



Decision of the European Ombudsman closing his inquiry into complaint 286/2011/RT against the European Commission

Decision

Case 286/2011/RT - **Opened on** 03/03/2011 - **Decision on** 02/05/2012 - **Institution concerned** European Commission (No maladministration found) |

The background to the complaint

1. The complainant is a small-sized enterprise, organised as a European Economic Interest Grouping ('EFIG'), which is registered in Romania.
2. The complainant signed two grant agreements with the European Commission for two projects (hereinafter 'Project I' and 'Project II') funded under the 7th Framework Programme for research and technological development (hereinafter '7FP').
3. After the projects were completed, on 27 May 2010, the Commission informed the complainant that it would carry out a financial audit on the cost statements it had submitted for the two projects. The audit was performed between 12 July and 12 August 2010. It did not cover the entire duration of the two projects.
4. On 18 October 2010, the Commission sent the complainant the draft audit report and invited it to submit its comments. The complainant did so on 17 November 2010, expressing its dissatisfaction with the auditor's conclusions.
5. On 21 December 2010, the Commission closed the audit. It informed the complainant that it agreed with the auditor's findings to the effect that the financial management of the two projects had not been carried out in compliance with the requirements of the two grant agreements. On the basis of the above findings, the Commission decided to recover partially the amounts paid for the two projects. A copy of the final audit report was forwarded to the complainant.
6. On 27 January 2011, the complainant turned to the European Ombudsman.

The subject matter of the inquiry



- 7.** In its complaint to the Ombudsman, the complainant alleged that the Commission failed to reply to its argument that the audit wrongly applied the 2010 Financial Guidelines retroactively, and should have instead relied on the 2007 Financial Guidelines, which were in force at the time when the two grant agreements were negotiated.
- 8.** It also alleged that the Commission acted unfairly by failing to respect the complainant's right to be heard in relation to the audit's findings.
- 9.** Moreover, it alleged that the Commission failed to respect the principles of sincere cooperation and mutual trust in two separate instances. First, it used the principle of extrapolation, which is not provided for in the Financial Guidelines. By virtue of this principle, in case errors of a systematic nature are detected in the audited documents, the results of the audit may be extrapolated to non-audited 7FP periods and/or grant agreements concerning the same beneficiary. Second, it failed properly to monitor the implementation of the two projects and to ask for clarifications at the time when the complainant submitted its cost statements.
- 10.** Finally, the complainant alleged that the Commission abused its power by implementing an audit policy which is not tailored to the structure and needs of SMEs.
- 11.** The complainant claimed that the Commission should: (a) apply the 2007 Financial Guidelines and adjust the conclusions of the audit report accordingly; (b) grant the complainant the right to be heard and to challenge the findings of the audit report; (c) not apply the principle of extrapolation; and (d) adopt an attitude of cooperation and trust towards the complainant.
- 12.** In its observations on the Commission's opinion, the complainant submitted two new claims. First, it claimed that the Commission should review the conclusions of the audit carried out in relation to a third project, which has, in the meantime been implemented by the complainant. Second, it claimed that the Commission should grant access to its contracts with the external auditor which performed the audit of the two projects.
- 13.** The Ombudsman will not, however, deal with the above-mentioned new claims in the decision. With regard to the complainant's first new claim, the Ombudsman points out that the present inquiry concerns only Projects I and II. Moreover, as regards the third project, the Commission requested the complainant to submit its comments on the draft audit report in question. The Ombudsman understands that the Commission did not take a final decision on the matter because no final audit report has been presented as yet. Under these circumstances, the Ombudsman considers that, in accordance with the provisions of Article 228 of Treaty on the Functioning of the EU, there are insufficient grounds for him to add the first new claim to his present inquiry because it was made prematurely. As regards the complainant's second new claim concerning access to documents, the complainant did not make the appropriate prior administrative approaches to the Commission as required by Article 2(4) of the European Ombudsman's Statute. In this respect, the Ombudsman draws the complainant's attention to the provisions of Article 7 of Regulation 1049/2001 [1], which must be complied with before submitting a complaint to him. For that reason, the second



new claim is inadmissible.

The inquiry

14. On 3 March 2011, the Ombudsman opened his inquiry and asked the complainant to clarify certain aspects of its complaint.

