

## Decision of the European Ombudsman on complaint 408/98/(PD)/GG against the European Commission

Decision

**Case 408/98/GG - Opened on 17/06/1998 - Decision on 04/11/1999**

Strasbourg, 4 November 1999 Dear Mr D., On 21 April 1998 you lodged a complaint with the European Ombudsman against the European Commission concerning Contract no. PRS/97/500385 concluded between your company and the European Commission. On 18 May 1998, and at my request, you submitted extensive documentation in support of your claims. On 17 June 1998 I forwarded the complaint to the European Commission for its comments. On 25 June 1998 you made a further submission regarding the financial consequences of the termination of the said contract. The Commission sent its opinion on 5 October 1998, and I forwarded it to you with an invitation to make observations, if you so wished. On 28 December 1998, you sent me your observations on the Commission's opinion. I am writing now to let you know the results of the inquiries that have been made.

### THE COMPLAINT

The complainant is the Managing Director of an Irish company which provides economic and environmental consultancy services. In 1996, the complainant's firm was invited to tender for the preparation of a "Vademecum Ligni", or user's guide to the EU forest-based industries, for the Commission's services in charge of the wood and paper industries (DG III/C/5). The Commission and the complainant's firm finally signed Contract no. PRS/97/500385 (the "Contract") which was dated 11 September 1997. According to this Contract, the complainant's firm was to prepare the said Vademecum within a period of seven months from the date of signature (Article 2 of the Contract). According to Annex III to the Contract, "interim reports or documents" were to be provided "within 30 days of the end of the reference period", the latter being defined as "within three months of the signature of the contract". These reports or documents were "to describe the work carried out and the results obtained". Furthermore, a "draft of the final report" was to be submitted to the Commission no later than two months prior to the expiration of the period specified in Article 2 of the Contract. The "final report" itself was to be submitted to the Commission by the end of the period specified in Article 2 of the Contract. On 8 October 1997, the complainant had a meeting with the Commission in Brussels. According to the summary report on this meeting which was prepared by the Commission and sent to the complainant for his agreement, the complainant's firm should draft a proposal for the structure and the contents of the Vademecum after what was called the "kick-off" meeting to be held the following month. According to the same document, the complainant's firm should conduct the necessary interviews and gather information "leading to an 'interim report' (= outline structure +



rough draft of contents)". The "kick-off" meeting took place on 10 November 1997. According to the report on this meeting which was prepared by the Commission and sent to the complainant for his agreement, the draft final report was to be delivered to the Commission by 11 April 1998 and the final report by 11 June 1998. Furthermore, the complainant's firm was to "prepare and present a draft structure of the Vademecum document by early December for scrutiny by C/5". On 5 December 1997, the complainant sent a fax to the Commission which set out what was called the "suggested format and contents" regarding the Vademecum for which the Commission's "early comments, suggestions and approval would be much appreciated". A meeting with industry federations was held in Brussels on 23 February 1998. In a fax dated 20 February 1998, the Commission apologised for the short notice, pointing out that "for logistical reasons" it had been necessary for the complainant's firm to be in Brussels that week. In a fax sent on 5 March 1998, the Commission informed the complainant that it awaited the latter's draft "for a modified structure of the Vademecum" and that this should arrive "by 25/03/98 at the latest". The Commission noted that it considered this document to be essential for further work and it insisted that the complainant's firm should send its proposal to the Commission "before any further meetings take place in Brussels or indeed any draft report be submitted". The draft report itself was to be submitted "by 25/03/98 at the latest". On 6 March 1998, the complainant sent a fax to the Commission which contained "the Interim Report as required and now due" under the Contract. On 18 March 1998, the complainant's firm submitted to the Commission a draft of a letter which it proposed to send to those federations from which it had yet to receive data. The Commission replied in a fax of 19 March 1998 in which it urged the complainant to bring the expanded version of the contents of the Vademecum to the attention of the federations as agreed at the meeting on 23 February. In this context, the Commission referred to the "refusal" of the complainant to do so. The fax contained an indication according to which a copy of this fax was to be sent to "[all] federations". In a fax sent to the Commission on 20 March 1998, the complainant commented inter alia on the fact that the Commission's fax of 19 March appeared to have been widely circulated outside the Commission. In his view, this could only be construed "as being intentionally damaging". In a letter dated 8 April 1998, the Commission informed the complainant's firm of its decision to terminate the Contract. This was based on the consideration that the complainant's firm had failed to provide the interim report due under the Contract in time. The complainant makes the following allegations: 1) The Commission refused to accept that delays and misunderstandings were very largely the result of its own failures; 2) Repeated requests by the complainant for a meeting were either turned down or ignored; 3) Correspondence to the Head of Unit, including the progress report required under the terms of the Contract, was either intercepted or ignored; 4) Circulars that were sent on at least two occasions by DG III C/5 to some two dozen EU Trade Federations libellously implied that the complainant was at fault; and 5) The grounds for the termination of the contract were themselves inaccurate.

