



COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

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Médiateur européen

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Ms Emily O'Reilly

European Ombudsman

Date d'arrivée

Dear Ms. Ombudsman,

In reply your letter of 25 September 2018, please be informed that Article 74(3) of the General Regulation No. 1303/2013 on the European Union funds provides for the Member States' obligation to ensure that effective arrangements for the examination of complaints concerning European funds are in place. The effectiveness of the arrangements should consist in ensuring that every complaint falling within the scope of arrangements adopted by a given EU Member State is examined, and that the results of the examination are justified in a precise manner. It should be noted that Member States have been given some freedom in setting up their mechanisms in this area, yet regulations and procedures drawn up by a given Member State have to be compliant with its legal framework as well as institutional systems. In examining the said complaints at the national level, various procedures may be used but their appropriateness should always be relevant to the context of the complaint, closely related to the conducted award procedure (e.g. if the complaint is related to the award of a public procurement contract, the relevant legislative instrument will be the *Public Procurement Law*).

In the Polish legislative system, there is always the possibility to apply, as a last resort, the provisions of the *Code of Administrative Procedure* that are general in nature, and that apply to complaints and motions. The results of such procedures may, in principle, be subject to judicial review.

The Polish legislator has also provided for a special appeal procedure for entities that take part in the selection of projects to be co-financed in competition proceedings. The procedure is regulated in Chapter 15 of the *Act of 11 July 2014 on the rules of implementation of the cohesion policy programmes financed under the 2014-2020 financial perspective* (Journal of Laws [Polish: Dziennik Ustaw - Dz.U.) of 2018, item 1431). The appeal procedure makes it possible for entities whose projects have not been selected for co-financing, to submit a complaint to the competent institution. In such a complaint, the complainant may raise substantive objections regarding the evaluation of their project. They may also point to any procedural shortcomings. The competent institution should consider the complaint within no more than 21 days of its receipt. The deadline may be extended to no more than 45 days. If the complaint is dismissed, the complainant may lodge a complaint with an administrative court.

If, during the appeal procedure, the amount allocated to the co-financing of projects gets exhausted, the competent institution leaves the complaint without consideration, and the complainant may only take the case to the court. If the said amount gets exhausted only at the stage of the court proceedings, and the court upholds the complaint, the court only adjudicates that the evaluation of the project in question has been carried out in a manner which was against the law. However, the court does not refer the case back for reconsideration. The Commissioner for Human Rights has doubts as to whether this solution does not violate the rule of two-instance proceedings guaranteed by the Polish Constitution (Article 78 of the Constitution of the Republic of Poland), as the project application is not subject to substantive evaluation for the second time. For this reason, the Commissioner joined the proceedings conducted before the Constitutional Tribunal in connection with a complaint lodged by the *STALAG* company whose complaint had been left unconsidered (case file no. SK 17/17). In its judgment of 13 November 2018, the Constitutional Tribunal ruled that the Constitution of the Republic of Poland had not been violated. The Tribunal emphasized that in view of the principle of citizens' trust in the state as well as its laws, it is of importance to ensure the stability of decisions on awarding co-financing. This is also related to the need to protect entities that have already used, in good faith, the EU funds that were allocated to them. The judgment of the Constitutional Tribunal is final.

In recent years, the Commissioner received only few complaints concerning the aforementioned appeal procedure. In those cases, no violations of the procedures in question were revealed. I would also like to emphasize that the Commissioner has no comprehensive data concerning the matter, which makes it difficult to reliably assess the practical effectiveness of the appeal mechanisms on the national scale.

Yours sincerely,

