

Afgørelse i sag OI/1/2009/GG - Návrat k otázce včasnosti plateb ze strany Evropské komise

Rozhodnutí

Případ OI/1/2009/GG - Otevřeno dne 17/02/2009 - Rozhodnutí ze dne 08/02/2011

V návaznosti na dvě dřívější šetření (OI/5/99(IJH)GG a OI/5/2007/GG) veřejný ochránce práv zahájil v únoru 2009 další šetření z vlastního podnětu týkající se otázky včasnosti plateb ze strany Evropské komise. Veřejný ochránce práv požádal Komisi zejména o informace o jejich výsledcích v roce 2008.

Poté, co veřejný ochránce práv obdržel stanovisko Komise, zahájil veřejnou konzultaci. Od zainteresovaných občanů obdržel celkem devět příspěvků.

Veřejný ochránce práv následně požádal Komisi, aby se zabývala argumenty, které byly zmíněny v těchto příspěvcích. Veřejný ochránce práv také požádal Komisi, aby mu poskytla informace o svých výsledcích v roce 2009.

Poté, co veřejný ochránce práv přezkoumal informace, které mu byly poskytnuty, dospěl k závěru, že reakce Komise na otázky a argumenty zmíněné v průběhu veřejné konzultace byly povětšinou přesvědčivé. Pokud se jedná o výsledky Komise v roce 2009, veřejný ochránce práv poznamenal, že opatření, která Komise přijala, přinesla ovoce a že byl učiněn významný krok k vyřešení problému opožděných plateb. Počet opožděných plateb se od roku 2008, kdy činil 22,67 % všech plateb, do roku 2009, kdy toto procento pokleslo na 14,42 %, značně snížil. Celkové částky postižené opožděním se od roku 2008 (13,95 %) do roku 2009 (6,63 %) se v procentuálním vyjádření snížily o více než polovinu. Průměrné opoždění bylo navíc také velmi zkráceno ze 47,45 na 40,43 dnů.

Veřejný ochránce práv však poznamenal, že problémy nadále přetrvávají.

S ohledem na výše uvedené skutečnosti a zejména na základě zřejmých zlepšení, kterých Komise dosáhla v roce 2009, se veřejný ochránce práv domnívá, že v současnosti nejsou důvody pro další šetření týkající se otázky včasnosti plateb ze strany Komise. Považuje se však za nezbytné tuto otázku stále posuzovat. Aby to bylo veřejnému ochránci práv umožněno, Komise by mu měla poskytnout údaje o platbách provedených v roce 2010, jakmile budou k dispozici. Tyto informace by měly být předloženy ve stejné formě, jako tomu bylo v předchozích letech.



The background to the own-initiative inquiry

1. Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman to conduct inquiries on his own initiative in relation to possible instances of maladministration in the activities of the Union institutions, bodies, offices and agencies.
2. In his own-initiative inquiry OI/5/99/(IJH)GG, the Ombudsman investigated the subject of late payment by the Commission. This inquiry was closed on 16 February 2001.
3. On 14 December 2007, the Ombudsman opened a further own-initiative inquiry concerning the issue of timeliness of payments by the European Commission (OI/5/2007/GG).
4. In its opinion in that case, the Commission *inter alia* pointed out that Article 106 of Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [1] ("Regulation 2342/2002") had been modified.
5. Article 106 of Regulation 2342/2002 [2] is worded as follows

"Payment time limits and default interest

1. Sums due shall be paid within no more than forty-five calendar days from the date on which an admissible payment request is registered by the authorised department of the authorising officer responsible (...).
2. The payment period referred to in paragraph 1 shall be thirty calendar days for payments relating to service or supply contracts, save where the contract provides otherwise.
3. For contracts, grant agreements and decisions under which payment depends on the approval of a report or a certificate, the time-limit for the purposes of the payment periods referred to in paragraphs 1 and 2 shall not begin to run until the report or certificate in question has been approved. (...)

The time allowed for approval may not exceed:

- (a) 20 calendar days for straightforward contracts relating to the supply of goods and services;
- (b) 45 calendar days for other contracts and grant agreements and decisions;
- (c) 60 calendar days for contracts and grant agreements and decisions involving technical services or actions which are particularly complex to evaluate.



(...)

5. On expiry of the time limits laid down in paragraphs 1, 2 and 3, the creditor shall be entitled to interest in accordance with the following provisions:

(a) the interest rates shall be those referred to in the first subparagraph of Article 86(2);

(b) the interest shall be payable for the period elapsing from the calendar day following expiry of the time limit for payment up to the day of payment.

By way of exception, when the interest calculated in accordance with the provisions of the first subparagraph is lower than or equal to EUR 200, it shall be paid to the creditor only upon a demand submitted within two months of receiving late payment. (...)"

6. In his decision of 20 June 2008 closing his own-initiative inquiry OI/5/2007/GG, the Ombudsman noted that many of the measures adopted by the Commission in this context, and in particular those that resulted in changes of Regulation 2342/2002, appeared to be comparatively recent and that it was therefore too early to assess the impact that they might have on the situation. In the Ombudsman's view, the best way to proceed was thus to close inquiry OI/5/2007/GG and to open a new own-initiative inquiry in early 2009, when figures for the Commission's performance in 2008 would be available.

7. In view of the above, the Ombudsman decided to open a new own-initiative inquiry into the subject of timeliness of payment by the Commission.

The subject matter of the inquiry

8. In his letter opening the present inquiry, the Ombudsman asked the Commission to inform him of the results of the steps it had taken to identify and deal with the causes of delays it experienced in making payments to contractors and to beneficiaries of grants and subsidies. The Ombudsman added that he would of course also be interested in obtaining information on any further steps the Commission might have taken in this field.

