



P. NIKIFOROS DIAMANDOUROS

**DECISION OF THE EUROPEAN OMBUDSMAN CLOSING HIS INQUIRY
INTO COMPLAINT 255/2009/JF AGAINST THE EDUCATION,
AUDIOVISUAL AND CULTURE EXECUTIVE AGENCY**

THE BACKGROUND TO THE COMPLAINT

1. In November 2002, the Danish NGO *Association for Community Colleges* ('the complainant')¹, applied for a Youth Programme grant from the Technical Assistance Office (TAO) for Socrates, Leonardo and Youth ('the Commission')². The applicable Youth Programme's financing rules on travel expenses provided that the Community would fund 70% of such expenses.
2. The complainant's project, entitled *Transylvania Community College 2003*, involved over 50 young people and youth workers from 11 European countries taking part in two-week-long discussions relating to the integration of Central and Eastern European minorities and the EU's enlargement policy. The total expenditure for the project's travel costs was EUR 13 750. In line with the Youth Programme grant, the Commission would cover 70% of that expenditure, corresponding to EUR 9 500. However, when filling in its application, the complainant mistakenly indicated this latter figure as the project's overall travel expenditure. Consequently, the Community funding of 70% applied to this latter amount and the Commission would only cover EUR 6 650 of the related travel costs.
3. In July 2003, after approving the project, the Commission sent to the complainant a Financial Agreement for a Youth Programme grant amounting to EUR 24 350 ('the Contract'). The Contract indicated EUR 9 500 as the total expenditure for travel costs.
4. On 9 July 2003, the complainant signed the Contract and sent it back to the Commission. Nevertheless, in the letter accompanying the Contract, the complainant drew the Commission's attention to the fact that "[it had] applied for an amount of 9.500 EUR for the coverage of 70% of travel costs (total costs

¹ The complainant "is a non-governmental, non-profit and non-partisan organisation that works for the development of a European (transnational) public sphere" (www.acc.eu.org).

² The Ombudsman notes that, according to the Commission's opinion, the TAO helped it with the administrative management of centralised action under the Socrates, Leonardo and Youth Community action programmes until 31 December 2005. Therefore, TAO and the Commission will henceforth be referred to solely as 'the Commission'.

will be 13.750 EUR). However, [the Commission's] proposed budget has reduced the amount one more time ($0,70 \times 9500 \text{ EUR} = 6650 \text{ EUR}$)." In light of the above, the complainant asked the Commission to reconsider the amounts in question.

5. On 21 July 2003, the Commission signed and approved the Contract.
6. Between 3 and 16 August 2003, the complainant implemented the project. During that period, on 7 August 2003, the Commission paid it the first instalment of EUR 19 480.
7. At the beginning of 2004, the complainant submitted its final report on the project, in which it identified EUR 13 817 of incurred travel costs.
8. On 6 July 2004, the complainant sent a letter to the Commission expressing its concerns about a possible misunderstanding relating to travel costs. The Commission paid the complainant EUR 6 650 of the project's travel costs. However, when signing the Contract, the complainant had informed the Commission that 70% of its total travel costs corresponded to EUR 9 500. It was, therefore, obvious that the Commission had made a mistake when it approved a budget of EUR 9 500 as corresponding to 100% of the travel costs. Although it noted this mistake before signing the Contract, the complainant did not enter into discussions with the Commission in this regard and signed the Contract because, at that time, the project was about to start. The complainant was under time pressure and had no other option than to sign the Contract as it was. Moreover, on 23 July 2003, the Commission identified the above problem as a mere "technicality". In light of the above, the complainant asked the Commission to correct this mistake and pay it the EUR 2 850 of the remaining travel costs with the final instalment.
9. On 15 July 2004, the Commission paid the full balance of the grant to the complainant and, on 27 July 2004, closed the project.
10. On 28 July 2004, the Commission replied to the complainant's communication of 6 July 2004. It stated that: (i) *"the application form submitted by [the complainant] was clearly wrong. The detail of the travel costs was clearly shown ... to be a total of 9500€. Pursuant to the funding rules of the Action, the Commission can only consider 70% of this amount for funding, i.e. 6550€"*; and (ii) it had, therefore, approved the EUR 6 650 of travel costs. The complainant's letter of 9 July 2003 was considered as a request for "supplementary funding". The Commission could, in exceptional circumstances and before 2003, amend its award-granting decisions. It was willing, at that time, to assist the complainant in finding a favourable solution to the situation. However, in 2003, a New Financial Regulation (NFR) containing detailed requirements for the management of Community programmes entered into force. As a result, supplementary funding could no longer be authorised, irrespective of any valid justifications. The Commission still sought a derogation from this rule and tried

to allocate the supplementary funding. However, in 2004, it became absolutely clear that, in circumstances such as the complainant's, the NFR would not allow for any amendments be made to the grant. The complainant had sole responsibility for its application and should have taken great care when completing the form in order to avoid mistakes. The Commission (i) regretted that the complainant's request for "supplementary funding" of EUR 2 850 could not be approved; and (ii) confirmed that it had already transferred the final instalment of EUR 4 870 to the complainant.