15. On 21 March 2011, the complainant sent a further letter to the Commission concerning the subject matter of its complaint to the Ombudsman. The Commission replied by letter of 23 March 2011 [2].

16. On 1 April 2011, the complainant replied to the Ombudsman's request for clarifications.

17. On 15 April 2011, the Ombudsman asked the Commission to provide an opinion on the complaint by 31 July 2011. The Ombudsman also asked the Commission to provide a copy of the final audit report which was enclosed with its letter to the complainant dated 21 December 2010.

18. The Commission sent its opinion on 8 August 2011. It was forwarded to the complainant with an invitation to submit observations by 30 September 2011. On 28 September 2011, the complainant requested that the deadline to submit its observations be extended to 31 October 2011. On that date, the complainant sent its observations on the Commission's opinion. It completed its observations on 28 November 2011 and informed the Ombudsman's services that, on 22 November 2011, it had a meeting with the Commission's services in relation to the subject matter of its complaint. It provided a copy of the minutes of this meeting. In the course of the inquiry, the complainant and the Commission had a voluminous exchange of correspondence [3].

The Ombudsman's analysis and conclusions

A. Alleged inappropriate reply to the argument that the audit wrongly applied the Financial Guidelines 2010 retroactively and related claim

Arguments presented to the Ombudsman

19. In its complaint, the complainant argued that the external auditor reproached it for not complying with the principles contained in the 2010 Financial Guidelines. However, these guidelines were not in force at the time when the grant agreements were negotiated and concluded. At that time, only the 2007 Financial Guidelines were applicable and the complainant submitted its proposals for the two projects in 2007, pursuant to the



requirements of the 2007 Financial Guidelines.

20. The complainant also took the view that the Commission failed to reply to its above-mentioned concerns regarding the applicability of the Financial Guidelines 2010 in its case.

21. In its opinion, the Commission took the view that, in the final audit report, it had replied to the complainant's submission concerning the allegedly wrong application of the Financial Guidelines as updated in 2010.

22. Moreover, it outlined that the financial audit of the two projects was carried out in accordance with the provisions of Article II.22.1 which is the same in both grant agreements [4]. In this respect, the Commission explained that the purpose of such audits is to verify whether the costs claimed fulfil all the eligibility criteria laid down in Annex II of the grant agreements. Therefore, the conclusions of the audit were based on the provisions of the grant agreement and not on those of the Financial Guidelines.

23. The Commission further outlined that the Financial Guidelines were adopted at the level of the Directors-General of the Commission services involved in the implementation of the 7FP. They explain and illustrate with concrete examples the contractual provisions laid down in the grant agreement. The periodic modifications of the Guidelines are limited to reflecting changes in the model grant agreement or to providing further clarifications. The Commission emphasised that such modifications of the Financial Guidelines are made subject to the condition that they are in favour of beneficiaries. Thus, ex-post audits in which the most recent version of the Financial Guidelines is used cannot apply less favourable provisions to the beneficiary than those existing in the earlier version of the Financial Guidelines.

24. In the Commission's view, the complainant failed to explain (i) which concrete provisions have changed to his disadvantage in the 2010 version of the Financial Guidelines when compared with the 2007 version, and (ii) what the concrete impact of the application of the 2007 version of the Financial Guidelines on the audit conclusions would have been. In the Commission's view, applying the 2007 Financial Guidelines would not result in any adjustment of the audit conclusions in favour of the complainant.

25. In its observations, the complainant noted that, should the Commission's opinion on the matter be correct, the Financial Guidelines are not contractual documents. It follows that the contracts, timesheets and other documents requested by the auditor on the basis of the Financial Guidelines should not affect the audit. In the complainant's view, the 2010 Financial Guidelines are more severe than the 2007 version and are not in its favour. In this respect, the complainant appeared to argue that, as regards the eligibility of staff costs, the 2010 version requires that cumulative criteria be fulfilled, while the 2007 version did not contain such a requirement. The application of the 2007 Guidelines could thus have led to the acceptance of its staff costs.

The Ombudsman's assessment



26. When dealing with this allegation, it is necessary to distinguish between the infringement of the duty to provide thorough explanations for a decision as a breach of a procedural requirement, on the one hand, and the infringement of that duty as an indicator of a substantive defect in the decision to be examined, on the other hand.

