

Decision of the European Ombudsman on complaint 2110/2003/(BB)TN against the European Commission

Decision

Case 2110/2003/(BB)/TN - Opened on 03/12/2003 - Decision on 06/10/2004

Strasbourg, 6 October 2004

Dear Mr M.,

On 30 October 2003, you made a complaint to the European Ombudsman on behalf of the North West Institute of Further and Higher Education concerning the European Commission's decision to recover the sum of EUR 325 462.56 with interest. The money had been granted under Business Community Project (BCP) grant agreement 98005636 in the field of training and related support services for SMEs - Lot 2: "The transfer of small and medium-sized enterprises from one generation to the next".

On 3 December 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 4 March 2004. I forwarded it to you with an invitation to make observations, which you sent on 28 April 2004.

On 19 May 2004, I wrote to the Commission, asking for further information relating to certain aspects of your complaint. I received the Commission's reply on 1 July 2004. I forwarded it to you with an invitation to make observations, which you sent on 20 August 2004.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

In October 2003, a complaint was made to the Ombudsman on behalf of the North West Institute of Further and Higher Education (hereafter "the Institute") concerning the European Commission's decision to recover the sum of EUR 325 462.56 plus interest. The money had been granted under Business Community Project (BCP) grant agreement 98005636 in the field of training and related support services for SMEs - Lot 2: "The transfer of small and medium-sized enterprises from one generation to the next".

According to the complainant, the relevant facts are, in summary, the following:



In 1998, DG XXIII published a call for proposals for several projects in the field of training and related support services for SMEs (1) . One lot concerned transfer of SMEs from one generation to the next and since the Institute was already doing some work in that area, it assembled a consortium of partners and submitted a bid.

In the bid, the Institute stipulated that it was using the participating companies' staff time and this was clearly indicated in the bid as "in kind match funding", amounting to EUR 850 200. The total cost of the project was EUR 1 525 000 and the Commission approved the project and provided the Institute with a letter of offer which did not in any way indicate that in kind staff time was ineligible. Article C7 of Annex 4 of the contract specifically stated that "Contributions in-kind, that is, other than monetary, may in exceptional circumstances be included in the project, provided that they are duly justified in the light of the aims of the project, are properly documented and are approved by the Commission before the project starts". The inclusion of the in kind funding in the bid and the subsequent approval by the Commission of the total cost of EUR 1 525 000 indicated to the Institute that it was in order to proceed as per the application.

The project was completed in March 2001 and the Institute's final claim was submitted in May 2001, including all necessary supporting documentation, such as time sheets for the participating companies' in kind match funding.

In June 2002, two auditors from the Commission visited the Institute to audit the project. During the audit it was suggested that the use of in kind contributions was ineligible and would probably be disallowed. The Institute pointed out that at no point previously had this problem been raised. The documentation and feedback that the Institute had received indicated that it was perfectly acceptable to use in kind match funding the way it had done. On 21 October 2002, the Institute received the audit report, which did not take into account any of the Institute's explanations given during the audit. The in kind match funding was disallowed and the Institute tried to dispute the Commission's findings and to provide explanations, but these were totally ignored. In July 2003, the Commission sent a demand for the return of EUR 325 462.56.

The Commission refused to accept any explanations provided by the Institute. The Institute should have been given the opportunity to correct its mistakes. The Institute considers that the rule of promissory estoppel applies in the case and that it acted in good faith in expending its resources to complete the project. None of the organisations involved in the project made a financial gain as only actual salary costs and receipted costs were included in the financial report.

In substance, the complainant alleges maladministration in that the Commission approved the project budget in 1998, received an interim financial report in which the expenditure was recorded and only a year after the project had been completed decided that half of the budget was not eligible and should not have been approved.

The complainant claims that the rule of promissory estoppel should be applied in this case.



THE INQUIRY

The Commission's opinion

In its opinion, the Commission makes the following comments:

Background

In the context of the project "Business Continuity Programme BCP" and following a call for proposals launched in 1998, a grant agreement was concluded with the Institute. The objective of the training project was to help entrepreneurs prepare for transferring their businesses. The maximum commitment of the Commission was fixed at EUR 762 500, which constituted 50% of the total estimated project cost. It was foreseen that the Institute's contribution of EUR 762 500 would consist of "Funding in kind (staff time)". Three payments were made to the Institute: one after receipt of the signed declaration, one after the first interim report and one after the second interim report. In total EUR 533 750 were paid and the balance of the Commission's contribution was to be paid after approval of the final report.

