

## Afgørelse i sag 1733/2009/JF - Krav om tilbagebetaling fra et universitet

Afgørelse

Sag 1733/2009/JF - Indledt den 24/09/2009 - Afgørelse af 25/10/2011

Klageren, et fransk universitet, deltog i et konsortium, som udviklede et projekt sponsoreret af Kommissionen. Efter at have oplevet problemer med koordinatoren trak klageren sig ud af projektet. Kommissionen krævede derpå tilbagebetaling af nogle af de betalinger, den havde foretaget til klageren. Klageren fandt Kommissionens krav urimelige og henvendte sig til Ombudsmanden.

Ombudsmanden indledte en undersøgelse, og i denne forbindelse gjorde Kommissionen udførligt rede for de beløb, den havde udbetalt til klageren. Den forklarede, at klageren ikke havde indsendt de nødvendige rapporter og projektleverancer rettidigt, som krævet i kontrakten. Den henviste endvidere til et forslag, som den havde forelagt koordinatoren, og hvorefter klageren kunne indsende de pågældende dokumenter endog efter den kontraktmæssige frist.

Da klageren ikke syntes at have været bekendt med det nævnte forslag, anmodede Ombudsmanden Kommissionen om at overveje at acceptere, at klageren indsendte en rapport vedrørende dets deltagelse i projektet. Kommissionen indvilligede heri og anførte, at den også kunne nedsætte de beløb, den havde krævet af klageren, hvis det var begrundet. Ombudsmanden fandt, at Kommissionen havde løst sagen, og afsluttede den.

## The background to the complaint

1. This complaint concerns a dispute over a Commission-sponsored project, the "*Ecosystems, Societies, Consilience and the Precautionary principle: Development of an assessment method to establish the societal cost of best fishing practices and efficient public policies*" (the 'ECOST Project'). The ECOST Project aimed at developing a new approach to the evaluation of fishing policies, based on the concept of societal costs, in order to contribute to better water management in the world. The Commission sponsored the ECOST Project under its Sixth Framework Programme with a maximum contribution of EUR 3 100 000. The ECOST Project was expected to last a total of 48 months.

2. On 6 July 2005, the Commission signed Contract No 003711 (INCO) (the 'Contract') with a



British university, the University of Portsmouth (the 'Coordinator'), acting on behalf of the consortium that was to develop the ECOST Project.

3. On 7 September 2005, " *CERTAP - Centre d'Études et de Recherche sur les Transformations de l'Action Publique* " of the French University of Perpignan Via Domitia (the 'complainant') signed an accession to the Contract, thus becoming " *partner N°.6 of ECOST* ".
4. On 13 September 2005, the Commission made a first global payment to the Coordinator for the ECOST Project.
5. In late October 2005, the Coordinator deposited EUR 53 002.23, corresponding to 85% of the complainant's budget for the first 18 months of its participation in the ECOST Project, in the complainant's bank account.
6. Between 24 and 29 October 2005, the complainant and other ECOST Project partners met in Rome (the 'Rome meeting').
7. Between 6 and 11 March 2006, the complainant participated in a second ECOST Project meeting in Dakar (the 'Dakar meeting').
8. In a letter dated 19 April 2006, the complainant informed the Coordinator that, following the Coordinator's negative remarks about one of the complainant's team members, 'Mr C', that member resigned from the ECOST Project. The complainant found the Coordinator's remarks unacceptable and unfounded and decided to withdraw from the ECOST Project with immediate effect. It informed the Commission accordingly.
9. In a letter to the Commission dated 10 May 2006, the Coordinator confirmed the complainant's withdrawal from the ECOST Project. It further stated that it expected to find a replacement within six weeks. Finally, it enclosed an annex containing its recollection of the complainant's and Mr C's participation in the ECOST Project.
10. On 24 May 2006, the Coordinator wrote a letter to the complainant in which, among other things, it requested the complainant to fill in and return to it a number of financial forms relating to its participation in the ECOST Project [1] .
11. On 1 November 2007, the Coordinator requested the Commission to modify the Contract. By letter dated 27 November 2007, the Commission replied that it accepted the Coordinator's above request to add the Belgian *Katholieke Universiteit Leuven* as a " *Contractor* " in the ECOST Project with effect from 1 October 2006. It thus appears that the latter replaced the complainant in the ECOST Project and the Commission consequently agreed to terminate the complainant's participation retroactively, as from 1 October 2006 (the 'First amendment to the Contract'). " *Article 1(2)* " of the Contract, which listed the contractors, was therefore modified accordingly.
12. In its letter of 27 November 2007 mentioned above, the Commission further stated that, as