27. The complainant first challenged the quality of the explanations provided by the Commission. The Commission, in turn, argued that it provided detailed explanations to the complainant in the final audit report.

28. In the course of the inquiry, the Commission provided the Ombudsman with a copy of the final audit report. When he examined it, the Ombudsman found that in section 15 of the report, which is several pages long, the Commission indeed replied to **all** the complainant's comments concerning the audit's conclusions. The Commission also gave its stance on the complainant's submission concerning the wrong application of the 2010 Financial Guidelines [5].

29. The Ombudsman concludes, therefore, that the Commission's reply to the complainant's argument on the application of the 2010 Financial Guidelines was thorough.

30. With regard to the allegedly wrong application of the 2010 Financial Guidelines, the Ombudsman does not see, in light of the information provided in the course of the inquiry, why they should not have been applied to the complainant's cost claims if (i) they did not modify the complainant's contractual rights, and (ii) they did not introduce any requirements which could be more cumbersome for the complainant to fulfil than the requirements of the 2007 Financial Guidelines. In fact, the Ombudsman takes the view that 2010 Financial Guidelines were no more than an updated version of the 2007 Financial Guidelines.

31. In this respect, the Ombudsman first notes that only the grant agreement represents the law of the parties. Its provisions give rise to rights and obligations legally binding on both parties. As the Commission rightly pointed out, the audit of the two projects could only be, and in fact it was, based on the relevant provisions of the grant agreements. Therefore, the auditor assessed the legality and correctness of the complainant's cost claims on the basis of the principles set out in the grant agreements.

32. As rightly explained by the Commission, the Financial Guidelines do not replace the grant agreement. The Commission has drafted with this aim not only the Financial Guidelines, but also several additional documents [6]. It follows that the information provided in the Financial Guidelines should comply with the provisions of the grant agreement. The complainant did not show that this was not the case.

33. It follows that the complainant cannot reasonably claim that the eligibility of its cost statements depended on the version of the Financial Guidelines actually used. The staff costs for the two projects would have been eligible if they fulfilled the criteria laid down in the grant agreement. Neither of the complainant's audited projects appears to satisfy the said criteria.



34. Furthermore, as rightly pointed out by the Commission, the complainant did not submit evidence to show how the 2007 Financial Guidelines would have changed the conclusions of the audit report. Nor did it demonstrate why the provisions relating to the acceptance of staff costs provided for in the 2010 version are more severe than similar provisions contained in the 2007 Financial Guidelines. In this respect, the Ombudsman does not share the complainant's view that cumulative criteria relating to eligible staff costs were only introduced in the 2010 version of the Financial Guidelines. Following a careful analysis of the relevant paragraphs of the version published in 2007 and the 2010 'updated' version, the Ombudsman considers that the 2010 version simply clarified the conditions under which staff costs could be accepted. It did not impose a stricter assessment of the eligibility criteria for staff costs than the 2007 version did.

35. The Ombudsman also notes the complainant's argument that the Financial Guidelines are not a legally binding document and thus, the contracts, timesheets and other documents requested by the auditor on the basis of this document should not affect the audit. As stated above, the audit was carried out on the basis of the relevant provisions of the grant agreement which also provides that the beneficiaries should support their cost claims with adequate evidence [7]. Thus, the Ombudsman considers that the fact that the Financial Guidelines are not a legally binding document does not relieve the beneficiary of a grant from the obligation to prove its cost statements for the project by means of time sheets, for instance. Therefore, the complainant's argument cannot be sustained.

36. Finally, at the time when the grant agreements were concluded, the complainant was well informed that the 2010 Financial Guidelines would be applied to its cost claims. In the foreword to the first version of the Guidelines, published in 2007, the Commission inserted the following disclaimer: "*this Guide has been conceived as an evolving document which, it is intended, will be updated regularly (in principle every 6 months) to reflect new questions and feedback from its users (both from outside and inside the Commission) and the knowledge gained through practice. On this point however it is important to remember that the only scope of the Guide is to provide interpretation on the legal texts (and in particular the GA), and that it cannot derogate from them. These guidelines do not reflect an official position of the Commission; only the provisions of the signed grant agreement are binding*" (emphasis added).

37. In light of the above, the Ombudsman considers that there was no maladministration in respect to this allegation. Therefore, the complainant's claim cannot be upheld.