The final report was submitted on 30 April 2001. The total cost amounted to EUR 1 294 284.23, of which the Commission should be charged with 50%. On 29 May 2001, the Commission requested clarifications on one of the deliverables of the project and on the accounting statement.

The Commission received the Institute's reply on 27 July 2001. However, this reply did not fully answer the questions raised and another request for clarifications was sent to the Institute on 17 August 2001. The Institute's reply arrived on 5 February 2002 and the missing accountant's statement arrived on 19 February 2002.

Since there were concerns about the accounting statement, in particular the eligibility of the high staff costs and company match funding, clarifications were requested by letter of 25 March 2002. However, the Institute's explanations did not assure the Commission about the eligibility of the costs and, therefore, an on-the-spot audit was carried out from 12 to 14 June 2002. Some irregularities were found in the accounts, leading to an amount of EUR 908 909.35 being declared as ineligible costs. 74.3% of these ineligible costs referred to declared costs (EUR 675 450) for "company match funding". In a letter of 2 May 2002, the Institute had stated that "this figure is the contributions the company personnel were making to this project. This contribution was their time and it is clearly highlighted in the application". However, the audit report indicates: "The initial proposal spoke of services in kind amounting to 50% of the project amount. This contribution in kind was to come from services provided by the beneficiary for which no charge is made to the project. However, what has been charged is the cost of the time spent in training by the people trained under the project, although this amount is in no way borne by the grant beneficiary. The whole of this item is ineligible."

The final audit report was sent to the Institute on 15 October 2002, for comments within 30 days. The Institute responded on 22 November 2002 by rejecting the results but without providing any new documentation. On 19 December 2002, the Commission sent the Institute a letter giving it until 27 January 2003 to provide evidence to support its objections. The Institute responded late by sending two fax messages, one on 31 January 2003 and one on 5 February 2003. Evidence concerning staff costs of one partner was provided and this was reflected in the



Commission's calculations. Finally, the total eligible costs for the project amounted to EUR 416 574.88 (i.e. EUR 385 374.88 as initially identified in the audit report + EUR 31 200 after receipt of evidence concerning staff costs) and the participation of the Commission to EUR 208 287.44 (50% of the total eligible costs). As the Commission had already paid the Institute EUR 533 750, a letter was sent to the Institute on 21 February 2003, announcing that a recovery process for the amount of EUR 325 462.56 would be launched.

The complainant's allegation

As regards the part of the complainant's allegation stating that the Commission approved the project budget in 1998, the Commission does not contest this fact. It did approve the budget, including the "funding in kind (staff-time)" as proposed in the Institute's bid. The budgetary post for "personnel fees" amounted to EUR 1 384 200 and consisted, amongst others, of "participating company staff time" (in later correspondence referred to as "company match funding") for which an amount of EUR 850 200 was budgeted. It was foreseen that the Commission's contribution would be limited to a maximum of 50%, i.e. EUR 762 500 with regard to the total estimated project cost. The Institute's contribution consisted of "50% funding in kind (staff time)".

However, the acceptance by the Commission of the budget proposal in the Institute's bid in 1998 should merely be read as an approval upon the budgetary posts for project costs that would be actually incurred in the course of action. It is an approval in principle that still needs to be substantiated by costs actually incurred. The fact that there was a budgetary post foreseen for "participating company staff time/company match funding" does not make these costs eligible a priori. It is obvious that there has to be evidence that these costs have also actually been incurred. The complainant seems to confuse budget approval with actual budget costs. It should also be noted that the complainant only cites part of article C7 of Annex 4 of the grant agreement and omits the sentence "[t]he Commission's contribution may not exceed the amount of expenditure actually incurred by recipients and reflected in a genuine accounting entry". No evidence has been provided that, for the budgetary post "participating company staff time/company match funding" actual expenditure had been incurred. Only attendance lists or time sheets of people trained under the project ("participants") have been provided to justify this "expenditure".

The complainant seems to be of the opinion that the wording "participating company staff time" in the budget proposal concerned the time spent by people that received training, whilst for the Commission it was clear that it covered services provided by the staff of the Institute or other partners participating in the project. Independently of which interpretation one would adopt, the issue is that expenditure had to be incurred either way. If not, any payment under the grant agreement is not justified. However, the complainant's letter of 31 January 2003 explicitly states that "We have never paid any monies to the companies for their participation and this was highlighted in the application and final accounts as "in kind"". Therefore, the concerned expenditure was never actually incurred and could not be found eligible. Moreover, since this "company staff time" was not a real cost for the complainant, invoicing it as an eligible cost would have made the project profitable, which, according to the grant agreement, was not allowed.