the Coordinator was aware, the Contract required the complainant to submit, within 45 days of the date of termination of its participation, reports and deliverables referred to in Article II.7 of the Contract relating to the work carried out and the costs incurred up to the termination date. In the absence of receipt of such documents within the deadline, the Commission could determine not to take into account any further cost claims or not to make any further reimbursement and, where appropriate, it could require the reimbursement of any pre-financing. However, the Commission would accept the submission of the above-mentioned reports and deliverables 45 days following the date of receipt of its letter of 27 November 2007, " *if this was more convenient.* "

**13.** Subsequently, the Commission signed a new amendment to the Contract, granting the Coordinator an extension of 12 months for the ECOST Project, until 31 December 2009 (the 'Second amendment to the Contract').

**14.** On 27 January 2009, the Coordinator informed Mr C by e-mail that the Commission had decided to partially recover from the complainant some of the expenses that it incurred during 2005 and 2006. The Coordinator explained that the Commission did not approve some of the complainant's personnel and indirect costs, totalling EUR 6 509.91. According to the Coordinator, the Commission emphasised that

*"[the complainant] withdrew in April and the activity of [Mr C] of 4 m/m has been declared. No deliverable has been produced and the only 'product' of [the complainant's] activity seems to be a preliminary analysis of present-day fisheries management policies: to this regard, only one slides presented to the meeting in Dakar has been available in the website. Since [these] have been already approved in the first year 3 m/m with an output miserable, it is impossible to accept all the declared costs ... "*

In light of the above, the Commission requested the Coordinator to " *delete 50% of the personnel cost* ".

**15.** In a letter dated 10 February 2009, Mr C replied to the Coordinator's e-mail stating that he profoundly disagreed with the Commission's assessment. He first pointed out that the start of the ECOST Project was delayed. He then emphasised that, according to the ECOST Project's Technical Annex (the 'TA'), the complainant and particularly Mr C himself were responsible for drafting documents referred to as " *WP 10 and WP 11* ". Considering that the official start of the project took place during the Rome meeting, the deadline within which to present " *the first deliverables* " was only (i) 11 months later, that is, September 2006, for one group of deliverables; and (ii) 12 months later, that is, October 2006, for another group of deliverables. Since both Mr C and the complainant had resigned in April 2006, they had no legal obligation to supply the deliverables.

**16.** Mr C then went on to emphasise that, notwithstanding the above, the complainant produced a number of scientific and administrative documents during the period between October 2005 and April 2006. It also dedicated three months to the recruitment of sub-contractors and four months to the drafting of their terms of reference, at the request of the



Coordinator. In this regard, Mr C emphasised that the complainant had experienced difficulties in communicating with the Coordinator, which resulted in the submission of three different versions of the above terms of reference and, ultimately, in Mr C's and the complainant's resignation. Nonetheless, the complainant produced an annual report for 2005, an activity report for the period between October 2005 and April 2006 and a monthly report for January 2006. All of these had been sent to the Coordinator. It further produced a presentation on " *WP10 and WP11* ", a report for the Rome meeting, a presentation on " *W10 progress* ", and an internal document for the Dakar meeting. Mr C had also provided the complainant with a first note on the article entitled " *Laws and fisheries policies to cope with the vulnerability of the marine ecosystems* ", the drafting of which had been suggested to it by one of the ECOST partners during the Dakar meeting. Following a suggestion made by the Coordinator during the above-mentioned meeting, he had also registered himself and the complainant's other team members, for a conference organised by the International Institute of Fisheries Economics and Trade ('IFET') to be held on 10 and 11 July 2006, and he had proposed a paper on " *Current fishing policies and WSSD Plan of Action* ", which was to be read during the conference but was later refused by IFET's Scientific Committee. Relatedly, Mr C had been invited to a workshop in Germany relating to another project, 'INCOFISH'. However this visit was cancelled due to the complainant's resignation. Finally, Mr C exchanged a large amount of correspondence on all the above, that could be forwarded to the Commission.

