

Decision in case 1491/2018/VB on the alleged failure by the Clean Sky 2 Joint Undertaking to protect the complainant's patent rights in the context of a project financed under the Horizon 2020 programme

Decision

Case 1491/2018/VB - Opened on 12/04/2019 - Decision on 13/05/2020 - Institutions concerned Clean Sky 2 Joint Undertaking (No maladministration found) | Clean Sky 2 Joint Undertaking (No further inquiries justified) |

The case concerned a project organised by the Clean Sky 2 Joint Undertaking (CS2JU) and funded under the EU Research and Innovation programme 'Horizon 2020'. The complainant claimed that a device developed in the context of the project breached his intellectual property rights.

The Ombudsman finds that the CS2JU has dealt with the complainant's concerns in a reasonable manner and that it provided him with the appropriate advice to contact the competent national authorities.

The Ombudsman closes the inquiry with the finding that CS2JU's handling of the complainant's concerns about the alleged infringement of his intellectual property rights does not reveal maladministration and that no further inquiries into the other aspects of the complaint are justified.

Background to the complaint

1. The complaint concerns the award of a grant for a project organised by the Clean Sky 2 Joint Undertaking ('CS2JU') for the '*validation of aero-vibro-acoustic model on new aerodynamic configurations*' (the 'CANOBLE' project) [\[1\]](#) [\[Link\]](#) and funded under the EU Research and Innovation programme 'Horizon 2020'. CS2JU is a public-private partnership between the European Commission and the European aeronautics industry funded under the Horizon 2020 programme.

2. Between 2016 and 2018, the complainant, who is the manager of a French engineering company, had exchanges in writing and met with staff of the CS2JU and the Commission regarding a number of concerns that he had in relation to the project. The complainant's



concerns were, in particular, that:

- i. By financing the project, the CS2JU financed the development of a device in breach of a patent owned by the complainant's company;
- ii. Several irregularities affected the classification, formulation and assessment of the topic and the project. [\[2\]](#) [\[Link\]](#)

3. In support of his claim under point ii above, the complainant said that the call for project proposals breached Horizon 2020 rules because it wrongly classified the project as a research and innovation action (RIA) and because it did not require a state of the art analysis [\[3\]](#) [\[Link\]](#) to be carried out *before* the submission of proposals. He added that the 'topic manager' [\[4\]](#) [\[Link\]](#) and one of the beneficiaries of the grant had access to privileged information and that the experts who evaluated the proposals did not analyse them in light of the existing state of the art situation.

4. The CS2JU informed the complainant that it is not the competent body to assess whether a submitted proposal or a funded project infringes the intellectual property rights of third parties. The CS2JU invited the complainant to refer the issue to the competent national authorities. The CS2JU also referred to the provisions of the grant agreement signed by the beneficiaries, according to which the CS2JU cannot be held responsible for damages to third parties caused by the beneficiaries of the grant. [\[5\]](#) [\[Link\]](#) In addition, the project topic did not require the specific use of any existing intellectual property rights for the development of the activities.

5. The CS2JU said that the approval process for the call for proposals and for its topics followed the Regulation establishing CS2JU [\[6\]](#) [\[Link\]](#). The independent experts had assessed the proposals on the basis of the standard Horizon 2020 evaluation criteria. [\[7\]](#)

6. Dissatisfied with the CS2JU's replies, the complainant turned to the Ombudsman in August 2018, arguing that the CS2JU had failed to ensure that the project was in line with the Horizon 2020 rules and that it did not breach existing intellectual property rights. The complainant considered that the CS2JU should suspend the project and the use of the device that the grant beneficiaries had developed.

The inquiry

7. The Ombudsman opened an inquiry into the complaint, asking the CS2JU to reply to certain concerns raised by the complainant.

8. In the course of the inquiry, the Ombudsman received the reply of the CS2JU on the complaint and, subsequently, the comments of the complainant in response to the CS2JU's reply.