## THE INQUIRY

**The Commission's opinion** In its opinion, the Commission denied the allegations made by the complainant. Its most important comments may be summarised as follows: At the meeting on 8 October 1997, it had been agreed that the Interim Report was to consist of an "outline structure and rough draft of the contents". The Commission had reacted to the fax sent by the complainant's firm on 5 December 1997 in telephone conversations which took place in



December 1997 and January 1998. The "Interim Report" submitted by the complainant on 6 March 1998 had not constituted such a report since it had not consisted of what had been agreed. There was a complete lack of substance. The Commission had not impeded the complainant's firm nor prevented it from carrying out the meetings or making the necessary contacts. The modifications and clarifications to the terms of reference had been made at the suggestion of the complainant's firm and had not been significant. On 10 March 1998, the complainant had sent a fax to the Commission in which he expressed the view that due to some faxes which he had recently received from and some telephone conversations he had had with the Commission, "the situation now seems clarified". He also noted that the next meeting with the Commission and the federations would be on 30 March and that he saw no reason "why we should not have a full and positive report with you by the agreed dates". On 27 March 1998, the Head of Unit contacted the complainant's firm by telephone, asking why the Interim Report which was overdue had not been submitted. Due to the complainant's firm's inability to respond, he saw no use in meeting the latter again. The Commission had not copied the fax which it had sent to the complainant on 19 March 1998 to the federations. The fact that the federations were mentioned as recipients was due to the fact that the Commission had used a "template" telefax cover sheet which regrettably included these references from a previous telefax. The Commission had not caused any delays in the performance of the Contract by the complainant's firm, nor had it ignored any correspondence or requests for meetings. Given the serious failure on the part of the complainant's firm to perform its obligations, the Contract had been terminated. **The complainant's observations** In his observations, the complainant maintained his complaint. According to him it was difficult to believe that, if the fax of 19 March 1998 had not been circulated to the federations, the Commission should not have corrected his erroneous assumption that this had happened.

## THE DECISION

**1 Failure of the Commission to accept that delays and misunderstandings were very largely the result of its own failures** 1.1 The complainant alleges that the Commission failed to accept that delays and misunderstandings were largely the result of its own failures. This allegation appears to be based essentially on several claims put forward by the complainant which may be summarised as follows: (a) the Commission failed to reply in good time to a fax of 5 December 1997; (b) the Commission failed to organise the meeting held on 23 February 1998 in a proper way; (c) the terms of reference were changed by the Commission to a significant extent; (d) the Commission caused confusion as to the documents to be submitted by the complainant's firm and (e) the Commission failed to reply to correspondence or telephone calls from the complainant's firm. 1.2 The Commission claims that it did reply to the fax sent by the complainant on 5 December 1997 in telephone conversations in December 1997 and January 1998. The Commission's claim that these conversations concerned the fax sent by the complainant on 5 December 1997 does not lack credibility. In these circumstances the complainant's allegation that the Commission did not respond to its fax of 5 December 1997 cannot be considered as having been established. 1.3 As to the meeting on 23 February 1998, the complainant argues that the Commission had agreed to organise it. However, the Commission denies this. The complainant has not been able to provide sufficient evidence which would prove the alleged agreement or to refute the Commission's argument that the organisation of such meetings was first and foremost the responsibility of the complainant's firm.



1.4 In so far as the changes in the terms of reference of the Contract are concerned, the Ombudsman considers that there is no need to inquire further into this matter. In his fax of 10 March 1998 the complainant thanked the Commission for its various faxes and telephone calls and noted that the situation "now seems clarified", that he would continue with the work and that he could "see no reason why we should not have a full and positive report with you by the agreed dates". These comments strongly suggest that even if the changes in the terms of reference should initially have affected work on the Vademecum, the resulting delays and misunderstandings had been resolved and did not prevent the complainant's firm from complying with its obligations under the Contract. This conclusion also applies to the complainant's claim that work was delayed or impeded by the fax of 5 March 1998 in which the Commission insisted that the modified structure of the Vademecum should be sent to it "before any further meetings take place in Brussels".

1.5 As to the alleged confusion concerning the documents which the complainant's firm had to submit, the view of the complainant according to which no interim report was to be delivered is irreconcilable with the clear wording of Annex III to the Contract. The complainant argues that if an interim report was due, he did submit it on 6 March 1998. However, the Commission claims that at the meeting on 8 October 1997, it was agreed that the interim report should contain an "outline structure" and a "rough draft of contents". This allegation is supported by the minutes of that meeting. Despite the obvious importance of this document, the complainant has not commented on it at all. In these circumstances, the complainant's claim according to which the Commission caused confusion as to the documents to be submitted by the complainant's firm thus cannot be regarded as having been established.