17. In light of the foregoing, Mr C disagreed that his participation in the project was " *miserable* " or that the complainant should reimburse the amounts claimed by the Commission. He therefore asked the Coordinator to request the Commission to reconsider its position.

18. On 12 March 2009, the Commission replied to Mr C's above-mentioned "[f]ormal appeal ", by means of a letter to the Coordinator. There, the Commission explained that it had accepted all costs claimed by the complainant for the first reporting period, in the amount of almost EUR 14 200. That figure included Mr C's three man-months of personnel costs, in the amount of EUR 8 274. The report relating to the second reporting period evidenced that " *no work was undertaken by [the complainant] in this reporting period and the participant withdrew in April 2006, to be replaced by PMI* ". Despite the above, the complainant claimed about EUR 12 000 in costs, which included almost EUR 10 850 corresponding to Mr C's four man-months of personnel costs. The Commission accepted the complainant's request only partially, in the amount of EUR 5 425. In addition, by letter dated 11 September 2006, the complainant itself confirmed that, as regards the second reporting period, it had only participated in the ECOST Project between 1 January and 13 April 2006 and that Mr C had resigned on 12 April 2006. As attested by Mr C himself, the complainant did not submit any deliverables during this period. The complainant's only activities, performed solely by Mr C, had been (i) the drafting of terms of reference and the recruitment of three sub-contractors; (ii) the preparation of a parallel workshop on public policy in Rome and of a presentation at the Dakar meeting, as well as two internal documents; (iii) the preparation of an abstract, sent in March 2006 to the IFET conference, which was later refused by the latter's Scientific Committee; (iv) the preparation to the INCOFISH meeting in January 2006; and (v) the exchange of e-mails.

19. In light of all the above, the Commission considered that the " *about 20.000 euro* ",



including the " *about € 16.000* " of Mr C's personnel costs, were consistent with the complainant's above-mentioned activity and that its decision to accept five man-months of Mr C's personnel costs was very positive for him. The Commission thus rejected Mr C's appeal and, in view of the fact that in November 2005 the complainant had received a pre-financing of " *€ 53.000* ", it asked the Coordinator to recover " *about 33.000 euro* " from the complainant. The Coordinator forwarded the Commission's letter of 12 March 2009 to Mr C.

**20.** On 2 April 2009, Mr C replied to the Coordinator that both he and the complainant opposed the Commission's decision. Mr C again took the view that the complainant was required to produce the first deliverables only in September 2006 and emphasised that both the complainant and himself worked on the project from October 2005 to April 2006 only. Mr C added that, nevertheless, the complainant had been involved in specific preparatory work, namely collecting data, writing bibliographic analyses and developing a network of scientific and institutional links. All of this was time-consuming and was not visible in any of the ECOST Project's official documents. He concluded that, were the Commission to maintain its position, he would be constrained to submit a complaint to the European Ombudsman.

**21.** On 6 July 2009, the complainant turned to the Ombudsman.

## **The subject matter of the inquiry**

**22.** The complainant alleged that the Commission's claim for reimbursement was unfair.

**23.** The complainant claimed that the Commission should deduct EUR 6 509.91 from its reimbursement claim.

## **The inquiry**

**24.** On 24 September 2009, the Ombudsman forwarded the complaint to the President of the European Commission.

**25.** On 18 January 2010, the Ombudsman received the Commission's opinion in English and, on 28 January 2010, its translation into French, which he forwarded to the complainant with an invitation to make observations.

**26.** On 25 March, and 19 and 25 May 2010, the complainant sent its observations.

**27.** On 5 November 2010, the Ombudsman asked the Commission to reply to a number of questions.

**28.** The Commission replied on 21 March 2011. The Ombudsman forwarded the Commission's reply to the complainant for its observations. No observations were received from the complainant.