B. Alleged failure to be heard and the second claim

Arguments presented to the Ombudsman

38. In support of this allegation, the complainant argued that the Commission acted unfairly "*by omitting to answer the specific points that [it] had submitted in its letter of 17 November 2010, thus failing to respect [the complainant's] right to be heard*". In this respect, the



complainant pointed out that, in its letter of 21 December 2010, the Commission did not provide a substantive reply to the issues it had raised but instead " *repeated the conclusions of the audit report* ". The complainant took the view that the Commission " *ignored* " its, that is the complainant's arguments and comments and failed to engage in a " *real dialogue* " and to explain why they were/were not founded.

39. In its opinion, the Commission emphasised that the complainant was indeed given the opportunity both to submit its view and also to provide additional supporting documents on the draft audit report in the context of the adversarial procedure. The Commission duly addressed in the final audit report (pages 32-43) [8] all 25 specific comments put forward by the complainant in its letter of 17 November 2011. The Commission took the view that the fact that it had maintained the audit conclusions was a result of the complainant's inability to substantiate its comments. Moreover, in its letter of 23 March 2011 sent in reply to the complainant's correspondence of 21 March 2011 [9] , the Commission expressed its availability for a meeting with the complainant, in case of " *new, conclusive and probative evidence* " that would allow it to review its conclusions concerning the amounts due pursuant to the audit carried out. However, up to the time when the Commission submitted its opinion on the complaint, the complainant did not confirm its availability to discuss the conclusions of the contested audit. The Commission concluded that the complainant was repeatedly given the opportunity to provide comments during the audit field work, the adversarial procedure and even following the audit's closure.

40. In its observations, the complainant argued that the Commission's comments made in the final audit report in reply to the complainant's submissions of 17 November 2011 did not provide further clarifications. Moreover, the complainant had asked for a meeting with the Commission before the latter closed the audit. The Commission only showed its willingness to hold such a meeting after the complainant lodged the present complaint with the Ombudsman.

41. In its further communication of 28 November 2011, the complainant informed the Ombudsman's services that, on 22 November 2011, it held a meeting with the Commission concerning the conclusions of the contested audit [10] .

The Ombudsman's assessment

42. As shown by the evidence submitted in the course of the inquiry, the complainant had numerous occasions to put forward its view and to rebut the audit's conclusions. Indeed, numerous letters were exchanged between both parties. In addition, in the course of the present inquiry, the complainant held a meeting with the Commission's services concerning the conclusions of the audit carried out on the two projects.

43. In these circumstances, the Ombudsman considers that the Commission fully respected the complainant's right to be heard. He thus does not find an instance of maladministration in relation to this allegation. Therefore, the complainant's claim must be rejected.



C. Alleged failure to respect the principles of sincere cooperation and mutual trust and the third claim

Arguments presented to the Ombudsman

44. In support of this allegation, the complainant mainly argued that the Commission (i) used the principle of extrapolation even if it is not provided for in the 2007 Financial Guidelines, and (ii) failed properly to monitor the implementation of the two projects and to ask for clarifications at the time when the complainant submitted its cost statements and could thus still make corrections.

45. The Commission rejected the complainant's allegation that it acted against the principles of sincere cooperation and mutual trust by applying the principle of extrapolation to the non-audited periods of the two audited grant agreements. In this respect, it pointed out that, in its letter of 27 May 2010 informing the complainant that it will carry out an audit [11], it had specifically alerted the complainant about the possibility of an extrapolation exercise. Moreover, according to the 7FP Audit Strategy, it is standard practice to have recourse to extrapolation, on the basis of the principle of sound financial management laid down in the Financial Regulation. The principle of extrapolation is based on the assumption that errors of a systematic nature may affect the non-audited periods of both audited and non-audited grant agreements. Finally, the Commission drew attention to Article II.5.3.d) of the grant agreements, which refers to errors of a systematic nature and the likelihood of their affecting the implementation of the other grant agreements.

