

Decision in case OI/5/2014/AN on the termination of a grant agreement by the Commission

Decision

Case OI/5/2014/MDC - Opened on 05/05/2014 - Decision on 15/07/2015 - Institution concerned European Commission (Critical remark) |

The case concerned the Commission's decision to terminate a grant contract with an Icelandic NGO ahead of time, on the ground that Iceland had, at the time, put on hold its accession negotiations with the EU, and thus no further financial assistance to that country was warranted. Iceland has since withdrawn its candidature. The complainant NGO works to improve the employment prospects of people with low level qualifications.

The Ombudsman inquired into the issue and disagreed with the Commission's stance. She thus proposed a solution to the Commission, which the latter rejected. Given that the Commission did not put forward any new arguments that could alter the Ombudsman's assessment, and, noting that a recommendation was unrealistic in light of the Commission's clear decision not to reconsider its position, the Ombudsman closed this inquiry with a critical remark. The Ombudsman was particularly critical of the fact that the Commission, in its dealings with a third country NGO, had failed to exemplify those standards which the EU expects accession states to achieve. In this case, the actions of the Commission have had the effect of undermining not just its own reputation but also that of the EU more generally.

The background to the complaint

1. This own-initiative inquiry is based on a complaint submitted by an Icelandic non-governmental organisation (NGO) [1] which signed a grant contract (the 'Contract') with the European Commission. The contract entered into force on 22 June 2012 and its execution period was to end at the moment when the Commission would make the final payment and in any case at the latest 18 months after the end of the implementation period (which was to run between 1 September 2012 and 31 August 2015). The purpose of the Contract was to implement an action aimed at increasing the employability of low qualified workers. The action was to be partly financed through the Instrument of Pre-Accession Assistance ('IPA') [2] . The rules for co-operation concerning EU financial assistance to Iceland under the IPA are laid down in the Framework Agreement signed between the EU and Iceland [3] . The Commission undertook to finance a maximum of EUR 1 875 000, equivalent to 75% of the total possible



eligible costs. The Commission paid the complainant an initial instalment of EUR 419 980.66 on 17 July 2012.

2. In December 2013, the Commission informed the complainant that, as a consequence of Iceland's decision to put on hold [4] the accession negotiations with the EU, no assistance under the IPA would be granted to that country and the Contract would thus be terminated. The Commission invited the complainant to take part in a consultation procedure in accordance with the Contract. The complainant objected to the termination, arguing that it would be unlawful and that the Contract was independent of the political decisions of the Icelandic government. Moreover, it contended that the Commission's so-called consultation was a process "*dictated by one party*" and aimed merely at consulting the complainant on the project's phasing-out, whereas the complainant had been willing to reach a fair solution with the Commission. It stated that it had been operating on the assumption that the Contract was a fully effective and binding instrument. This meant, for example, that it undertook extensive financial obligations, in order to meet its obligations under the Contract diligently. Moreover, it had undertaken social obligations. It stated that "*expectations have been built in LLL centres, occupational councils, in the formal school system and among practicing guidance counsellors under the auspices of the social partners. Most importantly there are individuals waiting for their competencies acquired on the labour market to be formally acknowledged.*"

3. The Commission terminated the Contract with effect from April 2014 and informed the complainant that it would reimburse all eligible expenses incurred up to that point. However, the complainant accused the Commission of withholding payments for projects carried out prior to the termination letter. Following the termination of the Contract, the complainant kept the project running despite the lack of financing from the Commission. The complainant received from the Commission EUR 419 980.66 out of the maximum amount of EUR 1 875 000 to which it would have been entitled under the Contract had the Contract been completed in full.

4. The Ombudsman opened an own-initiative inquiry into the **allegation** that the Commission wrongly terminated the Contract on the basis of the Icelandic authorities' decision to put the accession negotiations on hold, while at the same time failing to use the amicable settlement procedure provided for in the Contract. Linked to this allegation is the **claim** that the Commission should resume making the financial contributions due to the complainant under the Contract [5] .