## **The Ombudsman's analysis and conclusions**

### **A. Allegation of unfairness and the relating deduction claim**

#### **Arguments presented to the Ombudsman**

**29.** The complainant alleged that the Commission's claim for reimbursement was unfair.

**30.** In support of this allegation, the complainant originally argued that: (a) at the time when it withdrew from the ECOST Project, it had no contractual obligation, nor had it received any requests from the Coordinator for it to submit any preliminary scientific report; and (b) the work performed during the almost seven months of its participation in the ECOST Project justified the expenses incurred, as covered by the Commission.

**31.** The complainant claimed that the Commission should deduct EUR 6 509.91 from its reimbursement claim.

**32.** As regards argument (a) outlined above, in its opinion, the Commission stated that the ECOST Project started on 1 January 2005, as had been requested by the Coordinator. As attested by the Commission's letter of 27 November 2007 relating to the First amendment to the Contract, which the Commission enclosed with its opinion, the complainant's official withdrawal from the ECOST Project was effective as of 1 October 2006. Consequently, "*from a contractual point of view*", the complainant was part of the ECOST Project from 1 January 2005 to the end of September 2006.

**33.** The Commission did not provide a copy of the Contract with its opinion. Nonetheless, it stated in its opinion that, according to Article II.15.7 of the Contract, the Contractor was obliged to submit the reports and deliverables within 45 days of termination of the Contract. Notwithstanding the termination of the participation of a Contractor, the provisions of Article II.15 (among others) continued to apply after termination.

**34.** In addition, according to the Commission, Article II.7 of the Contract provided that the complainant should submit with the reports and deliverables all the necessary documents relating to the work carried out and to the costs incurred up to the termination date. In the absence of receipt of such documents, the Commission could determine not to take into account any further cost claims, and where appropriate it could claim reimbursement of any pre-financing.

**35.** The Commission emphasised that the complainant ought to have complied with its contractual obligations set out above. In this respect, it further referred to the Coordinator's letter to the complainant of 24 May 2006 where the former requested the latter to submit the financial



reports for 2005 and 2006.

**36.** As regards argument (b) outlined above, in its opinion the Commission stated that it accepted all the costs claimed by the complainant for the first reporting period, that is, from January 2005 to December 2005, in the amount of EUR 14 199.04. This amount included Mr C's personnel costs of EUR 8 274.33.

**37.** For the second reporting period, running from January 2006 to December 2006, the complainant claimed EUR 15 130.76 and the Commission accepted to cover EUR 8 620.85. The complainant withdrew, *de facto*, from the ECOST Project in the middle of this reporting period and made no substantial contribution to the project's implementation. Moreover, the Commission received no deliverables from the complainant. The Coordinator's second management activity report confirmed that "[n]o work was undertaken by [the complainant] in this reporting period and the participant withdrew in April 2006, to be replaced by PMI" [2]. For this reason, the Commission accepted only part of Mr C's requested personnel costs.

**38.** The Commission then went on to explain the calculations provided in its letter of 12 March 2009 to the Coordinator. It clarified that, as regards the second reporting period, instead of the four man-months claimed by the complainant, the Commission approved only two man-months of Mr C's personnel costs. Although the complainant confirmed that it did not submit any deliverables, the Commission considered, on the basis of the second management activity report, that Mr C had indeed worked on the ECOST Project. To calculate Mr C's personnel costs for the period in question, the Commission took into consideration the following activities carried out by Mr C: (i) the drafting of the terms of reference and the recruitment of three sub-contractors; (ii) the preparation of a workshop on public policy, held in Rome between 25 and 28 October 2005; (iii) the preparation of a seminar during the Dakar meeting of 6 to 10 March 2006; (iv) the preparation of the abstract for the IFET Conference, albeit later refused by its Scientific Committee; (v) the preparation to the INCOFISH meeting in January 2006; and (vi) the day-to-day work including exchanges of e-mails.