46. The Commission explained that extrapolation is not imposed, but rather results from the Commission's cooperation with beneficiaries. In its letter on the conclusions accompanying the final audit report, dated 21 December 2011, the Commission requested the complainant to review and analyse whether the systematic errors revealed by the audit affected the financial statements for all non-audited periods/grant agreements and to inform it of the results of this assessment. The letter also stated that, if the beneficiary considers that the audit findings cannot be extrapolated, it should explain why the non-audited periods/grant agreements do not include the errors identified by the financial audit [12]. The complainant, however, neither reviewed nor analysed its non-audited financial statements and did not provide any justification as requested by the Commission within the given deadline. Thus, on 17 October 2011, the Commission issued a recovery order for the amount of EUR 72,889.57. This corresponds to almost all the costs paid by the Commission for the entire Project II.

47. The Commission also explained that, in order to avoid delays in payments, it does not request detailed supporting documents from beneficiaries at the time they submit their financial statements. The acceptance of cost claims submitted by the beneficiaries is based on the declaration of honour which is an integral part of the financial statement. The Commission went on to state that this practice was adopted to facilitate the participation of SMEs, since delays in the processing of payments could potentially have a negative impact on their cash flow. However, the FP7 grant agreement provides for a detailed ex-post check to



be carried out in accordance with Article II.22.1. Such checks ensure that the EU budget is spent in accordance with the applicable legal framework. Therefore, the preliminary acceptance as reasonable of the costs indicated in the budget breakdown, and the approval of the project deliverables, including the cost statements, do not invalidate the Commission's right to perform ex-post audits.

48. In the Commission's view, only financial audits at the premises of a beneficiary can provide accurate indications of the financial management of the project and can verify whether the costs claimed fulfil all the eligibility criteria laid down in Annex II of the FP7 grant agreements. In the complainant's case, the financial audit revealed the following errors: a) unreliable time records and lack of sufficient and appropriate audit evidence in support of the hours worked on the project, the hourly rates claimed and amounts paid for the consultants; b) travel and subsistence costs claimed which were not related to the project or were not accompanied by appropriate supporting documents; and c) indirect costs claimed by applying the 20% flat rate to direct costs excluding subcontracting costs. Given that the complainant could not provide additional evidence to contest the conclusions of the audit report during the adversarial procedure, the Commission did not have any justified reasons to change its position.

49. In its observations, the complainant argued that the grant agreement did not provide for the extrapolation principle. It went on to state that the Commission's interpretation of the relevant provisions of Article II.5.3.d) of the grant agreement relating to errors of a systematic nature is arbitrary in the given context. In the complainant's view, given that these provisions are only applicable before the payments are made, they necessarily refer to the suspension of payments and not to the reimbursement of payments already made. In this case, however, extrapolation was applied to situations in which payments had already been made.

50. The complainant also noted that the Commission's new policy of checking the accuracy of the cost statements after the project's completion postpones the identification of eventual errors committed by the beneficiary in its financial management " *until when it is too late* ". In the complainant's view, this means that the Commission fails to monitor the project. In any event, the complainant considered that the Commission should not penalise it for its errors by rejecting all its claimed costs.

The Ombudsman's assessment

As regards the complainant's argument relating to extrapolation

51. It is true that the principle of extrapolation was not explicitly mentioned in the 2007 version of the Financial Guidelines and that it was referred to in the updated 2010 version [13]. This does not mean, however, that by applying this principle to the financial documents submitted by the complainant, the Commission acted against the principle of mutual trust or sincere cooperation principles. This is so for the following reasons.



52. First, as explained in paragraph 36 above, it was possible for the 2010 Financial Guidelines to be applied to the contracts signed at a time when only the 2007 version of the Guidelines existed.

53. Second, information relating to the new audit strategy, including the principle of extrapolation, was made available on the Commission's website at the time when the complainant signed the two grant agreements [14] . The complainant cannot reasonably claim that it was not aware of such information when signing these agreements.

54. Third, the Commission's explanations as to why the errors detected during the audit of the complainant's Projects I and II were of a systematic nature and why it extrapolated the results of the audit to non-audited periods of the same projects are reasonable. The complainant's argument that the Commission interpreted arbitrarily the relevant article of the grant agreement on systematic errors cannot be sustained. In this respect, the Ombudsman does not share the complainant's view that the Commission's reference to the above-mentioned provision should be interpreted as relating to the legal basis for the application of the principle of extrapolation; rather, he understands the Commission's reference to have been made in support of its view that errors of a systematic nature could be reproduced from one project to another.

55. Fourth, the results of the audit were not automatically extrapolated to non-audited parts of the project. The Commission rather invited the complainant to explain why the results of the audit should not be extrapolated before it did so. The complainant did not seize this opportunity but limited itself to challenging the results of the audit.