The alleged breach of the complainant's intellectual property rights



Arguments presented to the Ombudsman

9. In its reply to the Ombudsman, the CS2JU maintained that, in accordance with the provisions of the grant agreement, it cannot be held liable for damages to third parties caused by beneficiaries when implementing the agreement. A potential breach of third parties' intellectual property rights by the beneficiaries of a grant does not affect the implementation of the project. The CS2JU can carry out a review or an audit of a project only on specific grounds listed in the grant agreement. [8] [\[Link\]](#)

10. The complainant argued that the CS2JU and the beneficiaries of the grant were aware of the existence of the complainant's patented device when the CANOBLE project was prepared. In his view, this proves that the beneficiaries breached the ethical obligations under the grant agreement.

11. The complainant also argued that the CS2JU cannot rely on the provisions of the grant agreement towards third parties, such as the complainant, who are not part of the agreement. Given the risk of a breach of his intellectual property rights, the CS2JU should have suspended the project and discontinued its financing. The complainant considered that the CS2JU was responsible for ensuring that no counterfeit device was being developed in the context of the project.

The Ombudsman's assessment

12. The Ombudsman's role in this case in ensuring good administration is to assess whether the CS2JU has properly addressed the complainant's concerns by providing reasonable replies. To this end, the Ombudsman sought clarifications from the CS2JU.

13. The CS2JU has clearly set out its position as to why it could not act on the complainant's requests. It advised him to turn to the competent national authorities. The Ombudsman is of the view that the CS2JU's position is in line with the relevant grant agreements. The approach taken by the CS2JU is reasonable and does not reveal any maladministration.

14. The Ombudsman appreciates that the complainant does not agree with the CS2JU's position and explanations. However, on the issue of the complainant's intellectual property rights, the Ombudsman cannot assume the role of a patent court, which is the sole competent body to rule on an alleged infringement of a patent.

Concerns about the classification, formulation and assessment of the topic and the project



Arguments presented to the Ombudsman

15. The CS2JU argued that the complainant had not provided any material evidence to support the argument that the topic manager and one of the project partners had access to privileged information regarding the project. The CS2JU pointed out that all representatives of the CS2JU bodies involved in the consultation process and in the adoption of the project call were bound by the confidentiality rules in the CS2JU's rules of procedure. [\[9\] \[Link\]](#) The CS2JU also argued that it cannot be held liable for a potential confidentiality breach between private parties.

16. On the matter of classification, the CS2JU said that the topic had been classified as a research and innovation action in accordance with Horizon 2020 rules. The topic was "*not limited to measurements activities and did not require in its description the specific use of any existing IPR [intellectual property rights] for the development activities*" and that "*in the context of R&I [Research and Innovation] grants the existence of patents or any other form of protected IP, does not prevent applicants to propose to conduct research activities on new alternative and more innovative solutions in the same area, other than those already available on the market*". The CS2JU also said that the independent experts evaluated the proposals in compliance with the applicable rules.

17. The complainant maintained that when the topic was presented to the CS2JU, the topic manager and one of the eventual beneficiaries were still involved in another project which concerned the same subject matter and that a partnership existed between them at the time.

The Ombudsman's assessment

18. The Ombudsman notes that the concerns raised by the complainant regarding the classification, formulation and assessment of the topic and the project, including alleged access to privileged information, are all primarily made to support the complainant's claim that the CS2JU was financing the development of a device breaching his intellectual property rights.

19. Again, the Ombudsman appreciates that the complainant does not agree with the position and explanations given by the CS2JU in the course of this inquiry. However, the Ombudsman's role is not, and cannot be, to reassess the scientific choices and assessments made by the CS2JU and the experts, which led to the approval of the topic, the publication of the call for proposals and the selection of the proposal.

20. On the issue of access to privileged information, the Ombudsman concurs with the CS2JU that no conclusive evidence has been provided to support this allegation.