**39.** Finally, the Commission submitted four tables which explained that: (i) the complainant claimed reimbursement of Mr C's personnel costs for the two reporting periods in the amount of EUR 22 949.02; (ii) the Commission accepted to cover EUR 16 439.10 of Mr C's personnel costs for the two reporting periods, which corresponded to the amount of "about € 16.000 of the personnel costs of [Mr C]" referred to in its letter of 12 March 2009; (iii) the complainant declared a total amount of EUR 29 329.80 for its participation in the ECOST Project and (iv) the Commission accepted to cover EUR 21 734.89 of that amount which, in the Commission's view, corresponded to an amount consistent with the complainant's overall activities. In light of the fact that the complainant received a pre-financing of EUR 53 002.23, the Commission now expected it to reimburse a total of EUR 31 267.34 to the Coordinator.

**40.** In its observations, the complainant emphasised that it started to work on the ECOST Project only after it acceded to the contract between the Coordinator and the Commission, that is, in September 2005. Consequently, it could not have been part of the project "from 1 January 2005". Relatedly, it withdrew from the Project in April 2006, and it informed the Coordinator and





the Commission of this immediately. Consequently, it did not remain in the ECOST Project until " 30 September 2006 ".

**41.** The complainant emphasised further that, at the time of its resignation, the Coordinator made no mention of any obligation on its part to submit reports or deliverables within 45 days of the termination of its participation in the ECOST Project. In addition, the complainant was not informed of the Commission's letter of 27 November 2007, where the Commission accepted that it submit the above-mentioned reports and deliverables within 45 days of receipt of that letter. The complainant only became aware of that letter during the Ombudsman's inquiry, after the Ombudsman forwarded the Commission's opinion to the complainant for its observations.

**42.** Finally, the complainant suggested that it provide the Commission with an overview of its participation in the ECOST project in an attempt to settle the matter.

**43.** In its reply to the Ombudsman's further questions [3] , the Commission again took the view that its claim for reimbursement was fully justified. Notwithstanding this fact, it also stated that it was ready to accept an overview of the complainant's participation in the ECOST project. It would then re-examine the complainant's contribution to the ECOST Project. If, after this additional review, the costs claimed by the complainant appeared to be substantiated and the work carried out appeared to be useful and related to the Contract, the Commission was ready to consider reducing the amount of the reimbursement claimed from the complainant.

## **The Ombudsman's assessment**

### **Preliminary remarks**

**44.** Firstly, the Ombudsman notes that a significant part of the documents of the present complaint relate to the divergent views of the complainant and the Coordinator on the approach that ought to have been taken by both when developing the ECOST Project.

**45.** The Ombudsman recalls that Article 228 of the Treaty on the Functioning of the European Union empowers him to uncover maladministration in the activities of the Union institutions, bodies, offices and agencies. No action by any other authority or person may be the subject of a complaint to the Ombudsman. Consequently, the Ombudsman will focus the present decision on matters that relate strictly to the activities of the Commission and will thus refrain from investigating the actions of the Coordinator, the complainant and Mr C.

**46.** Secondly, the Ombudsman regrets that despite his explicit request to the Commission for a copy of the full version of the Contract, he was not provided with one [4] . For this reason, the Ombudsman will have to base his assessment on the Commission's, the Coordinator's, and the complainant's references to the Contract in the documents gathered during the inquiry.





## As regards the expenses incurred by complainant for the ECOST Project

**47.** At the outset, the Ombudsman understands that the Contract provided for two reporting periods relating to the complainant's participation in the ECOST Project.

**48.** In this respect, the Ombudsman notes that the Commission paid the total amount of Mr C's personnel costs for the first reporting period of the Contract, and half of the amount identified by the Coordinator as Mr C's personnel costs for the second reporting period of the Contract. According to the Commission, despite the fact that the complainant did not submit any deliverables during that second period, it still accepted that Mr C had performed a number of tasks relating to the ECOST Project during that second period and was, therefore, entitled to payment for the actual work performed, corresponding to half of the amounts claimed.

**49.** The Ombudsman notes that Mr C appears to agree with the Commission's view that he did not submit deliverables during the second period. Indeed, in its letter of 10 February 2009 to the Coordinator, the complainant considered that it was required to produce the first deliverables only in September 2006.

**50.** It follows that, ultimately, Mr C, and hence the complainant, confirm that on the date of the complainant's resignation, that is, 19 April 2006, the complainant had not yet produced and/or submitted any deliverables to the Commission.