11. On 7 September 2004, the complainant sent a reply in which it accepted that there had been mistakes in the application form. It pointed out, however, that, although it was possible for the Commission to correct the part relating to travel costs in the application, it did not do so. Moreover, although it was true that, on one specific page of the application, the complainant indeed inserted a wrong calculation, "*the amount was correct on page 10 (70% = 9.500) and correct in the enclosed budget.*" The complainant had further discussed the issue of travel costs with the Commission and the latter had "*considered it a mistake of the TAO*". Since the Commission had thus accepted responsibility, the complainant was satisfied and signed the Contract. Waiting for a new contract would have caused it serious financial problems. The complainant received the Contract only three weeks before the project began and it was the Commission which suggested the "*technical*" solution which made it possible for the complainant to apply for the "*supplementary funding*". In light of the foregoing, the complainant reiterated its request for the Commission to pay it the remaining EUR 2 850 of travel costs.
12. On 1 January 2006, the Education, Audiovisual and Culture Executive Agency (EACEA) took over from TAO the monitoring and administration of the youth projects.
13. On 3 November 2006, at the request of EACEA, the company *Moore Stephens LLP* ('the Auditor') audited the results of the project.
14. The Auditor produced three versions of its report, (i) the first, on 18 December 2006; (ii) the second, on 19 December 2007; and (iii) the third, and final, on 2 June 2008. In this latter report, the Auditor recommended that the Commission recover EUR 2 364 from the complainant for items other than the travel costs.
15. On 18 July 2008, EACEA sent to the complainant a financial note, entitled "*final financial situation of the YOUTH grant after audit*", whereby it requested it to reimburse EUR 2 364 ('the Decision'). The Decision provided that:

"the financial situation of [the complainant's] project with regard to financial audit findings nr 1 (incorrect calculation of activity costs), nr 2 (travel costs claimed in Final Report exceeded amount in accounting records) and nr 3 (budget overrun for travel costs) is as follows:

Proposed grant for the eligibility period: 27.325,00 EUR

<i>Final grant agreed after audit assessment:</i>	<i>21.986,00 EUR</i>
<i>Pre-financing and balance already paid:</i>	<i>24.350,00 EUR</i>
<i>To reimburse to the Executive Agency:</i>	<i>2.364,00 EUR".</i>

EACEA went on to point out that if the complainant failed to react within 60 days, EACEA would send it a debit note setting out the terms and the conditions of reimbursement. Failure to pay the above amount within the time limits set by EACEA would result in interest for deferred payment.

16. On 4 November 2008, EACEA sent the debit note to the complainant and, on 20 January 2009, sent it a reminder for payment of a total of EUR 2 384.17.
17. On 28 January 2009, the complainant turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

18. The complainant alleged that EACEA's reimbursement claim set out in its Decision was unfair, since it did not take into account the project's travel costs which were still due to it.
19. The complainant claimed that EACEA should (i) pay it the project's real travel costs, in accordance with the Auditor's recommendation made on page 17 of its Report of 18 December 2006; and (ii) explain in detail the calculations and conclusions set out in its Decision.

THE INQUIRY

20. On 19 March 2009, the Ombudsman forwarded the complaint to the President of the European Commission.
21. On 8 July 2009, the Ombudsman received the Commission's opinion in French and, on 15 July 2009, its translation into English, which he forwarded to the complainant with an invitation to make observations.
22. In the meantime, on 19 April and 27 June 2009, the complainant provided the Ombudsman with further information. On 4 August 2009, it submitted to the Ombudsman its observations on the Commission's opinion.
23. After careful consideration of the opinion and the observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complaint. He therefore made a provisional finding of maladministration and, in accordance with Article 3(5) of his Statute, proposed a friendly solution to the Commission.
24. On 1 March 2010, the Ombudsman received the Commission's reply, which he forwarded to the complainant for its observations. No observations were received from the complainant.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. The Allegation of unfairness and the related claims

Arguments presented to the Ombudsman

25. The complainant alleged that EACEA's reimbursement claim set out in its Decision was unfair, since it did not take into account the project's travel costs which were still due to it.
26. In support of this allegation, the complainant argued that:
 - (a) EACEA did not follow the Auditor's recommendation cited immediately below, concerning the travel costs, which was made on page 17 of its Report of 18 December 2006:

"a further € 2.723 should be reimbursed (the difference between the requested amount of € 9.500 and the actual costs incurred of € 9.373) [sic]"; and
 - (b) the Commission first agreed to pay the amount of EUR 9 500 and later changed its mind, arguing that the NFR did not allow it to do so.
27. The complainant claimed that EACEA should (i) pay it the project's real travel costs, in accordance with the Auditor's recommendation made on page 17 of its Report of 18 December 2006; and (ii) explain in detail the calculations and conclusions set out in its Decision.
28. In its opinion, the Commission confirmed its view that the complainant had made a mistake by incorrectly filling in the amount relating to the Community funding in the part of the application form relating to estimated travel expenses. The Commission could not, therefore, provide for a funding higher than that declared and approved by the complainant through its own signature.
29. Both the Commission and EACEA rejected the complainant's application for supplementary funding under the terms of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities³ and the contractual provisions approved by the complainant.
30. EACEA had no knowledge of the Auditor's report of 18 December 2006, which was an *"unofficial document"*. It only received the report of 19 December 2007 and the final report of 2 June 2008. The Auditor established that six participants in the complainant's project were older than the age allowed in the Programme,

which was between 15 and 25 years. Consequently, it rejected the costs associated with the activities of these six participants.

31. Following the complaint, EACEA asked the Auditor for further information on the above rejection. The Auditor re-examined the file and established that the six participants in question were monitors who accompanied the group of young participants in the project. They ensured the effectiveness of the learning process and the participants' protection and security. It follows that the requirement relating to age did not apply to them and their costs were, consequently, eligible. As a result, the Commission would cancel its recovery order and, since it had already granted the complainant the maximum amount provided in the Contract, close the project indefinitely.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

32. In its observations, the complainant emphasised that, until it received a copy of the Commission's opinion to the Ombudsman, it had never seen the Auditor's final report dated 2 June 2008. After seeing the opinion, the complainant was satisfied that the Commission had finally explained why it considered some of the project's costs ineligible and addressed to the complainant a Decision with a claim for reimbursement.
33. In this regard, the Ombudsman noted that the recovery in question did not concern any amounts relating to travel costs, which formed the subject matter of the present complaint, but rather to "activities costs" of some of the participants in the complainant's project.
34. The Ombudsman welcomed the fact that the Commission took steps to clarify the calculations of its Decision, and noted that these steps resulted in the cancellation of its order for reimbursement. He pointed out, however, that the said steps and outcome had no impact on the complainant's claim that the Commission should pay it the project's real travel costs.
35. The Ombudsman also analysed in detail the other aspects of the Auditor's final report. In that report, the Auditor established that (i) eligible travel costs corresponded to EUR 9 372.03; (ii) the budgeted travel costs corresponded to EUR 6 650; and, consequently (iii) there was a total budgetary deficit of EUR 2 722.03, which had to be considered ineligible under the Contract. In this regard, however, the Auditor accepted that the Commission could have amended the budget or authorised some supplementary funding to the complainant. Nevertheless, it left the final decision on travel costs to EACEA, using the following conditional terms:

"... if the TAO stated that it would be willing to amend the budget or provide supplementary funding to correct this administrative misunderstanding (albeit orally), we believe this could have been carried out. We are willing to accept the issue described above as a misunderstanding that can be remedied prior to

the final acceptance and validation of this audit report. While retaining this as a finding, we leave the final decision to the appreciation of EACEA."⁴

36. In this regard, the Ombudsman noted that, in the course of his inquiry, the Commission did not contest the complainant's statement that the Commission had suggested a "technical" solution to the problem whereby the complainant would apply for further "supplementary funding".
37. Later, however, in its letter of 28 July 2004, the Commission refused this supplementary funding, on the grounds that it had, in the meantime, adopted a "thorough shift of approach". Although the Commission was willing to help, it could not do so because the NFR prevented it from allocating supplementary funds to the complainant⁵.
38. The Ombudsman did not see why the Auditor's view, expressed in June 2008, that "this could have been carried out" could not have been decisive and allowed the Commission to overturn its previous position, expressed formally in July 2004.
39. He emphasised that the issue at hand was a simple mistake, which was identified as such by the Commission and described as an "administrative misunderstanding" by the Auditor. The Commission only covered the EUR 6 650 of travel costs because this was the amount mistakenly inserted by the complainant in an application form it duly signed and approved, while the complainant's eligible travelling costs were, in accordance with the Auditor's final report, EUR 9 372.03. In other words, had the complainant not committed this mistake, the Commission would have covered the full amount of EUR 9 372.03 corresponding to the travel costs.
40. The Ombudsman has repeatedly emphasised the Commission's legal duty to protect the financial interests of the Community. In the Ombudsman's view, it is only correct that the Commission makes efforts to guarantee that no funding is granted without appropriate justification.