Allegation of wrongful termination and failure to use the amicable settlement procedure, and related claim

The Ombudsman's solution proposal

5. On 5 November 2014, the Ombudsman made a proposal for a solution. When proposing the solution, the Ombudsman took into account the arguments and opinions put forward by the parties.



6. The Ombudsman carefully analysed the Contract and considered that there is nothing in it to suggest that its implementation is conditional on the continuation or outcome of the accession negotiations. The Ombudsman added that even if the Contract ought to be interpreted in light of the broader context in which it was signed, the Commission's position is not warranted for at least two reasons.

7. First, the purpose of IPA assistance is to assist candidate and potential candidate countries with a view to membership. Therefore, the objective of actually becoming a member of the EU need not be immediate or entirely certain. Consequently, the Contract could continue to be implemented.

8. Second, the Framework Agreement envisages that should the Contract be terminated, "*any assistance still in the course of execution shall be carried out to its completion*". The Commission argued that this Article should not be invoked since the Framework Agreement is still in force. However, the Ombudsman rejected this argument as disingenuous. She stated that if the Commission's assistance obligations subsist despite the termination of the Framework Agreement, the Commission is all the more obliged to maintain financial assistance while that Agreement is still in force. Hence, the Commission could not unilaterally abandon its financing obligations towards the complainant.

9. The Ombudsman also rejected the Commission's argument that the complainant failed to cooperate with it in good faith in seeking a solution to the impasse through consultations. She considered that it is doubtful whether a 'consultation' for the purposes of the Contract actually took place since, in the consultation talks, the Commission envisaged no solution other than phasing out the ongoing project and therefore left no room to agree whether the parties could effectively implement the Contract.

10. Moreover, the Ombudsman considered that the Contract had created not only legal obligations but also moral and social ones which prevented the Commission from acting the way it did. It was unfair, if not abusive, to place the whole burden of the uncertainty of the accession process on the shoulders of an NGO. It was also unfair to expect that the financial costs of the political impasse in the negotiations should be borne by the intended final beneficiaries who, together with the complainant's social partners and its employees had a legitimate expectation that the project would be completed.

11. The Ombudsman concluded that the Commission's conduct constituted maladministration and proposed the following solution:

" Taking into account the above findings, the Ombudsman proposes that the Commission reconsider its position with a view to making all of the financial contributions that are due under the terms of the Contract until its completion. "

12. The Ombudsman also asked the Commission to take a position on the complainant's statement that the Commission had not paid it the amounts due for actions carried out prior to the purported termination. She added that she expected the Commission to take immediate



action in order to settle the outstanding amounts should the complainant's statement be accurate.

13. In its reply to the Ombudsman's proposal for a solution, the **Commission** stated that it was not in a position to accept it for a number of reasons.

14. First, it maintained that it was entitled to terminate the Contract under the conditions set out in it [6] . It insisted that the Contract must be interpreted in light of the broader context in which it was signed, that is, the EU accession context, to which Annex I to the Contract contains several references [7] . Moreover, the complainant was well aware of the broader context in which the Contract was signed, in which the Government of Iceland played an important role [8] and where the financed action's relevance to the EU accession process was of utmost importance. The Commission argued that without that context, the action could no longer be carried out effectively and appropriately.

15. Second, the Commission contended that since Iceland ceased to pursue the objective of EU membership of its own will, the Commission's decision to terminate the Contract was not "*untimely and in want of foundation in facts* .", as the Icelandic government had argued. The Commission reiterated that since the objective of the IPA funding to assist Iceland in its efforts to comply with the EU *acquis* [9] with a view to membership could no longer be met, the Commission would not be correctly exercising its responsibility to ensure sound financial management of the EU budget if it were to accept the Ombudsman's proposal. Moreover, the Commission denied having created the impression that it would be willing to continue financing ongoing projects.