As regards the part of the complainant's allegation relating to the interim financial report, according to Article 2 of the grant agreement, the Commission was entitled to contest the eligibility of the proposed costs either on the receipt of the interim reports and/or upon receipt of the final report. However, with reference to article 4(a) and Annex 4 of the grant agreement, it is obvious that contractually only the final report may be considered as the financial report on the use of the subsidy. Therefore, the fact that the Commission did not raise objections with regard to the eligibility of the concerned costs upon receipt of the interim reports may not be considered as a tacit approval of costs. The interim reports were limited to a description of the impact of work already done and were not at all of a financial nature. The Commission therefore had no reason to react. In the complaint, the complainant incorrectly refers to the interim report as an "interim *financial* report".

As regards the part of the complainant's allegation stating that the Commission only a year after the project had been completed decided that half of the budget was not eligible and should not have been approved, the complainant seems to confuse the approval of the budget and the eligibility of costs. In signing the grant agreement in 1998, the Commission approved the budget as proposed in the Institute's bid and has never withdrawn its approval. However, in line with good financial management and in accordance with the relevant contractual provisions, the Commission has the obligation to ensure that Community funds are spent in accordance with the provisions of the contract and the approved budget. This means that the Commission verifies the eligibility of the proposed costs. Following the Institute's submission of an incomplete final report, the Commission systematically requested clarifications, but the complainant never provided proof to justify the main part of the ineligible costs; the "company match funding". The fact that the decision to recover the amount concerned was taken some time after the completion of the project only shows that the Commission acted in accordance with the principles of good financial management and systematically gave the Institute the necessary time to react.

The complainant further asserts that the Commission did not accept any explanations provided by the Institute. However, the Commission did accept new evidence provided by the Institute in its letter of 31 January 2003, in that an amount of EUR 31 200 for staff costs, which had been declared ineligible in the audit report, was accepted. With regard to the other explanations given by the Institute, clear and appropriate evidence has never been provided to show that the costs in question were actually incurred.

As regards the complainant's claim that the rule of "promissory estoppel" should apply in the case and that the Institute acted in good faith in expending its resources, it must be noted that the contract does not foresee any application of the principle of "promissory estoppel". Furthermore, this principle does not form part of the common principles of contractual law of the Member States. The closest principle applied at Community level would be the "protection of legitimate expectations". According to the Court's case law, the right to rely on such a principle extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations. On the other hand, a person may not plead a breach of that principle unless the administration has given him precise assurances (2). In the present case, the complainant has furnished no evidence proving that



the Commission had led him to entertain reasonable expectations. In addition, at no point in time has the Commission provided the "precise assurance" through which the principle of protection of legitimate expectations could be invoked.

The complainant does not seem to raise objections with regard to the other costs that were not found eligible, notably costs related to the inclusion of VAT, staff, travel, translation, audit and evaluation.

The complainant's observations

In his observations, the complainant maintains his initial complaint and makes, in summary, the following additional remarks:

It is crucial to the issue in dispute to revisit the Institute's proposal and the Commission's letter of approval, granting a subsidy of EUR 762 500, representing 50% of the total cost of EUR 1 525 000. In the Institute's proposal, it was clear that EUR 850 200 was attributable to participating company staff time, and not to the delivery and management staff of the applicant, which was separately itemised. However, at no time was the Institute intending to use the grant to fund the companies who were participating. If actual costs for delivery were not to reach EUR 762 500, which was the case, this amount would never be, and indeed never was, claimed.

The Institute does not accept that the participating company staff time costs are not eligible a priori. Article C 7 of Annex 4 clearly provides that contributions in kind need to be approved. The award of the grant, which incorporated these costs, was seen as an approval to proceed. In this context, it could be useful to refer to Regulation 1260/99, section 1.4, where it states that "contributions in kind and overheads can also form part of the payments effected by final beneficiaries". Furthermore, as regards other EU funded programmes, such as Socrates and Interreg, private companies participate and their time spent working on the project is considered funding in kind and is deemed eligible. The Institute genuinely believed that such in kind costs had been approved by the Commission.

The grant did not give rise to any profit. The element of proof that was provided was timesheets for the staff participating in the project. To provide timesheets is the normal method for confirming time spent on projects, particularly in kind time. The Institute has only claimed actual costs, which included the time spent by participating companies in helping with the research to develop the best approach to deal with the problems of owner managed businesses throughout Europe. This was a pilot project to research and develop a local approach to the succession problems of owner managed businesses. The participating companies were not guaranteed or promised any benefits from taking part in the project and their participation would have been a direct cost to them.

