

## Decision of the European Ombudsman on complaint 391/98/PD against the European Commission

Decision

**Case 391/98/PD - Opened on 11/05/1998 - Decision on 29/06/1999**

Strasbourg, 29 June 1999 Dear Mr A., Dear Mr. J., On 3 April 1998 you made a complaint to the European Ombudsman on behalf of your two companies. Your complaint concerned the European Commission's acting towards your companies in a contractual context, a so-called Red Flag procedure. On 11 May 1998 I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 26 August 1998 and I forwarded it to you with an invitation to make observations, if you so wished. On 28 September 1998 I received your observations. I also received letters from you on 3 July 1998 and on 12 April 1999, as well as a copy of your contract with the Commission, sent on 8 December 1998. I am writing now to let you know the results of the inquiries that have been made.

### THE COMPLAINT

The complainants, two companies, claimed that the Commission acted wrongfully in its attempts to review a project which was the subject of a contract between a Consortium of which they formed part and the Commission. The background to the complaint is in brief: The contract in question was concluded in 1995 and provided that it should be governed by Danish law. The Consortium, which consisted of a number of small and medium size enterprises, was to develop a package that would facilitate the introduction of telematics into the yearly business development plans of small and medium size enterprises in Europe. In August 1997 the Consortium took part in a so-called annual project review. The review was organised by the European Commission which employed a panel of independent experts to assess the project. Depending on the overall outcome of this review and the recommendations of the independent experts, the Commission would take a decision to continue, modify or stop the project or initiate a so-called Red Flag procedure. To make their recommendations the experts were provided with a so-called R3 form which sets out the relevant considerations for assessment. The 1997 recommendation by the independent experts advised the Commission to initiate the Red Flag. The Red Flag procedure is described in the Annual Project Review Procedures 1997 as follows: *"The 'RED FLAG' procedure is used when any major and imminent problems which prevent work from proceeding normally is detected at project level or where in the course of the Annual Review the project has not adequately demonstrated the satisfactory performance of the project in terms of the objectives as stated in the Project Programme (Annex I to the Contract)."* Following the Red Flag, the Commission shall ask the contractor in question if it wants to continue the project or not. If the contractor replies that it intends to continue, the procedures



provide that: *"it has to perform an internal review of all aspects of the project (technical, managerial and financial) and decide which corrective actions it will implement - if any. The project has one month to do this."* On the basis of the internal in-depth review, the contractor and the Commission - again with the assistance of independent experts - may perform a two-day in-depth review organised by the Commission. As regards the Commission's communication of its decision to follow the Red Flag recommendation, it is provided that: *"the Commission Services provide extracts of the R3 form to indicate the main areas of concern raised by the Annual Review or state that the Red Flag has been issued because there was insufficient information to form an opinion on the status of the project. It must be clear, that the project is asked to perform an internal review of all aspects of the project and not just the ones which have been raised by the Annual Review and have given reason for concern."* In the present case, the Commission's letter to the Consortium of 24 October 1997 stated that: *"The Annual Review of the ... project, ... , gives reason for concern as to the success of this project. In accordance with the programme management procedures the Commission Services are initiating, with this letter, a "Red Flag Procedure". As part of this procedure, the project partners should: a) limit themselves to addressing the requirements of this in depth-review and, b) not undertake any new project activities. Accordingly, the project partners are invited to examine the state of their project and to reflect on the following question: "Does the performance of the project, in the light of the objectives, justify a continued commitment of the human resources and finance of the partners?"* The Commission also informed the Consortium that the internal in-depth review could lead either to an "in-depth review and financial audit" (referring to the relevant contract terms) or to the termination of the contract. In its reply to the Commission the Consortium expressed its surprise over the Commission's decision but nevertheless ensured "utmost cooperation with the Commission to meet all the requirements of this procedure". The Consortium also requested clarification of what the review requirements implied, and what consequences could ensue. The Commission's reply to this request was considered unsatisfactory by the complainants, and more than five months of correspondence followed. The Consortium repeated its request for clarification of what it had done wrong, and what exactly it would have to do to remedy the alleged deficiencies in the project. The Commission provided fairly short replies, largely re-stating the Consortium's obligations under the Red Flag procedure. It informed the Consortium that it did not consider it appropriate to state its detailed views on the project at that stage, because this could potentially compromise the independent nature of the external expert evaluation which could follow the internal in-depth review. The Consortium made a number of attempts to satisfy the requirement of producing an internal review, by producing relatively short overviews of its project. The Commission considered these reports inadequate and refused them. Serious delays followed, which the Commission attempted to remedy by extending the time limits so as to allow the Consortium to produce an adequate internal in-depth review. Eventually the Consortium considered that the Commission was unwilling to give reasons and the Consortium could therefore no longer accept participation in the Red Flag procedure as such. It also submitted its final attempt to produce an internal in-depth review report. The Commission replied that the report was inadequate, but nevertheless suggested to the Consortium a two day review-meeting with independent experts to save the project. The Consortium rejected the Commission's proposal, repeating its view that the Commission had not provided sufficient reasoning. Subsequently the Commission made a final offer to save the project, enclosing the full R3 evaluation form to provide further details of



the experts panel's deliberations at the annual review meeting. The Consortium decided to repeat its rejection of the whole procedure, after which the Commission considered itself obliged to terminate the contract. Against this background, the complainants in substance claimed that the Commission's termination of the contract was unjustified and that the Commission had failed to provide information as to the reasons for its decision to follow the Red Flag recommendation of the independent annual evaluation panel.