9. The Ombudsman pointed out that, in this context, it would be most useful if the Commission could also present statistical data that might illustrate the problem or the remedial action taken by the Commission. He added that he would be particularly interested in receiving information on the number and percentage of cases where delays in payment occurred, on the extent of the delays that occurred, on the sums involved and on the cases where interest was paid on account of late payment.

10. The Ombudsman noted that, as explained in point 1.10 of his decision on case OI/5/2007/GG, he also considered it necessary to review the effects of the revision of Article 106(5) of Regulation 2342/2002. He therefore invited the Commission to address this aspect in its opinion.



The inquiry

- 11.** On 17 February 2009, the Ombudsman opened the present own-initiative inquiry.
- 12.** The Commission presented its opinion on 28 May 2009.
- 13.** On 24 June 2009, the Ombudsman asked the Commission for further information concerning the subject-matter of his inquiry. The Commission sent its reply on 30 October 2009.
- 14.** On 12 January 2010, the Ombudsman launched a public consultation. A total of nine contributions were received from interested members of the public.
- 15.** On 21 April 2010, the Ombudsman asked the Commission to address the arguments that had been raised in these contributions. He also requested it to provide him with further information. The Commission sent its reply on 14 September 2010. The Commission subsequently informed the Ombudsman that, due to an error that had in the meantime been detected, certain figures had to be corrected.

The Ombudsman's analysis and conclusions

Preliminary remarks

- 16.** In its reply to the Ombudsman's first request for further information, the Commission presented, at the Ombudsman's request, data concerning the five cases in which the highest amount of interest was paid in 2008. One of these cases concerned a payment to a "public institute" where a delay of 754 days had occurred.
- 17.** This was an exceptional delay. The Ombudsman took the view, therefore, that it was appropriate to take a closer look at this case. At first sight, it appeared fair to assume that this case constituted an exception. The Ombudsman also noted that interest on account for late payment had been paid in this case and that no complaint seemed to have been submitted to him concerning this matter.
- 18.** The Ombudsman therefore took the view that it was appropriate to examine this case separately from the present inquiry. He therefore opened a separate own-initiative inquiry (OI/1/2010/GG).
- 19.** After a thorough examination of the facts of that case, which included an inspection of the relevant file, the Ombudsman concluded that there were no grounds for further inquiries. He therefore closed that case on 21 April 2010.



A. The arguments and information taken into account by the Ombudsman

The Commission's opinion and its reply to the first request for further information

20. In its opinion, the Commission stated that it had maintained a level of performance for payments in 2008, which, in number and in value, as well as in average delay, was similar to previous years. The following table summarises the 2008 situation concerning payments made after the expiry of the relevant time-limits. Data relating to 2005 and 2007, that were communicated previously, are used for the sake of comparison:

Table 1: Late payments in 2005, 2007 and 2008

2005

2007

2008

Number of late payments

42.74 %

22.57 %

22.67 %

Value of late payments

17.48 %

11.52 %

13.95 %

Average delays [3]

49.13 days

47.98 days

47.45 days



21. As far as the payment of interest for late payments was concerned, the Commission noted that it had had to deal with more requests and had had to pay more interest in 2008 than before:

Table 2: Interest on account of late payments in 2005, 2007 and 2008

2005

2007

2008

Number of requests for interest submitted by creditors on account of late payment

149

136

138

Amount of interest paid

EUR 230 736.58

EUR 378 211.57

EUR 631 909.62 [4] (of which EUR 512 830.79 upon request)

22. The Commission noted the many steps it had already adopted in recent years to avoid late payments, both at the administrative and the legislative level. It added that these steps had been recorded in its submissions concerning OI/5/2007/GG and had helped considerably to reduce the percentage of late payments, even though the situation in 2008 was still very close to the one witnessed in 2007. However, one had to take into account that most of the different measures adopted to tackle the issue of late payments were of a long-term character. Their effect would therefore only be shown gradually. For instance, Article 106(5) of Regulation 2342/2002 in its revised version was only applicable as from 1 January 2008, whereas requests for interest still needed to be made with regard to procurement contracts or grant agreements/decisions concluded before 1 January 2008.

23. The Commission stressed that it was fully aware of the need to comply with time-limits for payments and that it considered that more efforts were needed in this respect. This was why it had adopted, on 8 April 2009, a Communication entitled 'Streamlining financial rules and accelerating budget implementation to help economic recovery' [5] (the "2009 Communication"). This Communication focused on the part of the budget that the Commission implements directly (centralised management) and instructed the Commission's services to go a



step further by implementing the following measures on a voluntary basis:

- Speeding up 'first' pre-financing payments by paying within 20 calendar days from the date of the conclusion of the procurement contract or grant agreement/decision to the day on which the Commission's bank account is debited. [6] According to the Commission, pre-financing payments covered about one third of the payments in value;
- Speeding up all other payments, for which the Commission would apply a 30-day time-limit; and
- Promoting the use of lump sums and flat rates, which avoid time-consuming and cumbersome checks for standardised actions/costs.

24. The Commission stated that, through this Communication, it also reinforced the monitoring of its departments' performance. Firstly, the Commission's Accounting Officer had been entrusted with the task of monitoring and coordinating progress in the implementation and delivery of the reduced time-limit. His first appraisal would be made on the basis of payment delays observed during the last quarter of 2009. Secondly, the relevant stock-taking would be intensified and become a more dynamic exercise, as Directors-General and/or heads of service would now have to present and, if need be, comment on the performance of their Directorate-General/service.

25. The Commission submitted that it was thus clear that it was engaged with determination in addressing the challenges it faced with late payments and had made its departments fully aware of the need to achieve better performance with regard to payment delays in 2009 and beyond.