56. It follows that the complainant's arguments concerning extrapolation cannot be sustained.

As regards the complainant's argument relating to the timing of the control carried out by the Commission

57. The complainant argued that ex-post checks, such as audits, of the implementation of a project are inappropriate because they only lead to the late detection of eventual errors. Moreover, if all cost claims have been accepted in the course of the project's implementation, the Commission cannot subsequently reject the same cost claims following a financial audit.

58. The above arguments cannot be sustained either. According to the relevant provisions of the grant agreement [15] , the Commission could carry out financial audits concerning the proper execution of the project up to five years after its implementation. The Commission could check the correctness and legality of the cost claims not only at the time they were submitted, but also after the project had been completed.

59. The Commission explained that it had strengthened its ex-post checks on the



implemented projects, while at the same time alleviating the evidentiary burden incumbent on beneficiaries at the time of submission of their cost claims. This was done in order to avoid delays in payments and thus additional difficulties for the beneficiaries during the implementation of projects. In this respect, the Ombudsman underlines that this aim, which is reasonable, must be conciliated with the need to respect the principle of sound financial management. In other words, the Commission should make sure that EU funding is spent in accordance with the applicable legal framework. At the same time, should the Commission carry out detailed checks on cost claims at the time the beneficiaries submit their cost statements, this would inevitably lead to delays in payments.

60. The fact alone that the complainant does not endorse the assessment made by the auditor does not prove that the Commission failed properly to monitor the projects in question. Furthermore, as a participant in the 7FP, the complainant was necessarily aware of that Commission was empowered to carry out a financial audit within five years of the project's completion. Therefore, it could not reasonably believe that the approval of its cost statements at the time they were submitted could not be reviewed eventually, following the results of an audit which aimed precisely to assess the proper execution of the projects.

61. It follows that the complainant's argument that the Commission failed properly to monitor the implementation of the two projects and to ask for clarifications at the time when the complainant submitted its cost statements cannot be upheld.

62. In light of his findings in paragraphs 56 and 61 above, the Ombudsman does not find an instance of maladministration in relation to this allegation. Therefore, the complainant's related claim must also be rejected.

D. Alleged abuse of power

Arguments presented to the Ombudsman

63. The complainant argued that the Commission abused its power by implementing an audit policy which is not tailored to the structure and needs of SMEs. It referred in this respect to the "*Final report of the expert group accounting system for small enterprises*" [16].

64. The Commission rejected the complainant's allegation. It emphasised that it had followed the applicable rules and principles, "*fully respecting all the advantages that result for SME's from their participation in FP7 projects, including higher reimbursement rates*".

65. It went on to point out that, the scope of financial audits performed by the Commission is the same for all beneficiaries participating in the 7FP projects, including SMEs. Any advantage or special audit policy applied in favour of the complainant would infringe the principle of equal treatment of beneficiaries.

66. The Commission further explained that financial audits assess the necessity of costs



incurred for the implementation of the projects and verify whether those costs have been incurred solely for the intended purpose of the grant agreements. This implies verifying that specific costs are provided for in the budget proposals sent to the Commission prior to the signing of the grant agreement and that those costs, when actually incurred, are processed, validated and approved within an accounting system and related internal control structure which respect the principle of sound financial management. Moreover, the financial audit is designed to verify whether the costs claimed fulfil all the eligibility criteria laid down in Annex II of the 7FP grant agreements. The obligation to comply with the above criteria applies to all participants without any exception for SMEs. The complainant failed to provide evidence in support of the eligibility of the costs it claimed.

67. Finally, the Commission noted that the complainant failed to establish a clear link between (a) the audit procedures, and (b) Parliament's Resolution 2010/2079 INI and the "*Final report of the expert group accounting system for small enterprises*" referred to in its complaint. It further failed to indicate which specific part of the audit procedure did not comply with those documents.

The Ombudsman's assessment

68. The Ombudsman underlines that the Commission enjoys broad discretionary power in deciding on the audit policy to be implemented for its framework programmes. Accordingly, his review is necessarily limited in cases involving a political decision on which audit policy should be implemented. The Ombudsman can only verify in his inquiry whether the relevant procedural rules have been complied with and whether there has been a manifest error of assessment or misuse of power.