21. The Ombudsman opened an inquiry into the above issues to seek clarifications for the complainant about certain aspects of his complaint. The Ombudsman considers that the CS2JU has provided a reasonable reply also on these aspects. The complainant now has information that might be useful in allowing him to determine whether he wishes to pursue the intellectual property issue at the national level, such as by initiating judicial proceedings.



22. In light of the above, the Ombudsman finds that further inquiries into this aspect of the complaint are not justified.

Conclusions

Based on the inquiry, the Ombudsman closes this case with the following conclusions:

The CS2JU's handling of the complainant's concerns about the alleged infringement of his intellectual property rights does not reveal any maladministration.

No further inquiries into the other aspects of the complaint are justified.

The complainant and the CS2JU will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 13/05/2020

[1] [\[Link\]](#) JTI-CS2-2015-CFP02-LPA-01-05 - Validation of aero-vibro-acoustic model on new aerodynamic configurations'.

[2] [\[Link\]](#) A CS2JU call for proposals contains multiple topics focusing on different areas of interest. Applications are evaluated against the following award criteria: (i) excellence, (ii) impact and quality, and (iii) efficiency of implementation. Once appointed, the partners proceed with their projects within an agreed timeframe and budget.

[3] [\[Link\]](#) A state of the art analysis is carried out to find what is the level of development achieved in a certain market, application domain, science or technology.

[4] [\[Link\]](#) The 'topic manager' is the representative of the private Member of the Joint Undertaking (either a 'Leader' or a 'Core Partner', as defined in the basic act of the Joint Undertaking), designated as responsible for the topic in the call for proposals under which the action was selected.

[5] [\[Link\]](#) Article 46.1 of the 2015 Horizon 2020 Model Grant Agreement for Members provides



that ‘ *The JU cannot be held liable for any damage caused to the beneficiaries or to third parties as a consequence of implementing the Agreement, including for gross negligence. The JU cannot be held liable for damage caused by any beneficiaries or third parties involved in the action, as a consequence of implementing the Agreement*’ ,

https://www.cleansky.eu/sites/default/files/h2020-mga-cleansky_en.pdf [Link]. The same provision can be found in Article 46.1 of the 2014 General Multi-Beneficiary Model Grant Agreement for the Horizon 2020 Programme, https://ec.europa.eu/research/participants/data/ref/h2020/mga/gga/h2020-mga-gga-multi_v2.0_en.pdf [Link].

[6] [Link] Council Regulation (EU) 558/2014 establishing the Clean Sky 2 Joint Undertaking, https://ec.europa.eu/research/participants/data/ref/h2020/other/legal/jtis/cleansky-establact_en.pdf [Link].

[7] [Link] CS2JU referred to the ‘CS2JU Work Plan’. The Work Plan 2015 - 2017 is available at http://ec.europa.eu/research/participants/portal/doc/call/h2020/jti-cs2-2015-cfp02-lpa-01-05/1662632-cs_work_plan_ [Link].

[8] [Link] Article 22 of the General Multi-Beneficiary Model Grant Agreement for the Horizon 2020 Programme provides that checks can be carried out to ‘ *check the proper implementation of the action and compliance with the obligations under the Agreement, including assessing deliverables and reports*’ ; that audits can be carried out ‘ *on the proper implementation of the action and compliance with the obligations under the Agreement*’ ; and that reviews can be carried out on ‘ *the proper implementation of the action (including assessment of deliverables and reports), compliance with the obligations under the Agreement and continued scientific or technological relevance of the action*’ , https://ec.europa.eu/research/participants/data/ref/h2020/mga/gga/h2020-mga-gga-multi_v2.0_en.pdf [Link].

[9] [Link] Decision on the CS2JU Governing Board Rules of Procedure, art. 12, https://www.cleansky.eu/sites/default/files/documents/legal/cs-gb-2014-03-07_doc1a_gb_rules_of_procedure.pdf [Link].