26. Having examined this information, the Ombudsman pointed out that one of the steps adopted by the Commission concerned a new time-limit of 30 days for all payments other than 'first' pre-financing payments. In its 2009 Communication, the Commission explained that "[m]eeting this ambitious target will require a specific effort, given the number and volume of payments handled by the Commission and the proportion which is currently overdue compared to existing time-limits." In its opinion, the Commission had referred to the role entrusted to its Accounting Officer and the fact that Directors-General and/or heads of service will be required to present and comment on the performance of their services. However, welcome and important though these steps no doubt were, it was far from clear whether they would be sufficient to ensure that the revised target is met. As a matter of fact, it was clear that the Commission had considerable difficulties in meeting the previous, less demanding target. Introducing an even more ambitious target was therefore only likely to lead to improvements if steps were taken to ensure that the Commission's staff was in a position to comply with this target and would in fact do so. The Ombudsman therefore asked the Commission to indicate what concrete measures it had taken with regard to its staff in order to ensure that its target was reached, also taking into account the relevant steps that it had already mentioned in its opinion in case OI/5/2007/GG.

27. The Ombudsman further noted that the figures provided by the Commission showed that



the overall amount of interest paid had increased in 2008 and that, on average, the amount of interest paid per request had also increased. He therefore asked the Commission for more specific information concerning the interest that it had paid in 2008, in particular as regards the areas or services which accounted for most of this interest and the changes, if any, which had been noted in so far compared to previous years. The Ombudsman also requested the Commission to provide details for the five cases in which the highest amount of interest was paid upon request in 2008 and for the five cases in which the highest amount of interest was paid without a request in 2008.

28. In its reply, the Commission explained that it had been implementing enhanced operational support and monitoring for its staff through the following measures.

29. Guidance on specific issues had been developed since the release of the 2009 Communication. This guidance notably focused on providing support guidelines for authorising officers on how to make their choices based on risk assessments, on the need for pre-financing guarantees, on the implementation of the flexibility measures suggested in the 2009 Communication, as well as on streamlining financial circuits as much as possible.

30. Although the Commission's accounting system ("ABAC") already offered substantial support (registration and follow-up of payment due dates, automatic calculation of interest on late payments and monitoring via statistical reporting), two particular actions were being implemented in order to allow the new time-limit to be monitored:

- New functionalities had been developed in ABAC in order to include a set of automatic warning mechanisms alerting users of approaching due dates; and
- The Commission's Accounting Officer would share with the responsible authorising officers in charge of the payments the information contained in the reports drafted to implement the quarterly monitoring procedure of payment delays he was in charge of. Such an approach would offer full transparency and information. Payment times would be compared with targets as from 1 October 2009 and reasons for not respecting these would be examined with authorising services.

31. As regards the specific information requested by the Ombudsman, the Commission stated that the statistics on overdue payments showed that the average number of days overdue had remained stable in 2008 (47 days), whereas the number of late payments for which interest was paid increased by nearly 30 percent to 173 payments totalling EUR 576 000, yielding an average of approximately EUR 3 300 per payment.

32. The Commission explained that the three following tables summarised, for the year 2008, the top ranking DGs/services as regards interest paid and the top five cases in which the highest amount of interest was paid upon and without request. It added that these tables required further analysis, taking into account the improvements that had already been implemented. [7]



Table 3: Top ranking Directorates-General/services as regards interest paid in 2008

DG/service [8]

Number of payments with interest

Amount of interest paid

Total number of payments

total amount paid

AIDCO

18

EUR 219 221.62

11 648

EUR 3 632 million

TREN

10

EUR 70 787.15

2 554

EUR 715 million

RTD

28

EUR 61 806.23

28 518

EUR 4 270 million

OIB

27

9



EUR 42 608.61

9 750

EUR 357 million

IEEA

4

EUR 40 569.54

580

EUR 144 million

Table 4: Details for the five cases in which the highest amount of interest was paid upon request in 2008

Sum at stake

Delay (in days)

Economic sector

Commission service involved

Type of creditor (S-M-L enterprise)

EUR 114 398.85

244

Consulting/Audit

AIDCO

Large

EUR 38 298.80

754

Energy

10



TREN

Public institute

EUR 28 642.21

241

Freight transport

IEEA

Large

EUR 19 805.06

133

Tools

RTD

Large

EUR 18 320.01

154

Consulting

ELARG

Medium

Table 5: Details for the five cases in which the highest amount of interest was paid without request in 2008

Sum at stake

Delay (in days)

Economic sector

Commission service involved



Type of creditor

EUR 6 839.38

43

Education/Research

RTD

Academy of Science

EUR 5 617.99

5

IT

INFSO

Large

EUR 4 977.33

56

Electronic

ENTR

Large

EUR 4 654.96

27

Education/Research

RTD

University

EUR 4 184.17

12



33

Services (cleaning)

OIB

Medium

The public consultation and its results

33. On 12 January 2010, the Ombudsman launched a public consultation. In order to enable the public to make contributions, the Ombudsman's letter opening the present inquiry, the Commission's opinion, the Ombudsman's request for further information and the Commission's reply were made available on the Ombudsman's website.

34. The issues and arguments that were raised in the contributions submitted to the Ombudsman can be summarised as follows:

(1) After the relevant documentation is submitted to the Commission, the latter typically transmits a list of observations and indicates mistakes and defects related to the documents that need to be corrected. The deadline for payment is suspended until the applicant has made the necessary amendments. After these corrections have been made, the Commission again transmits observations that are not related to the above corrections and that concern issues that could already have been raised in its first observations. This again leads to a suspension of the deadline for payment.