The complainant notes that the Commission argues that promissory estoppel does not form part of the common principles of contractual law of the Member States and that the closest principle would be the protection of legitimate expectations. The complainant would therefore like to argue that, by allowing EUR 850 200 for participating company staff time when calculating the overall cost of the project and by approving a grant based upon this calculation, the Commission created the legitimate expectation that, subject to the production of the necessary



time sheets etc., such costs should be allowed.

As regards other costs, the Institute still objects to the Commission's findings on travel, translation, audit and evaluation costs. It is self-evident and can be sustained from the documentation examined by the Commission that the Institute incurred such costs. To disallow these items in their totality would be disproportionate.

In light of the above, the Commission should not be allowed to recover the alleged overpayment.

Further inquiries

In the Ombudsman's view, the complainant's allegation, which concerns the fact that half of the budget was found ineligible by the Commission, can be divided into three parts: 1) the approval of the budget; 2) the receipt of the interim financial report; and 3) the time aspect.

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary regarding certain issues pertaining to the first part of the allegation, i.e. the approval of the budget. The Ombudsman therefore wrote to the President of the Commission, asking for further information on the basis of the following analysis of issues in dispute.

In the Ombudsman's view, there were still some question marks regarding the approval of the budget, particularly as regards the status of contributions "in kind", consisting of staff time.

The complainant had included in the budget a post called "professional fees" which was sub-divided into "staff costs" and "participating company staff time". Under "staff costs" the complainant had included sums in respect of "in-kind" contributions, consisting of time spent by staff of the complainant Institute and its partners, i.e. the trainers. The Ombudsman found that the Commission appeared to accept that at least some of the "in-kind" contributions under "staff costs" could count as eligible expenditure.

The complainant had also included, however, under the heading "participating company staff time" amounts which he intended to represent time spent by the staff of the SMEs participating in the project, i.e. the trainees.

In the Ombudsman's view, the main dispute between the Commission and the complainant appeared to concern the latter amounts.

From the Commission's opinion, the Ombudsman considered it likely, but not entirely clear, that the Commission would reject any possibility that "in-kind" contributions consisting of trainees' time could count as eligible expenditure.

In light of the above, the Ombudsman therefore asked the Commission the following:

1. Does the Commission consider that staff time of the SMEs participating in the project, i.e. the trainees, could possibly count as eligible expenditure?



2(a). If the answer to Q 1 is no, please specify which provisions of the contract exclude this possibility. Why did the Commission not reject the amounts entered by the complainant under the budget in respect of "Participating Company Staff Time" at the time when the budget was submitted to the Commission for approval?

2(b). If the answer to Q 1 is yes, What would constitute acceptable proof of these costs and in what way does the proof already supplied by the complainant not constitute such proof?

The Ombudsman further asked the Commission to respond to the complainant's argument, brought forward in his observations, that:

3. The Institute provided sufficient proof of travel, translation, audit and evaluation costs.

The Commission's reply

The Commission submitted the following reply to the Ombudsman's questions:

Question 1 : As a general principle, costs are eligible in as far as they have actually been incurred by the beneficiaries of the contract. In the contract concerned and with regard to staff time of the SMEs participating in the project, i.e. the trainees, this condition is not fulfilled. Since the Institute itself, in its letter of 31 January 2003, stated that it "has never paid any monies to the companies for their participation", it explicitly confirms that staff time of the trainees was not an expenditure for the Institute or for any one of the subcontractors or the other beneficiaries. Therefore, in this project, staff time of the SMEs participating in the project, i.e. the trainees, cannot count as eligible expenditure.

Question 2(a) : Article 2(i) of the grant agreement clearly stipulates that "the subsidy may not in any circumstances give rise to any profit". Since the "participating company staff time" did not represent a direct or indirect cost for the Institute, or entail any other economic consequences for the institute, any payment by the Commission to cover this post would contribute to making the project profitable. Article 2(h) of the grant agreement stipulates that: "The final account (actual expenditure and income) must be submitted in ECU /.../". Actual expenditure is to be read as expenditure incurred by the recipient of the grant. Since no copy of any payments made has been transmitted, there is no evidence that the cost was actually incurred.

Article C 1 of annex 2, "Reports and documents", indicates that "the only eligible expenditure shall be the expenditure /.../ incurred for goods or services which contribute to achieving the aims of the project". The time spent by the people trained under the project cannot be considered as a service rendered by the Institute or its associated contractors, nor did it constitute an (in-kind) expenditure for the Institute.