1.6 As to the complainant's claim that the Commission failed to reply to correspondence or telephone calls, the Ombudsman considers that in the light of the explanations provided by the Commission this claim cannot be considered as having been established.

1.7 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the first allegation put forward by the complainant is concerned.

**2 Turning down or ignoring requests for meetings**

2.1 The complainant alleges that the Commission turned down or ignored its requests for meetings. The Commission claims that it did not ignore any requests for meetings. According to the Commission, its head of unit saw no reason in meeting the complainant's firm again since the latter had been unable to explain why the interim report had not yet been delivered.

2.2 It is undisputed that on 10 March 1998 the complainant sent a fax to the Commission in which he expressed his understanding that there was no need to meet during the week in course. As to the further requests, the Commission's explanation that it saw no reason for a further meeting is inter alia based on the argument that the complainant had failed to provide an interim report by the date agreed. However, and as shown above (see 1.6), the Commission's view that an interim report was due in March 1998 and that this report had to contain an "outline structure" as well as a "rough draft of contents" appears to be in accordance with the terms of the Contract and the subsequent discussions between the parties. The complainant does not appear to dispute the fact that he did not submit a report which would have fulfilled the above criteria. In these circumstances, the Commission's refusal to accede to a request for a further meeting with the complainant cannot be regarded as unreasonable.

2.3 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the second allegation put forward by the complainant is concerned.

**3 Intercepting or ignoring correspondence to the Head of Unit**

3.1 The complainant alleges that correspondence addressed to the head of unit was



intercepted or ignored. The Commission claims that all correspondence sent by the complainant was duly delivered to the appropriate addressees. In the absence of further evidence, the complainant's allegation that correspondence had been intercepted cannot therefore be considered as having been established. 3.2 In his letter of 28 December 1998, the complainant admits that the Commission had replied to one of the items of correspondence concerned (his fax sent on 20 March 1998). As to the remaining correspondence addressed to the head of unit, it has to be noted that the addressee of this mail called the complainant on 27 March 1998. In these circumstances, the complainant's claim that the Commission ignored his correspondence to the head of unit in charge cannot be considered as having been established. 3.3 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the third allegation put forward by the complainant is concerned. **4**

**Dispatch of libellous circulars** 4.1 The complainant claims that at least on two occasions the Commission, in circulars sent to some two dozen trade federations, libellously implied that the complainant's firm was at fault. 4.2 The Commission denies this allegation. In so far as the second of the relevant documents is concerned, the Commission claims that it was not sent to the federations and that the reference to them was only included by mistake. 4.3 The first of the documents criticised by the complainant is the fax sent by the Commission to several federations on 20 February 1998 which refers to "logistical reasons" as the reason for the late notice. However, the complainant has not demonstrated why this expression should be considered as being libellous. 4.4 In so far as the Commission's fax of 19 March 1998 is concerned the Ombudsman has not found any evidence which would cast doubt on the Commission's claim that this fax had not been circulated to the federations. The Ombudsman notes, however, that the Commission could have avoided any subsequent problems if it had promptly corrected the complainant's mistaken belief that the document had indeed been sent to third parties. 4.5 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the fourth allegation put forward by the complainant is concerned. **5 Inaccuracy of the grounds for termination of the Contract**

5.1 The complainant claims that the grounds given by the Commission for the termination of the Contract were inaccurate since the Commission's decision was based on the failure to deliver the interim report by the allegedly agreed date of 25 March 1998. However, the document which was to be circulated was the 'modified structure for the Vademecum contents' whilst the draft final report was only due for 11 April 1998. 5.2 The Commission claims that there was a serious failure of the consultant to perform its obligations which had allowed the Commission to terminate the contract. 5.3 In its decision of 8 April 1998 to terminate the Contract, the Commission relies on the importance which it attached to the timely delivery of the interim report for the meeting on 30 March 1998. However, and as already discussed above (1.6), the Commission's interpretation according to which the Contract provided for the delivery of an interim report which was to comprise an outline structure and a rough draft of contents and that this report was to be ready by 25 March 1998 at the latest, is in conformity with the terms of the Contract and the subsequent discussions between the contracting parties. Furthermore, the complainant does not appear to dispute the fact that he did not submit a report which would have fulfilled the above criteria. The complainant has thus not shown that the reasons given by the Commission for terminating the Contract were inaccurate. 5.4 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the fifth allegation put forward by the complainant is concerned. **6 Conclusion** On the basis of the



European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman has therefore decided to close the case. The President of the European Commission will also be informed of this decision. Yours sincerely Jacob SÖDERMAN