(2) Delays are in particular due to the fact that there are two separate departments dealing with reports as regards substance and administrative aspects respectively. There does not appear to be enough communication between these departments. Queries from applicants are often passed from one of these departments to the other and back, thus further complicating matters.

(3) During the summer break of four weeks, there is practically no one available at the Commission to deal with payment issues.

(4) The problem of late payment is endemic, i.e., it is a problem that is built into the system. Delays occur when the Commission puts questions to one or more project partners, which lead to an interactive process between the Commission, the project coordinator and the partners that can be quite protracted. Where an amendment to the contract is proposed, payments are suspended until the amendment has been finalised. Finally, delays occur because the Commission's financial officer is ill, or because he is new and takes time to process matters.

(5) The Commission withholds 20 % of the budget when making interim payments. This means that a lot of money is owed for a long time after the end of the project.



(6) The problem has become much worse since the Commission moved from 6-monthly payments to annual payments. The system needs changing so that payments are received more frequently - say quarterly - with interest to be paid if payments are delayed for more than one month for whatever reason.

(7) Where payments are delayed, the beneficiary often needs to find the necessary means to cover the relevant expenditure in the meantime. The right to ask for interest on account of late payment does not solve the problems involved in finding such funds.

(8) It appears that the problem is no longer due to the central payment system of the Commission but rather to delays on the part of the Commission's delegation in the country concerned. This points towards management/staff problems at certain delegations, which should be examined more closely.

(9) The delays in payment could be due to the lack of competence or of care on the part of the officials in charge. A code of good behaviour should therefore be drawn up in order to define the rights and obligations of creditors and to foresee appropriate measures, notably systematic compensation in case of avoidable delays. This code should be mandatory.

(10) An inquiry should systematically be opened where this code is not respected or where avoidable delays occur, so as to understand the origin of these difficulties, to establish the reasons and responsibilities and to define corrective measures (notably dissuasive sanctions against the responsible persons).

(11) Recitals 18 and 19 and Articles 4(6) and 12 of Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC [9] could serve as a model for the measures to be adopted.

(12) Where questions or problems arise as regards one project partner, payments are withheld as regards the entire consortium. It would be useful to consider the possibility to ensure that at least the other project partners are paid.

(13) There is a lack of uniformity as regards the 30-day time-limit for payments to suppliers. For example, DG AIDCO applies a 45-day time-limit.

(14) The period for making payment only starts to run on the date when the Commission enters an invoice into the system. As a matter of fact, the relevant period only starts to run when the Commission confirms that the invoice is complete (provisional acceptance - PAC). A more appropriate date would be the date when the product or service is supplied.

(15) Requests for further information enable the Commission to create the impression that no delays occurred.



(16) Interested parties do not contact the European Ombudsman because they fear to lose the Commission as a customer. Businesses also waive any claims for damage on account of late payment.

(17) Experts working for the Commission are regularly only paid after 55-65 days, sometimes even later. The problem appears to be due to a lack of commitment and motivation on the part of the Commission staff dealing with financial issues. The Commission should see to it that this staff is better qualified, that a working atmosphere conducive to commitment and motivation is created and that a system of personal responsibility, combined with performance-related pay, is introduced.

The Commission's reaction and its reply to the request for further information

35. The Ombudsman asked the Commission to address the issues and arguments raised during the public consultation. He also asked it for further information. In its reply, the Commission noted that in 2009, and as part of the preparation of its proposal for the triennial review of the Financial Regulation, it had itself organised a public consultation. One question covered by the consultation dealt directly with payments (specifically pre-financing and the related recovery of interest). Additionally, the consultation documents noted that "any contribution relating to other topics covered by the Financial Regulation [e.g., late payments] will be appreciated and will feed the Commission's own thinking".

36. The Commission pointed out that it had received 235 contributions and that, whereas many contributors expressed views on pre-financing payments and the related recovery of interest, almost none of them evoked the issue of late payments.

37. As regards the issues and arguments that were raised in the contributions submitted to the Ombudsman, the Commission provided the following comments:

(1) Successive waves of comments may be due to the successive examination of reports from an operational and financial point of view by the Commission's services. Sending successive comments may also be meant to save time by alerting contractors or beneficiaries immediately to obvious omissions (deficiencies) or mistakes in cost claims or supporting documents, without prejudice to the results of a more thorough examination of the documentation submitted. This may actually help to finalise the payment within the overall deadline.

If additional information is requested from the beneficiary, the Commission's services are required to suspend the payment (and so extend the deadline) while they await the arrival of this information. However, only about 6 % of payments made by the Commission since 1 January 2009 have been subject to a suspension of the payment. Directorates-General ("DGs") with a high rate of suspension will be informed and given suggestions on how they can improve their performance. However, the overall rate of suspension of 6 % does not suggest that this is a systemic problem nor that it is used in an abusive manner.



(2) Fostering cooperation between operational and financial units has always been a key objective in the internal organisation of DGs, regardless of the financial circuits used. In the case of grants, in order to reduce the time taken to verify and approve the final or interim payments, a number of measures have already been adopted. These include providing templates for financial and technical reports which are used both to simplify reporting by beneficiaries and to allow an easier and harmonised verification by the Commission services involved. As stated above, an overall rate of 6% concerning payments where the payment deadline was suspended does not suggest that this is a widespread problem.

(3) The Commission does not share this opinion. Business continuity is a key concern in the Commission. The Commission's services are required to put in place adequate measures to ensure the continuity of service at all times (both during crises and to cater for staff absences and other issues). Services are required to report on any non-compliance with this requirement in their annual activity reports.