**51.** Consequently, the Commission is right in wanting to pay the complainant only for the work it has actually performed. The Ombudsman emphasises in this respect that he is satisfied that, in its opinion, the Commission paid proper attention to the requirements of sound financial management and presented calculations relating to the payments it made to the complainant which are more accurate than those provided previously in its letter of 12 March 2009 to the Coordinator.

**52.** In light of the above, the Ombudsman takes the view that no maladministration on the part of the Commission can be found as regards this aspect of the complaint.

## As regards the complainant's contractual obligations

**53.** The Coordinator was the first party to sign the Contract on 29 June 2005. The Commission signed it on 6 July 2005. This meant that the Contract entered into force between the Coordinator and the Commission on 6 July 2005. The Contract included a clear provision which stated that the ECOST Project had begun on 1 January that year [5] .

**54.** However, even if the complainant worked for a project which had begun on 1 January 2005, it could only start assuming obligations in relation to that project after both the Coordinator and the complainant signed the latter's accession to the ECOST Project, that is, on 7 September 2005, and the Commission accepted this accession [6] .



**55.** Since the complainant acceded to an existing contract, its obligations were therefore those which had been agreed to in the Contract between the Coordinator and the Commission. As stated in the document entitled 'Form A - Accession to the Contract', provided by the complainant with its observations, the complainant "*accept [ed] in accordance with the provisions of the [C] ontract all the rights and obligations of a contractor*".

**56.** According to the Commission, one of these obligations was to submit reports and deliverables within 45 days of the termination of the Contract. The complainant did not contest the existence of such an obligation. Nevertheless, it argued that it was not aware of it since the Coordinator did not mention any such obligation when the complainant withdrew from the ECOST Project in April 2006. Although the Ombudsman was not able to take a stance on this issue on the basis of the evidence available to him, he nonetheless considers it unlikely that, when acceding to the Contract, the complainant did not become properly acquainted with its full content. Thus, the complainant should indeed have delivered the reports in question within the 45-day deadline after the termination of its contractual relationship in relation to the ECOST Project.

**57.** It was, therefore, important to establish the exact date when the complainant was no longer involved in the ECOST Project since there were diverging opinions in this respect. The complainant argued that it withdrew from the ECOST Project in April 2006. The Commission considered that until October 2006, the complainant was fully involved in that project. It took the view that the complainant's withdrawal took effect, "*from a contractual point of view*", only on 1 October 2006.

**58.** The Ombudsman does not understand the Commission's view set out above. It is not contested that in April 2006, the complainant informed both the Coordinator and the Commission that it decided to withdraw from the ECOST Project with immediate effect. The following month, the Coordinator confirmed this fact to the Commission. It follows that, at the very latest by May 2006, the Commission was duly aware that the complainant no longer worked on the ECOST Project.

**59.** If the complainant indeed withdrew, unilaterally, from the ECOST Project in April 2006, after having informed the Coordinator and the Commission accordingly, it ought not to have had any contractual obligations relating to the ECOST Project five months after that date, unless the Contract provided otherwise [7] .

**60.** Not having been made aware of the exact content of the Contract, the Ombudsman addressed a specific question to the Commission in this respect [8] . Both the Commission's interpretation of the Ombudsman's question [9] and the Commission's reply [10] did not help the Ombudsman to clarify this matter. At no point did the Commission explain on which basis it considered that despite having withdrawn from the ECOST Project in April 2006, the complainant was still part of that project "*from a contractual point of view*" until October 2006.

**61.** Even if at first glance it appears that in order for the complainant's withdrawal from the



ECOST Project to be accepted, the Commission would first need to approve a replacement [11] , there is nothing in the file that suggests that the Coordinator or the Commission opposed that withdrawal in any way, after having been informed of it by the complainant.

**62.** In accordance with the Commission's account of the relevant provision of the Contract and if one were to assume that the complainant's termination indeed took place in May 2006, the complainant would have been required to submit a number of reports and deliverables within 45 days of that termination, that is, before the end of June 2006. On the other hand, if one were to assume that the complainant left the ECOST Project only on 1 October 2006, then it would have had to submit those reports and deliverables before 15 November 2006. It appears that the complainant failed to comply with either one of the above deadlines.