## THE INQUIRY

**The Commission's opinion** The Commission referred to the facts as stated above, and emphasised the nature of the Red Flag procedure: *"The main purpose of the "Red Flag" is not to terminate the project but to warn the contractors on the critical situation of the project in order to allow them to take all remedial actions to save the project and to rectify non-performance. The Commission's decision to follow the recommendation of the experts by launching a Red Flag Procedure is made in the light of the interests of the project, and in order to give it a chance to overcome the problems the Consortium has faced."* As regards the lack of detailed explanations for its decision, the Commission submitted that this should be assessed in the light of the use of independent experts. It considered that: *"As the benefit of having independent experts evaluating the project in a two-day Review meeting would obviously be lost if Commission officials could influence or pre-empt the result by their intervention at this stage, the procedure ensures that during the preparation of the In-depth Review, the Consortium is not influenced by the Commission services in one way or another. The Commission services are bound to make sure that absolute neutrality is observed during this process."* The Commission further commented that it did not consider itself obliged to provide the contractor with the full R3 assessment form used by the independent experts, but only an extract. The fact that it eventually did so was based on its intention to encourage the Consortium to produce the internal in-depth review so as to save the project. On this background the Commission did not consider that there had been maladministration in its attempts to conduct a review of the project to save the project. **The complainants' observations** The complainants maintained their allegations, stating that the Commission should have provided a more comprehensive statement of reason for its decision to initiate the Red Flag procedure. They also challenged the various considerations which would appear to underlie that decision, these primarily being the concerns which the independent expert panel had expressed in their R3 form.

## THE DECISION

**1 Scope of the inquiry** 1.1 The complainants consider the Commission's decision to initiate a so-called Red Flag procedure against the complainants as unfounded and that the Commission failed to provide adequate explanation for doing so. In support of this last allegation, the complainants have in particular referred to Art 253 (previously Art 190) EC Treaty. The framework of the case is a contractual relationship between the complainants and the Commission which, according to the information available, is governed by Danish law. Therefore, the Ombudsman shall recall what he stated in his Annual Report for 1997 concerning complaints of maladministration that arise from contractual relationships: The Ombudsman does not seek to determine whether there has been a breach of contract by either party. That question can 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. However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes that its view of the contractual position is justified. **2 The**

**Commission's contractual behaviour** 2.1 As concerns the complainants' first allegation that the Commission has not acted in conformity with its contractual obligations, the Ombudsman shall observe the following: The facts and elements brought forward in the course of the inquiry make it clear that the Commission and the complainants have quite different versions of the facts which seemingly, against the will of both parties, led to the deterioration of the contractual relations. Both versions may be plausible. Entering into a detailed assessment of such a conflict would require an examination of the relevant national law and evaluation of conflicting evidence and would therefore fall outside the scope of the inquiry to be conducted by the Ombudsman.

The Ombudsman shall accordingly limit himself to observing that the Commission has given a coherent account of the legal basis for its actions and why it believes its view of the contractual position is justified. **3 The Commission's failure to give information** 3.1 As concerns the

complainants' second allegation that the Commission failed to give information as to the reasons for the initiation of the Red Flag procedure, it shall be observed that it is established that the Commission initially only provided an extract of the so-called R3 form which contained the evaluation of the experts, on which the Commission based itself to initiate the procedure. It is also established that it later produced the full R3 assessment form. It appears

comprehensible that the complainants may have had problems in remedying the shortcomings detected by the independent experts if the complainants were never fully informed of them; shortcomings that both the Commission and the complainants seemed to be interested in overcoming. 3.2 While it may be understandable that the Commission, as stated in its opinion,

has to preserve the independence of the experts, this objective does not appear to warrant that the R3 assessment form could not be communicated to the complainants. As stated above, the Commission did eventually communicate the form to the complainant; however, it did so only after the contractual relations had already deteriorated. 3.3 Principles of good administration

require that the administration shall deal with citizens in a fair and just way. This implies amongst others that the administration shall provide citizens with the information that they require unless there are grounds which hinder it. In this case, the Commission initiated a procedure towards a project contractor which could result in the cancellation of the contract, which was of significant economic value to the contractor. The Commission did so on the basis of an assessment of the project which was contained in a form. However, the Commission did not want to communicate the form to the contractor, to whom it was essential to have knowledge of the form so as to prevent possible cancellation. The Commission acted so without any valid reasons. Accordingly, the Commission failed to comply with principles of good

administration. As the Commission eventually provided the contractor with the form, the Ombudsman shall not inquire further into this issue but below address a critical remark to the Commission. **4 Conclusion** On the basis of the European Ombudsman's inquiries into this

complaint, it appears necessary to make the following critical remark: Principles of good administration require that the administration shall deal with citizens in a fair and just way. This implies amongst others that the administration shall provide citizens with the information that they require unless there are grounds which hinder it. In this case, the Commission initiated a procedure towards a project contractor which could result in the cancellation of the contract,



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