(4) The Commission has the obligation to verify the costs incurred in supported projects. However, some of the payment suspensions could easily be avoided if all the information (technical and financial) was provided from the beginning, as specified in the grant agreement or contracts. The systematic suspension of payments in the case of an amendment could be considered abusive. However, there are many cases where the amendment is necessary to process a payment, because, for example, the coordinator waited until the submission of the interim or final report to inform the Commission that a partner to the project has changed. The alternative would be for the Commission to reject altogether the amounts at stake.

Business continuity is always a priority, as already stated. However, the Commission encourages the mobility of its staff, so changes concerning its financial officers cannot be avoided. This is mitigated by a number of measures such as compulsory financial training, on-the-job training, tutoring and handover notes.

As stated above, only 6% of payments since 1 January 2009 have been subject to a suspension of the payment delay and late payments represented 6.63% of 2009 payments in value (see below). The conclusion that this problem is "endemic" would thus not seem to be supported.

(5) This may include performance-type guarantees which are not systematic but depend on the sector or the profile of the beneficiary. They are requested to ensure sound financial management. In any case, such requirements are part of the contractual conditions and thus known in advance by contractors.

(6) Payments schedules depend on several factors, such as the amount at stake, the type of beneficiary, the length of the action or the financial risks involved. Quarterly reports would be quite heavy to manage for both the beneficiary and the Commission's services, increasing administrative red tape, adding an unnecessary workload, and thus risking hindering the whole payment management.



Interest should not be due for 'whatever reason' in case of late payments. There is no reason to pay if the Commission is not responsible for the delay, for example, if proper documentation is never submitted. Since 2007, interest above EUR 200 on late payments is automatic from the first day the payment becomes overdue, provided the delay is the responsibility of the Commission.

(7) The Commission is well aware of the problem. Therefore, this issue has been tackled by the 2009 Communication, which sets targets even more stringent than the legal ones. Commission monitoring of payment deadlines shows real progress in this area (see below). Besides, since 2007, interest on late payments above EUR 200 is automatic.

(8) The relevant arguments seem to be based on two specific contributions received by the Ombudsman following his public consultation. As regards the first one, it is impossible for the Commission to assess it in the absence of any indication as to which EU Delegation is concerned. As regards the second one, the body that had made this contribution had acknowledged that, for the other external aid contracts it has with the Commission, no problem with payment delays was encountered. According to the Commission's database on external aid contracts, 33 contracts are encoded with the body concerned.

As regards the contract that gave rise to problems, some delay did indeed occur. However, the first payment could not be processed until the receipt of the contract addendum counter-signed by the beneficiary. As regards the second payment, the beneficiary submitted a claim for interest, and the Commission paid EUR 106.17 interest. The third payment request was paid within the deadlines laid down in the contract and within the internal target payment deadlines following the 2009 Communication.

(9) There is no need for a code of conduct, given that the existing rules foresee provisions for payment deadlines, with automatic payment of interest above EUR 200 in the case of late payments, and lay the responsibility on authorising officers to organize their services and set up procedures so as to ensure sound financial management as well as the legality and regularity of the transactions processed under their responsibility. Furthermore, information on the rights and obligations of creditors is provided in the relevant contracts.

In addition, Article 22 of the Staff Regulations establishes the financial liability of any official guilty of serious negligence. This serves both as a dissuasive sanction as well as a corrective measure.

The competence of staff is a major priority of the Commission, which is notably addressed by compulsory financial training, on-the-job training, tutoring and handover notes (see above). Since October 2009, attention to payment deadlines has also been reinforced by the installation of an automatic warning system in the ABAC system.

(10) Such elements are already part of the responsibility of the Authorising Officer by Delegation, under the internal control framework (see above).



(11) Existing rules, notably in the Financial Regulation and in the Staff Regulations (see above) already include an appropriate control framework.

(12) This possibility could be used in agreement with the Commission services in charge of the projects. However, doing so might be possible in only a limited number of cases. Where there is a global ceiling per grant, in value and in percentage of eligible costs, the amount due to one co-beneficiary is often dependent upon the amounts to be reimbursed to the others. Thus dissociating payments in time could lead to numerous corrections and possibly recoveries by the Commission, after the rights of each co-beneficiary have been established properly. This would make payments unnecessarily complex for all parties.

Furthermore, this would hinder the collective character of a consortium, whereby partners share responsibility and thus payments, but also enjoy organisational flexibility. In this context, it can also be noted that, when problems arise, it may not be easy rapidly to identify the defaulting contractor(s).

In recent model contracts, the possibility of suspending payments only to the defaulting contractor is already provided for.

(13) The relevant rules specify a number of payment periods (generally 30, 45 or 60 days) which apply to different categories of payment. Each contract or grant agreement indicates the payment period, so that there should be no misunderstanding on the part of the contractor or grant beneficiary. These contractual periods are of course legally binding on the Commission, and failure to comply with them leaves the Commission liable to late payment interest.

The 2009 Communication specifies that reduced target payment periods should be applied in certain cases. The Commission services are expected to comply with these new, reduced targets irrespective of the contractual periods. Performance is monitored against these targets for the Commission as a whole.

(14) Article 106 of Regulation 2423/2002 indeed foresees that payment periods only run from the receipt of an acceptable invoice, and even then allow for suspensions where, for example, key supporting documents are missing. This is in line with common practice and it is difficult to see how payment periods could run from the delivery of supplies, as suggested, without any invoice being submitted, as no substantiation of the amount requested would then be possible.

(15) All suspensions should be communicated to the beneficiary or contractor and justified with regard to the legal or contractual requirements. An example would be the lack of supporting documents showing that costs claimed as eligible have actually been incurred. Thus the Commission's services cannot request further information without specifying what is missing or incorrect. As stated above, only 6 % of payments are subject to a suspension, so this does not seem to be a systemic problem.