16. Third, the Commission maintained its view that it was under no obligation to follow the amicable settlement procedure envisaged by Article 13 of the General Conditions of the Contract since that procedure needs to be followed prior to submitting a dispute to the Brussels courts, not prior to terminating the Contract on the basis of Article 12.1 of the General Conditions. The Commission reiterated that it duly consulted the complainant prior to terminating the Contract. It insisted that it "*showed flexibility and proposed alternatives to reach a mutually agreed solution* " and that the consultation was not void of purpose. The Commission added that it had made a proposal concerning the phasing out of the Contract to the complainant orally, through the Icelandic Ministry of Foreign Affairs, but the complainant rejected its offer.

17. As regards the outstanding payments requested by the complainant, the Commission stated that it had explained to the complainant in the termination letter that it would reimburse all eligible costs incurred until the early termination date (that is, 11 April 2014), as long as it received a payment request and a final report in accordance with Article 2 of the General Conditions of the Contract. It noted that the report sent by the complainant in June 2014 did not comply with the contractual requirements. The Commission had written to the complainant explaining that a final report in the correct form was due but the complainant refused to send such a report.



18. The Commission added that due to the complainant's failure to submit a final report covering the period 1 September 2012 - 11 April 2014, the latter failed to account for €148 670.38 (which had been paid to the complainant as part of an initial instalment in July 2012). The Commission stated that unless the complainant accounts for that sum, it may have to recover it in order to protect the EU's financial interests.

19. The Commission, nevertheless, stated that while it is not prepared to accept the Ombudsman's friendly solution proposal for the reasons outlined above, it remains open to suggestions from the Ombudsman on how the Commission and the complainant could find an alternative solution.

20. The **complainant** stated that the Commission had merely reiterated the views and arguments which it had already put forward and which are based on the wrong premise that a political decision to put accession negotiations on hold should automatically lead to private contracts becoming null and void. The complainant maintained that the Contract was not conditional upon Iceland becoming a Member State of the EU or on the continuation of the accession negotiations. It said that, since the Commission did not put forward new arguments that have not already been rejected, it was not constructive to continue the discussion further. The complainant expressed the hope that the Ombudsman will be able to settle the matter in the way already suggested.

21. With regard to the outstanding invoices, the complainant rejected the "*highly inappropriate insinuation of malpractice ... as regards the funding already distributed by the Commission*". The complainant argued that since it has always contested the Commission's unlawful termination of the Contract, sending a final report would contradict its argument that the termination is unlawful and would be tantamount to accepting it. The status report which it sent to the Commission on 10 July 2014 contained all the required financial information and constitutes an appropriate form of reporting for as long as the dispute has not been resolved. It added that "[t]o issue threats as the Commission does, in terms of reclaiming funds, which they perfectly are aware of have been appropriately distributed, received and used, is a below belt blow, not fitting the EU Commission. However, it perfectly demonstrates the insurmountable pressure the Commission has been putting on [the complainant] in this case."

The Ombudsman's assessment after the proposal for a solution

22. The Ombudsman finds it regrettable that, as the complainant correctly stated, the Commission merely reiterated the position it had adopted in the opinion it had submitted to the Ombudsman before she made her proposal for a solution. There is no need for the Ombudsman to repeat all the considerations she made in that proposal. She has already explained why in her view the Commission was not entitled to consider that the Contract could no longer be executed effectively or appropriately even taking into account the broader context in which it was signed.



23. As for the Commission's argument relating to the role played by the government of Iceland in the signing of the Contract, the Ombudsman points out that the fact remains that the government of Iceland was not a party to the Contract and that its intentions or actions should not be considered to constitute valid reasons for terminating the Contract, in the absence of a specific provision in this regard in the Contract itself.