**63.** However, the Ombudsman emphasises in this respect that, according to the evidence available to him, it was only on 27 November 2007, that is, one year and a half after the complainant's *de facto* withdrawal and almost 14 months after its " *contractually relevant* " termination, that the Commission formally established, by means of a First amendment to the Contract, that the complainant terminated its participation in the ECOST Project on 1 October 2006. It was also in that very letter of 27 November 2007 that the Commission pointed out that the Coordinator knew that, in accordance with the provisions of the Contract, the complainant needed to submit the reports and the deliverables within 45 days of termination of its participation, that is, from 1 October 2006 [12] . It follows that, at that time, that is in late November 2007, it was impossible for the complainant to comply with the above deadline.

**64.** It appears that the Commission was aware that complying with the above condition was impossible for the complainant. In its above-mentioned letter, the Commission stated that it would also accept the submission of the reports and deliverables 45 days following " *the date of receipt of this letter, if this is more convenient.* " It therefore appears that the Commission expected the Coordinator to take this matter into its hands and to give the complainant the possibility of submitting the missing reports and deliverables before mid-January 2008.

**65.** Since, in its observations, the complainant (i) argued that the Coordinator did not inform it about the Commission's letter of 27 November 2007 and that it saw that letter for the very first time in the context of the Ombudsman's inquiry, and (ii) proposed to draft an overview of its participation in the ECOST Project in an attempt to close the matter [13] , the Ombudsman asked the Commission whether it would consider accepting the complainant's above proposal and, if the answer were to be positive, settle the complaint by waiving the recovery of EUR 6 509.91 from its reimbursement claim addressed to the complainant.

**66.** The Ombudsman thanks the Commission for accepting to receive the complainant's overview of its participation in the ECOST Project and, if justified, to reduce the amounts claimed from it. By replying positively to the Ombudsman's question in this respect, the Commission has settled the complaint. The Ombudsman therefore closes the case.

## B. Conclusion



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

**The Commission has settled the complaint.**

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 25 October 2011

[1] In the original French version: "[c] *oncernant les aspects financiers, je vous saurais gré de bien vouloir utiliser les formulaires expédiés au mois de janvier dernier par [X] avec toutes les explications pour les compléter. Plusieurs rappels ont depuis lors régulièrement été faits pour leur envoi à l'université de Portsmouth. Il faut fournir un jeu pour l'année 2005 et un autre jeu pour 2006. Si besoin est, je peux demander à [X] de vous les expédier à nouveau.*"

[2] The Commission enclosed this report with its opinion and the Ombudsman forwarded it to the complainant for its observations.

[3] On 5 November 2010, the Ombudsman addressed the following questions to the Commission: " (1) *Having regard to the complainant's letter to the Commission dated 19 April 2006, could the Commission explain the statement in its opinion that 'from a contractual point of view, [the complainant] was part of the ECOST project from 1 January 2005 to 30 September 2006'? It would be useful if, when replying to the above, the Commission could provide the Ombudsman with a full version of [the Contract] and explain, in particular, its interpretation of Article 4 of that contract. (2) In its observations, the complainant stated that it became aware of the contents of the Commission's letter dated 27 November 2007 to the [Coordinator] only in the context of the Ombudsman's inquiry. Would the Commission consider accepting the complainant's proposal, made in its observations, to submit an overview of its participation in the ECOST project? If so, would the Commission be ready, upon receipt of the above-mentioned overview, to settle the complaint by waiving the recovery of EUR 6 509.91 from its reimbursement claim addressed to the complainant?*"

[4] In its reply to the Ombudsman's request for further information, the Commission stated that "[t] *he full version of contract No 003711 ECOST (Annex 2) is enclosed as requested.*" However, the version provided by the Commission still did not include "[t] *he provisions set out in Articles II.7, II.9, II.10, II.11, II.29, II.30, II.31 and Part C of Annex II [which] shall continue to apply after the final implementation date as well as any provisions in Annex III which specifically state that they shall continue to apply after the final implementation date*", as mentioned in Article 4(2) of the Contract. According to Article 14(1) of the Contract, entitled "Annexes forming an integral part of this contract", "[t] *he following annexes form an ... integral part of [the] contract: Annex I*



- Description of work, Annex II - General Conditions, Annex III - Specific provisions related to Specific Targeted Project, Annex IV - Form A - consent of contractors to accede to the contract, Annex V - Form B - accession of new legal entities to the contract... " The version of the Contract provided by the Commission did not include any annexes.