(16) Interest above EUR 200 on late payments has been paid automatically since 2007 (see above) and therefore need not be claimed by parties contracting with the Commission.



Furthermore, the Commission applies to all its beneficiaries without distinction the same principles of equal treatment and fair competition, based on criteria known in advance through transparent procedures.

(17) Competence of staff is a major priority of the Commission, (as already stated above), while compliance with the required payment periods has been reinforced since October 2009 by an automatic warning system in the ABAC system. Furthermore, any specific conditions applicable to experts are known to them in advance as they form part of their contracts.

38. The Commission also provided information on its performance in 2009, as requested by the Ombudsman.

39. This information is set out in the following tables. In order to allow a rapid comparison, the first two tables also include information on previous years that was already presented in points 20 and 21 above.

Table 6: Late payments in 2005, 2007, 2008 and 2009

2005

2007

2008

2009

Number of late payments

42.74 %

22.57 %

22.67 %

14.42 %

Value of late payments

17.48 %

11.52 %

13.95 %

6.63 %



Average delays [10]

49.13 days

47.98 days

47.45 days

40.43 days

Table 7: Interest on account of late payments in 2005, 2007, 2008 and 2009

2005

2007

2008

2009

Number of requests for interest submitted by creditors on account of late payment

149

136

138

142

Amount of interest paid on account of late payment

EUR 230 736.58

EUR 378 211.57

EUR 631 909.62 [11] (of which EUR 512 830.79 upon request)

EUR 847 736.00 [12] (of which EUR 564 821.46 upon request)

Table 8: Top ranking Directorates-General/services as regards interest paid in 2009

Commission service involved [13]



Number of payments with interest paid

Interest paid

Total number of payments

Total amount paid

OIB

103

EUR 197 380.99

7 650

EUR 341 million

PMO

33

EUR 181 373.40

204 331

EUR 3 861 million

AIDCO

25

EUR 70 364.19

10 135

EUR 3 997 million

ECHO

64

EUR 69 490.59

3 708

21



EUR 779 million

DIGIT

2

EUR 56 140.16

7 856

EUR 187 million

Table 9: Details for the five cases in which the highest amount of interest was paid upon request in 2009

Interest paid

Delay (in days)

Economic sector

Commission service involved

Type of creditor

EUR 57 021.80

N/A

Staff matters

PMO

EU staff

EUR 54 904.25

N/A

Legal Consulting

DIGIT

Private company

22



EUR 47 384.40

N/A

Staff matters

PMO

EU staff

EUR 42 131.65

362

Energy/transport

EACI (IEEA)

Private company

EUR 36 344.12

N/A

Supplies

OIB [14]

Private company

Table 10: Details for the five cases in which the highest amount of interest was paid without request in 2009

Interest paid

Delay (in days)

Economic sector

Commission service involved

Type of creditor

EUR 60 317.37

23



N/A

Energy

OIB

Private company

EUR 17 434.28

92

Education/ Research

TREN

Private company

EUR 10 056.51

61

Equipment

RELEX

Private company

EUR 8 290.39

87

Education/ Research

RTD

Private company

EUR 6 731.75

N/A

Energy

24



OIB

Private company

40. The Commission stated that it understood that the Ombudsman's inquiry related to the delays in making payments to contractors and beneficiaries of grants and subsidies, which should lead to the exclusion of payments made by the PMO to members of the EU's staff. It added that it also understood that the Ombudsman aimed to identify the causes of these delays in case of maladministration, which should lead to exclude delays due to cases submitted to court (such as the ones concerning the above-mentioned payment by DIGIT) or to legal discussions with the Belgian State concerning the Protocol on Privileges and Immunities (as was the case in relation to the above-mentioned payments by the OIB).

41. The Commission explained that, taking account of these exclusions, the above three tables would read as follows:

Table 11: Top ranking Directorates-General/services as regards interest paid in 2009

Commission service involved

Number of payments with interest paid

Interest paid

Total number of payments

Total amount paid

OIB

101

EUR 130 331.99

7 650

EUR 341 million

AIDCO

25

EUR 70 364.19

10 135

25



EUR 3 997 million

ECHO

64

EUR 69 490.59

3 708

EUR 779 million

JLS

22

EUR 55 869.33

1 986

EUR 685 million

EACI (IEEA)

3

EUR 50 200.73

637

EUR 107 million

Table 12: Details for the five cases in which the highest amount of interest was paid upon request in 2009

Interest paid

Delay (in days)

Economic sector

Commission service involved

Type of creditor

26



EUR 42 131.65

362

Energy/transport

EACI (IEEA)

Private company

EUR 36 344.12

N/A

Supplies

OIB

Private company

EUR 20 452.15

N/A

Justice

JLS

Private company

EUR 18 960.42

N/A

Security

JLS

Private company

EUR 14 509.00

N/A



Co-operation

AIDCO

Private company

Table 13: Details for the five cases in which the highest amount of interest was paid without request in 2009

Interest paid

Delay (in days)

Economic sector

Commission service involved

Type of creditor

EUR 17 434.28

92

Education/Research

TREN

Private company

EUR 10 056.51

61

Equipment

RELEX

Private company

EUR 8 290.39

87

Education/Research

28



RTD

Private company

EUR 5 661.75

91

Humanitarian aid

ECHO

Private company

EUR 5 449.54

60

Research

RTD

Private company

42. As regards the first assessment made by its Accounting Officer on the basis of payment delays observed during the last quarter of 2009, as foreseen in its 2009 Communication, the Commission explained that the statistics on payments made between 1 October 2009 and 31 May 2010 showed that, depending on the type of payment deadline, between 23% and 29% of payments were made outside the targets.