24. As regards the Commission's contention that it duly consulted the complainant prior to terminating the Contract, the Commission acknowledged at the same time that its "consultations" were aimed at finding *"a mutually agreed solution for the phasing-out of the activities under the Contract"* (emphasis added). It is thus clear that the Commission had already decided to terminate the Contract and that the consultation merely concerned the details of this termination. In this context, regard should be had to the fact that (i) the clause in question which provides for such a consultation grants the Commission a significant margin of manoeuvre as to when it should be invoked, and (ii) it was the Commission that imposed the clause on the complainant through the standard General Conditions.

25. Consequently, the Ombudsman maintains the finding made in her solution proposal that the Commission's behaviour amounted to maladministration.

26. The Ombudsman notes that, in its reply to her proposal, the Commission submitted that it had demonstrated its intention to find an alternative solution with the complainant and that, in this respect, remained open to suggestions from the Ombudsman. However, the Commission also made it clear that it did not accept the Ombudsman's proposal. The Ombudsman therefore does not see what other suggestions she could make that the Commission would find acceptable. In any event, the discrepancy between the views put forward by the Commission on the one hand, and the complainant on the other, is such that no mutually acceptable compromise solution appears to be at hand.

27. In these circumstances, the Ombudsman considers that it would not be appropriate to continue this inquiry by making a recommendation to the Commission. She therefore closes the case with two critical remarks below.

Conclusion

On the basis of her inquiry into this complaint, the Ombudsman closes it with the following conclusion and critical remarks:

The Commission's early termination of the Contract, on the ground that the Icelandic government had put the accession negotiation on hold, constituted serious maladministration.

Critical Remarks



The Commission has acted wrongly and in bad faith in this case. Having regard to its role as guardian of the Treaties, and having regard to the right to good administration recognised at Article 41 of the EU Charter of Fundamental Rights, the actions of the Commission can be expected to be of the utmost propriety and integrity. Indeed, in its dealings with accession states and with other parties within accession states, the Commission can reasonably be expected to be an exemplar of good administration, setting standards to be followed by accession states in due course. The fact that an accession state had, as in this case, put its accession negotiations on hold, does not release the Commission from its obligation to act in an exemplary fashion.

The actions of the Commission in this case are quite unacceptable and have the consequence of undermining the reputation, not just of the Commission, but also of the overall European Union. It remains in the interests of the Commission, of the European Union and of the complainant that the Commission correct its wrongful behaviour, even at this late stage.

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

Emily O'Reilly Strasbourg, 15/6/2015

[1] Given that the complainant does not reside in the European Union, the Ombudsman could not deal with the complaint directly. She decided, however, to investigate the concerns raised in this case by means of an own-initiative inquiry.

[2] Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ 2006 L 210, p. 82.

[3] Framework Agreement between the Government of Iceland and the European Commission on the rules for co-operation concerning EU financial assistance to Iceland in the framework of the implementation of the assistance under the instrument for pre-accession assistance (IPA), signed on 8 July 2011.

[4] Subsequently, in March 2015 Iceland's government requested that "Iceland should not be regarded as a candidate country for EU membership".

[5] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's friendly solution proposal available at:

<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/60402/html.bookmark> [Link]

[6] Article 12.1 of the General Conditions: "*If a party believes that the Contract can no longer*



be executed effectively or appropriately, it shall consult the other party. Failing agreement on a solution, either party may terminate the Contract by serving two months' written notice, without being required to pay compensation. "

[7] The Commission cited point 5.4 of Annex I as an example. It states: "*This project supports employment and human resources development which would prepare Iceland for participation in the EU's common policies and implementation of EU funds especially European Social Fund (ESF)*" (emphasis added by the Commission.

[8] The Commission explained that the government of Iceland had outsourced some of its functions through a service contract with the complainant and that it had participated together with the complainant in the contract negotiation with the Commission.

[9] The term EU '*acquis*' refers to the body of European Union law applicable in the EU (that is, all treaties, EU legislation, international agreements, standards, court verdicts, fundamental rights provisions and horizontal principles in the treaties such as equality and non-discrimination). All candidate countries must accept the full *acquis* to become a member of the European Union.