[5] Article 4 of the Contract, entitled " Entry into force of the contract and duration of project " provides: " 1. This contract shall enter into force on the day of its signature by the coordinator and the Commission. 2. The duration of the project shall be 48 months from 1st January 2005 (hereinafter referred to as the 'start date'). This contract shall be completed once the rights and obligations of all the parties to the contract have been met. The implementation and payment phases relating to the project must be completed by the final implementation date of the contract. The provisions set out in Article II.7, II.9, II.10, II.11, II.29, II.30, II.31 and Part C of Annex II shall continue to apply after the final implementation date as well as any provisions in Annex III which specifically state that they shall continue to apply after the final implementation date. "

[6] Article 3 of the Contract, entitled " Evolution of the consortium ", provides that "[t] he consortium may be enlarged to include other legal entities... The Commission is deemed to have accepted this legal entity as a contractor in the consortium, if it does not object within six weeks... Any new contractor... shall assume the rights and obligations of the contractors as established by the contract with effect from the date of their accession to the contract... "

[7] Article 3 of the Contract, entitled " Evolution of the consortium " provides that "[C] ontractors leaving the consortium shall be bound by the provisions of the contract regarding the terms and conditions applicable to the termination of their participation. "

[8] " Having regard to the complainant's letter to the Commission dated 19 April 2006 [where the complainant withdrew from the ECOST project] , could the Commission explain the statement in its opinion that 'from a contractual point of view, [the complainant] was part of the ECOST project from 1 January 2005 to 30 September 2006'? It would be useful if, when replying to the above, the Commission could provide the Ombudsman with a full version of Contract No. 003711 and explain, in particular, its interpretation of Article 4 of that contract. "

[9] " The first question asks to explain the difference between the starting date of the project and the date of entry into force of the contract. "

[10] " In answer to the first question, in Article 4.1 of the contract, it was specified that the date of entry into force of the contract was the day of its signature by the coordinator and the Commission; the date of entry into force of the ECOST contract was 6 July 2005. Article 4.2, on the other hand, gave the duration and the start date of the project. The start date may be different from that of the entry into force of the contract. In the case of ECOST, the start date of the project was 1 January 2005. The start date of the project defines the date when the contractors begin implementing the tasks and activities defined in the contract. The usual rule is that contractors start carrying out the work after the entry into force of the contract; however by allowing the possibility of a start date prior to the date of entry into force the contract provides that work may be carried out before this date. The start date defines the date from which costs



*are eligible according to Article II.19 of the contract... "*

[11] The Commission's letter of 27 November 2007 to the Coordinator included the following statements: "[w]ith reference to [your letter requesting amendment dated November 1, 2007], this is to inform you that the Commission agrees to your request to modify the contract as follows:... [Katholieke Universiteit Leuven] is added as Contractor with effect from [01/10/2006] ... The participation of [the complainant] is terminated from [01/10/2006]..."

[12] The Commission's letter of 27 November 2007 to the Coordinator included the following statements: "[t]herefore, as you know, the contract requires that the above mentioned Contractor shall submit to the Commission, within 45 days of the date of the termination of participation, reports and deliverables referred to in Article II.7 of the contract relating to the work carried out and the costs incurred up to the termination date. In the absence of receipt of such documents within the delays, the Commission may determine not to take into account any further cost claims or costs or not to make any further reimbursement and, where appropriate, require the reimbursement of any pre-financing..." The Commission enclosed this letter with its opinion to the Ombudsman, which he forwarded to the complainant for its observations.

[13] In the original French version: "[u]n document de synthèse qui reprendrait de façon structurée l'ensemble de notre participation et qui constituerait un document de clôture... Une telle solution semble équilibrée étant donné que les différents rapports de travail ont déjà été rédigés ultérieurement par l'équipe remplaçante..."