43. The Commission added that the statistics for new transactions (where the invoice or cost claim arrived after 1 October 2009) were considerably better than the overall statistics, especially where there was a report to be examined. The average total time taken to pay the beneficiary, the average payment time according to the Commission's calculation and the percentage of late payments had all decreased. The statistics suggested that recent performance was much improved, but that there remained a backlog of difficult or long-outstanding cases. However, data covering a few more months were needed to confirm this observation.

B. The Ombudsman's assessment

44. The Ombudsman considers that his examination should cover three issues, that is to say, (i) the performance of the Commission as regards the timeliness of payments carried out in 2009, (ii) the Commission's responses to the issues and arguments raised during the public



consultation and (iii) the effects of the revision of Article 106(5) of Regulation 2342/2002.

45. As regards point (i), it emerges from the information provided by the Commission that the number of late payments decreased considerably from 2008, when it amounted to 22.67 % of all payments, to 2009, when this percentage went down to 14.42 %. The improvement thus achieved is even more noticeable if one bears in mind that as recently as 2005 more than 42 % of all payments were delayed.

46. The figures provided by the Commission further show that, in percentage terms, the overall sums of money affected by delays more than halved between 2008 (13.95 %) and 2009 (6.63 %).

47. In addition to that, the average delay also decreased considerably from 47.45 to 40.43 days. Again, it is worthwhile to compare figures for earlier years. In 2005, the average delay amounted to 49.13 days. This figure only minimally improved in 2007 (47.98 days) and 2008 (47.45 days).

48. It should further be noted that, whereas in 2008 DG AIDCO was responsible for by far the largest amount of interest paid on account of delays in payment (EUR 219 221.62), it managed to reduce this amount to roughly a third in 2009 (EUR 70 364.19).

49. The above findings clearly show that the measures undertaken by the Commission have borne fruit and that an important step has been made in order to get to grips with the problem of delayed payments. In this context, the Ombudsman is particularly pleased to note that the first figures available indicate that the ambitious target introduced by the 2009 Communication appears to have worked much better than could perhaps be expected. If one compares the figure for 2005, which is based on respect for the legally binding deadlines, the fact that a maximum of 29% of payments failed to respect the more stringent target imposed by the 2009 Communication in the initial period of the latter's implementation looks encouraging.

50. To be sure, the picture is not entirely positive. In particular, the Ombudsman notes with concern that the amount of interest paid on account of delays in payment considerably increased over the last years, from EUR 230 736.58 in 2005 to EUR 378 211.57 in 2007, EUR 631 909 in 2008 and EUR 847 736.00 in 2009. It is clear that these sums diminish the amount of money that is available for the implementation of the EU's tasks.

51. However, it should also be noted that, on 1 January 2008, the amendment of Article 106(5) of Regulation 2342/2002 became effective, which resulted in interest exceeding an amount of EUR 200 being paid automatically. It should further be noted that the figures indicate that the number of requests for interest on account of late payment has remained fairly stable between 2005 (149) and 2009 (142).

52. The present inquiry does indeed focus on payments to contractors and beneficiaries of grants and subsidies. The Commission is therefore right in arguing that delays incurred by the PMO as regards payments made to members of the EU's staff should not be considered in this



context. It further emerges from the explanations provided by the Commission that two payments by the OIB (of EUR 60.317.37 and 6 731.75) concerned Belgian taxes on energy consumption. Given the focus of the present inquiry, the delays incurred in relation to these payments can be disregarded here as well. Lastly, the Commission indicated that the sum of EUR 54 904.25 paid by DG DIGIT resulted from a court case that had been pending for years. The Ombudsman agrees that it is therefore not necessary to include this amount in his examination. In view of the above, the amount of interest that is relevant for present purposes is less important than the overall figures suggest, even though it is still considerable.

53. The Ombudsman further notes that the amount of interest for which the OIB is responsible increased from EUR 42 608.61 in 2008 to EUR 197 380.99. Even if one deducts the above-mentioned sums concerning Belgian taxes, the amount is still considerable. Moreover, whereas in 2008 only 27 out of 9 750 payments by the OIB were delayed, the figure had risen to 103 (or 101, if one disregards the two above-mentioned payments) out of 7 650 payments in 2009. The Commission has explained that the OIB was one of the pilot services it used when introducing new measures to combat delays in payment. The resulting adaption problems may well explain part of the result. However, the situation clearly needs to be kept under review.

54. The EACI (formerly IEEA) deserves to be mentioned in particular, given that it accounts for interest amounting to EUR 42 131 in a case in which an astonishing delay of 362 days occurred. The Commission has explained that this was due to delays in transferring the file from its central services to the agency. It would thus seem clear that responsibility for this delay lies with the Commission, and not the EACI. The Ombudsman trusts that this case was exceptional and that such problems will not revert in the future. It should in any event be noted that, if one disregards this case, the performance of the EACI (IEEA) shows an impressive improvement.

55. As regards (ii) the Commission's responses to the issues and arguments raised during the public consultation, the Ombudsman considers that the arguments put forward by the Commission are largely convincing. It is therefore not necessary to examine each and every aspect. A number of issues need to be addressed, nevertheless.

56. The contributions submitted to the Ombudsman showed that there was concern that the Commission might abuse the possibility of asking for further information, thus suspending the deadline for payments, in order to camouflage delays on its part. However, the Commission has pointed out that such suspensions of deadlines only occurred in about 6 % of all cases handled since 1 January 2009. As the Commission observed, this figure does not indicate that the problem identified in some of the contributions is systemic. The Ombudsman considers it useful to add that any person who considers that a suspension was not justified remains free to turn to him, thus enabling him to examine the concrete facts of that case.