⁴ Cited on page 17 of the copy of the Auditor's final report submitted to the Ombudsman by the Commission with its opinion.

⁵ The Commission's letter of 28 July 2004 contains the following statements: "... the previous practice before 2003 had made amendments to grant award decisions possible where exceptional circumstances justified the case. These decisions were at the discretion of the Commission. Against this background, the TAO was willing to assist in seeking a favourable solution to the situation ... [I]n 2003 a New Financial Regulation (NFR) entered into force ... The problem with your project came at the moment where a thorough shift of approach was adopted by the Commission, and remains valid: no supplementary funding is authorised, for whatever reasons, after a selection committee decision has been taken and validated by the Commission (in conformity with the terms of the Financial [R]egulation - Art. 111 of the Implementing Measures) ... [T]he TAO and the competent youth services in the Commission nevertheless sought for a derogation to this rule, in order to enable the allocation of supplementary funding; in early 2004, it became absolutely clear that the New Financial Regulation would not permit the amendment of the grant in this type of circumstances ...".

41. In the present case, it was undisputed that the travel costs identified by the Auditor in its final report corresponded to those incurred by the complainant in the context of its Youth Programme project. Moreover, the Ombudsman considered that the complainant's mistake was so patent that the Commission, albeit orally, agreed to a solution for that mistake. The Commission did not contest this in the context of the present inquiry and confirmed⁶ that, as argued by the complainant in its letter of 6 July 2004, page 10 of the complainant's application indeed identified EUR 9 500 as "[t]ravel costs (70% of actual costs)", that is, the "[t]otal amount requested from the YOUTH programme".
42. The Ombudsman considered it reasonable that, in cases where patent mistakes are committed at the time of an application, the competent institution should, when assessing that application, provide the applicant committing the mistake with a possibility to correct it⁷. Alternatively, if the mistake is discovered only after the Contract has been signed, it is only reasonable to amend that Contract accordingly. Although the complainant, who was, ultimately, the weaker party to the Contract, did not insist on that amendment, the principles of service-mindedness and fairness required the Commission to take the initiative in this respect. However, the institution did not do this.
43. In light of the above, not repaying the complainant project's real and eligible travel costs appeared to the Ombudsman not only unfair, but also incompatible with the principle of proportionality, as provided for in the European Code of Good Administrative Behaviour⁸.
44. The Ombudsman thus made the preliminary finding that EACEA's refusal to cover the remaining part of the complainant's project travel costs amounted to an instance of maladministration. He, therefore, made a corresponding proposal for a friendly solution, in accordance with Article 3(5) of his Statute, that

⁶ The Commission enclosed a copy of the complainant's application with its opinion.

⁷ See, by analogy, Case T-211/02, *Tideland Signal Ltd v Commission of the European Communities*, ECR [2002] II-3781, paragraph 37: "... the power [to seek clarification] must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary ... While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is liable to be vitiated by a manifest error of assessment on the part of the institution in the exercise of that power."

⁸ Article 6 of the European Code of Good Administrative Behaviour provides that:

"1. When taking decisions, the official shall ensure that measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued.

2. When taking decisions, the official shall respect the fair balance between the interests of private persons and the general public interest."

"EACEA could pay the complainant the remaining EUR 2 722.03 of its project travel costs."

The arguments presented to the Ombudsman after his friendly solution proposal

44. EACEA found the Ombudsman's proposal for a Friendly Solution reasonable and agreed to pay the remaining EUR 2 722.03 of project travel costs to the complainant.
45. The complainant confirmed by telephone that it was satisfied with the outcome of the inquiry.

The Ombudsman's assessment after his friendly solution proposal

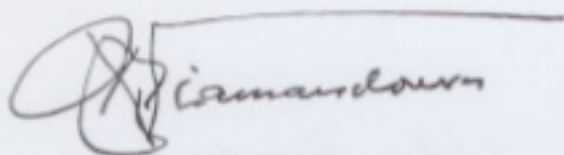
46. The Ombudsman applauds EACEA's acceptance of his friendly solution proposal and its willingness to settle the complaint. Accordingly, he closes the case.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Ombudsman applauds EACEA's acceptance of his friendly solution proposal and its willingness to settle the complaint. He, therefore, closes the case.

The complainant, the Director of EACEA, and the President of the Commission will be informed of this decision.



P. Nikiforos DIAMANDOUROS

Done in Strasbourg on1.9 -05- 2010