69. The complainant did not submit evidence to show that the Commission's choice of audit policy was tainted by a manifest error of assessment. Furthermore, the audit carried out in relation to the two projects in question appears to comply with the principles and rules laid down by the Commission in its audit policy. The complainant did not demonstrate how the Commission abused its power in relation to the audit carried out on the two projects.

70. In light of the foregoing, the Ombudsman does not find an instance of maladministration as regards this allegation.

E. Conclusions

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

There has been no maladministration.

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



P. Nikiforos Diamandouros

Done in Strasbourg on 2 May 2012

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[2] The Commission enclosed a copy of this exchange of correspondence with its opinion.

[3] In this respect, on 5 September, 14 and 27 October, 16 and 28 November, 6 and 21 December 2011 and 24 January 2012, the complainant sent copies of its exchange of correspondence with the Commission concerning the subject matter of its complaint to the Ombudsman.

[4] Article II.22.1 reads as follows: "*The Commission may, at any time, during the implementation of the project and up to five years after the end of the project, arrange for financial audits to be carried out by external auditors, or by the Commission services themselves including OLAF: The audit procedure shall be deemed to be initiated on the date of receipt of the relevant letter sent by the Commission. Such audits may cover financial, systemic and other aspects (such as accounting and management principles) relating to the proper execution of the grant agreement. They shall be carried out on a confidential basis.*"

[5] The explanation contained in the final audit report reads as follows: "*The Audit did not submit any Financial Guide to the Beneficiary. During the application of the audit procedures and during the discussions held with management related to the eligibility of the costs claimed, we have brought to the attention of the Beneficiary the recommendations as included by the EC in the Guidelines dated 2 April 2009 (and not 2010 as the Beneficiary claims). The Beneficiary stated that the Guidelines that they have used are the ones dated 24 July 2007, available at the date the proposals for the two projects were submitted. It is to be mentioned that the aforementioned guides are aimed at assisting beneficiaries and are provided for consultation purposes, and it is the responsibility of the Beneficiary to keep updated to the most recent recommendations included therein. Furthermore, it is to be mentioned that there are no significant differences in terms of the content of the two guides (2007 and 2009), the 2009 version having added further details to the 2007 version in order to improve clarity. The audit conclusions drawn were based on the applicability of the provisions of the Grant Agreement, and not on the aforementioned guides, which were used for information and discussion purposes only.*"

[6] As may be seen on the Commission's website http://cordis.europa.eu/fp7/home_en.html

[7] Articles II.14 and II.22 of the grant agreement.

[8] The Commission enclosed with its opinion a copy of the final audit report.



[9] This exchange of correspondence took place after the complainant turned to the Ombudsman.

[10] Following this meeting, the Commission invited the complainant to submit in writing "*new, conclusive and probative evidence*" that would permit the Commission to review its conclusions relating to the amounts due pursuant to the audit carried out on the two projects. The complainant replied to the above invitation on 4 December 2011. On 16 and 21 December 2011 and on 19 January 2012, the complainant and the Commission exchanged further correspondence concerning the subject matter of the present complaint.

[11] The relevant paragraph of this letter reads as follows: "*We draw your specific attention to the following: any financial audit findings in the audit report, once finalised, may lead, if appropriate, to extrapolation of such finding to any other research grant agreement in which you are or have been participating. To this end, you may be requested to provide us with additional information on any of these grant agreements.*"

[12] The relevant paragraph of this letter reads as follows: "*If you consider that the audit findings cannot be extrapolated to the non-audited periods of the audited grant agreements, or to one or more of the non audited grant agreements mentioned in Annex II, you are kindly requested to justify under point III of Annex III why these projects and/or periods do not suffer from the errors as detected in the audited projects.*"

[13] The latest version of the Financial Guidelines available on the Commission's website contains detailed information in this respect, including the circumstances in which the Commission may extrapolate the results of audits.

[14] The information is available on the Commission's website http://cordis.europa.eu/audit-certification/home_en.html , including in leaflets dated November 2007.

[15] Article II. 22.1.

[16] This project was conducted by the European Commission and experts in the field of accounting appointed by the national authorities, under the Multiannual Programme for Enterprise and Entrepreneurship coordinated by the European Commission's Directorate-General for Enterprise and Industry.