57. One further important reproach made in some of the contributions was that the co-operation between the Commission's services dealing with the projects themselves and those services that handled financial aspects left room for improvement. The Ombudsman considers that the Commission's reply on that point did not address this concern as comprehensively as one would have expected. However, the Commission's argument that suspensions of deadlines only



occurred in about 6 % of all cases handled since 1 January 2009 clearly suggests that any problems that may exist in this field are not systemic.

58. As regards the criticism that was made in relation to delegations, the Commission pointed out that it would need clearer indications as to which delegation was concerned in order to take useful action. The Ombudsman considers the Commission's position to be reasonable. Again, any person who is unhappy with the way a Commission delegation has handled a payment is welcome to turn to the Ombudsman for help.

59. A similar conclusion applies as regards the criticism concerning delayed payments for external experts used by the Commission. Although the Commission's answer on this point is not entirely satisfactory, it is clear that further details would be needed in order to deal with this aspect. The Ombudsman considers that such an examination should be undertaken in the framework of inquiries concerning individual complaints rather than in the context of the present own-initiative inquiry.

60. One of the persons who presented a contribution submitted that interested parties do not contact the Ombudsman because they fear losing the Commission as a customer. The Commission's statement that it applies to all its beneficiaries without distinction the same principles of equal treatment and fair competition should be understood as meaning that such fears are unfounded. The Ombudsman nevertheless would like to put it on record that he will vigorously investigate any complaint in which a person alleges that she or he was disadvantaged on the grounds that she or he turned to the Ombudsman. It appears useful to add that, in so far as late payments are concerned, the fact that interest exceeding EUR 200 is now paid automatically should help avoid potential difficulties in this area.

61. As regards (iii) the effects of the revision of Article 106(5) of Regulation 2342/2002, it should be recalled that the Ombudsman already addressed this issue in his decision in a previous own-initiative inquiry (OI/5/99). The Ombudsman there explained that the said revision did not change the situation with regard to creditors whose payments gave rise to no more than EUR 200 of interest. In such cases, interest continued to be paid to the creditor "only upon a demand submitted within two months of receiving late payment." It appeared fair to assume that claims for payment by citizens or small and medium-sized undertakings would normally fall into this category. In the Ombudsman's view, it could thus not be excluded that thoroughly addressing the negative effects of late payment, in particular as regards citizens and small and medium-sized undertakings, might make it necessary to reconsider the threshold foreseen in Article 106(5) of Regulation 2342/2002.

62. In its submissions to the Ombudsman in the present case, the Commission did not specifically address this issue. The Ombudsman notes, however, that this issue was not raised in any of the contributions that he received in the context of his public consultation. He further notes that, as already mentioned above, the number of requests for interest on account of late payment has remained fairly stable between 2005 (149) and 2009 (390). In these circumstances, the Ombudsman considers that there is no need to pursue the said issue at present.



63. In view of the above, and in particular in light of the clear improvements achieved by the Commission in 2009, the Ombudsman considers that there are no grounds for further inquiries into the issue of the timeliness of payments by the Commission at present. However, he considers it necessary to keep this issue under consideration. In order to enable him to do so, the Commission should provide him with figures on the payments made in 2010, as soon as these are available. This information should be submitted in the same form as it was provided with regard to previous years.

C. Conclusions

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

There are no grounds for further inquiries at present. However, the Commission should provide the Ombudsman with figures for its performance in 2010, as soon as they are available.

The Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 8 February 2011

[1] OJ 2002 L 357, p.1.

[2] In its version resulting from Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13).

[3] Net delays.

[4] The Commission originally indicated that 173 requests had been made and that EUR 576 027.11 had been paid. These figures were subsequently corrected when it was discovered that an error had occurred.

[5] SEC(2009) 477/5.

[6] The Commission noted, however, that the period between 15 December and 15 January would not be taken into account for determining the said time-limit.

[7] For instance, in 2008, DG ENTR payments represented more than EUR 360 million, of which only EUR 7 021.80 were generated by automatic late interest payments from five



invoices. 70% of that sum resulted from 11 days of delay of one single pre-financing payment. At the time when this reply was sent, DG ENTR paid 5 % of its invoices after the legal deadline, which was a very significant improvement compared to earlier years where up to 30 % of all payments had been delayed.

[8] The acronyms stand for Directorates-General EuropeAid Co-operation Office (AIDCO), Transport and Energy (TREN), Research (RTD), Enlargement (ELARG), Information Society (INFSO), Enterprise (ENTR), the Office for Infrastructure and Logistics (OIB) and the Intelligent Energy Executive Agency (IEEA). The names of some of these bodies have changed in the meantime.

[9] OJ 2000 L 181, p. 65.

[10] Net delays.

[11] The Commission originally indicated that 173 requests had been made and that EUR 576 027.11 had been paid. These figures were subsequently corrected when it was discovered that an error had occurred.

[12] The Commission originally indicated that 390 requests had been made and that EUR 815 753.04 had been paid. These figures were subsequently corrected when it was discovered that an error had occurred.

[13] As regards the acronyms used in the following tables, see footnote 8. The further acronyms stand for the Office for the Administration and Payment of Individual Entitlements (PMO), the Office for Humanitarian Aid and Civil Protection (ECHO), DG Informatics (DIGIT), the Executive Agency for Competitiveness and Innovation (EACI), DG External Relations (RELEX) and DG Justice, Freedom and Security (JLS).

[14] The interest paid concerns delays in paying four invoices under a specific contract relating to food supplies.