represent the network as its de facto secretariat until a formal contract was signed"* .

1.8 The Ombudsman did not find in the file a document in which the Commission would have explicitly rejected the complainant's request, made in the letters of 4 July and 7 October 1997. In its opinion of 4 April 2003, the Commission indicated that it always settles contractual matters in writing. However, in the present case a written reply to the complainant's requests of July and October 1997 appears to be missing. The Commission seems implicitly to accept this by stating, later in the same opinion, that the complainant was informed orally and not in writing, as frequent oral contacts took place with all networks.

1.9 It appears from the above that the Commission has not reacted in a way which would have made clear to the complainant from the beginning that the reimbursement of the secretarial costs was excluded. This lack of a clear response from the Commission appears to be at the basis of the complainant's belief that the secretarial costs, or at least part of these costs, could be reimbursed by the Commission.



1.10 Principles of good administration require that the Commission should provide adequate and clear information and take decisions within a reasonable time-limit on requests from the public (3). In the present case, it appears that, further to the complainant's requests of July and October 1997, the Commission has failed to inform the complainant within a reasonable time-limit of its decision. Moreover, it appears that the Commission has failed to inform the complainant in an adequate and unambiguous way of its decision.

1.11 In these circumstances, the Ombudsman's provisional conclusion is that the Commission's rejection of the complainant's claim, which appears to be based on the unclear information provided by the Commission, seems to be unfair. This constitutes an instance of maladministration.

The proposal for a friendly solution

The friendly solution proposed by the Ombudsman consisted in the Commission reconsidering the complainant's claim on the basis of the above elements. Such reconsideration could lead to a reasonable offer that might be less than the amount claimed by the complainant.

The Commission's response

The Commission's services reconsidered the case. However, the information contained in the file does not provide a basis for redress.

Although the Commission regrets the absence of a written reply to the complainant's requests of July and October 1997, it does not seem possible that he was misled. His long involvement with the Commission and his knowledge of the normal procedures would not have allowed him, acting in good faith, to interpret the situation as meaning that the Commission and its departments had entered into commitments towards him.

The complainant's additional observations

The complainant maintained his complaint and observed that his claim for redress was entirely justified. He underlined that the Institute acted in good faith. Considering the supporting documentation, the oral encouragement and assurances given by the Commission, it is unfair for the Commission to claim that the complainant could not be misled. How could the complainant conclude otherwise if he did not receive an adequate or timely response?

The complainant further observes that, through long involvement with the Commission, he knows that there is not such a thing as "normal procedures".

THE DECISION

1 The claim for reimbursement of the secretarial costs made by the Institute

1.1 The complainant is the Director of the "International Institute for the Urban Environment" (IIUE, hereafter "the Institute"). He claims that the Commission should reimburse the costs the Institute incurred in providing the secretariat for the European Network of Urban Forums for Sustainable Development (UFSD), totalling 171,689 €. According to the complainant, after receiving encouragement and specific requests from the Commission to continue the work until a contract would be finalised, the complainant agreed to do so. The complainant cannot understand why the Commission did not state at the outset that this work could not be



compensated.

1.2 The Commission observed that the secretarial and co-ordination task was not a part of the standard contract, which only provides for payment of an annual flat-rate subsidy. This was in reality a task of the Commission which could not be delegated. The initial contract has not been amended in any way which would allow payment for additional services. Also, the complainant has not had the occasion to misunderstand the Commission's oral and written positions.

1.3 After careful consideration of the opinion and observations, the Ombudsman found that, further to the complainant's requests of July and October 1997, the Commission had failed to inform the complainant within a reasonable time-limit, and in an adequate and unambiguous way, of its decision. The Ombudsman's provisional conclusion was that the Commission's rejection of the complainant's claim, which appears to be based on the unclear information provided by the Commission, seemed to be unfair. The Ombudsman proposed a friendly solution to the Commission consisting in the Commission reconsidering the complainant's claim. The Ombudsman pointed out that such reconsideration could lead to a reasonable offer that might be less than the amount claimed by the complainant.

1.4 In its brief reply to the Ombudsman's proposal for a friendly solution, the Commission regretted the absence of a written reply to the complainant's requests. The Commission stated, however, that the complainant's knowledge of the normal procedures would not have allowed him, in good faith, to interpret the situation as meaning that the Commission had entered into commitments towards him. In observations on the Commission's reply, the complainant maintained his complaint and underlined that the Institute acted in good faith.

1.5 The Ombudsman has not found in the Commission's reply to the proposal for a friendly solution any new arguments that could lead him to revise his provisional finding of maladministration. On the contrary, the Commission has confirmed the absence of a written reply to the complainant. Moreover, the Commission's argument concerning the complainant's supposed knowledge of the Commission's normal procedures is not convincing, since the Ombudsman's provisional finding of maladministration was not premised on the existence of a contractual commitment, but on the Commission's failure expressly to inform the complainant, within a reasonable time-limit and in an adequate and unambiguous way, of its decision not to enter into such a commitment.

2 Conclusion

In view of the above, the Ombudsman maintains his provisional conclusion of maladministration and makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The draft recommendation

The Commission should reconsider the complainant's claim on the basis of the above elements. Such reconsideration could lead to a reasonable offer that might be less than the amount claimed by the complainant.

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 by 30 June 2004. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 31 March 2004

P. Nikiforos DIAMANDOUROS

(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, p. 15.

(2) "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 complaint".

(3) See Article 17.1 of the European Code of Good Administrative Behaviour.