The project costs as approved by the Commission foresaw a total budget of EUR 1 525 000. The major part consisted of "personnel fees" (EUR 1 384 200). The "participating company staff time" amounting to EUR 850 200 was part of these "personnel fees" or "professional fees" (both terms used as such in the Institute's budget). Therefore, in approving the budget, the Commission considered the concerned part ("participating company staff time") of the



"personnel fees" as expenditures ("fees") for services rendered by staff of the Institute ("personnel", "professional") or associated contractors. In any case, it would be contrary to any reasonable meaning of the term "fee" to use it to designate the "presence" in training of people that are external to the beneficiary companies. Within this context and under this wording and given the above-mentioned provisions of Articles 2(i), 2(h) and Article C 1 of annex 2 of the grant agreement, the Commission approved the budget. The Commission is of the opinion that any other interpretation of the term "participating company staff time" would not have been justified in the described context.

One might argue that, when approving the budget, the Commission did not pay attention to the fact that the "participating company staff time" was separately itemised next to "staff costs". It is true that for reasons of clarity, the Commission might have raised questions on this issue before adopting the budget. The fact that the Institute now argues that "participating company staff time" should be interpreted as the time spent by people that received training indicates that, indeed, further clarification would have helped to avoid problems. However, the Institute's alternative interpretation would have to be confirmed by facts that have taken place during the implementation of the contract and that are measured against contractual provisions: costs are eligible in as far as they have actually been incurred for services actually rendered by the beneficiary. The Institute explicitly confirmed that it never paid the trainees. Furthermore, the Institute never provided any reasonable argument or evidence proving that time spent by trainees represents an in-kind expenditure (i.e. a non-monetary "cost") on the Institute's behalf which could have resulted from services rendered by these trainees to the project. In conclusion, the factual evidence regarding the actual implementation of the contract does not support the Institute's alternative interpretation of "participating company staff time".

Question 3 : It should be noted from the audit report that it is incorrect to state that the Commission disallowed "[t]hese items [i.e. travel, translation, audit and evaluation] in their totality", except for the "translation" item. For those parts related to travel, audit and evaluations that have been found ineligible, appropriate justifications have been put forward in the audit report. The Institute never provided satisfactory evidence to the contrary. As concerns "translation", the total amount was found ineligible. The Commission did not contest that the costs were actually incurred, but it discovered serious irregularities in the tender procedure for translation of the BCP manual from English to Spanish. In the audit report, serious doubts about the authenticity of two rejected bids were expressed. The audit report concluded, therefore, that the concerned declared costs were ineligible. The Institute has never provided satisfactory evidence about the authenticity of the concerned bids. In the absence of such evidence, there were serious indications that the contract for the translation work had been awarded by direct agreement rather than on the basis of a tender procedure involving three bidders.

The complainant's observations

The complainant made the following comments on the Commission's reply:

The Institute argues that the participating companies, i.e. the SMEs, are also beneficiaries of the project/contract and their time spent participating is an actual cost to them and was included in the project. The costs of the SMEs were included and deemed eligible as per the first line of the Commission's response to Question 1: "As a general principle, costs are eligible in as far as



they have actually been incurred by the beneficiaries of the contract".

The Institute is not asking for payment for the "participating company staff time", nor has it ever asked to be paid for it. The Institute only requires that "participating company staff time" should be acknowledged as an expense incurred by the "beneficiaries of the contract" and that it can be treated as in-kind funding.

In the Institute's view, the Commission admits to maladministration by its statements that it "did not pay attention to the fact that the participating company staff time was separately itemised next to staff costs" and that "for reasons of clarity, the Commission might have raised questions on this issue before adopting the budget". These statements show that the Commission was not thorough enough in its deliberations on the approval of the budget.

As regards the disallowed items, the Institute agrees that all except one were not disallowed in their totality. However, the reasons for disallowing part of the items were flawed and the Institute's explanations were ignored. The Institute does not understand what the Commission would consider as "satisfactory evidence to the contrary" with regard to some of these items, as the Institute has corresponded copiously with the Commission regarding the matter.

THE DECISION

1 Preliminary remarks

1.1 The complaint concerns the European Commission's decision to recover from the North West Institute of Further and Higher Education ("the Institute") the sum of EUR 325 462.56 with interest. The money had been granted under Business Community Project (BCP) grant agreement 98005636 in the field of training and related support services for SMEs - Lot 2: "The transfer of small and medium-sized enterprises from one generation to the next". In substance, the complainant alleges maladministration in that the Commission approved the project budget in 1998, received an interim financial report in which the expenditure was recorded and only a year after the project had been completed decided that half of the budget was not eligible and should not have been approved. The complainant claims that the rule of promissory estoppel should be applied.

1.2 The Ombudsman considers it useful to examine the complainant's allegation under three headings: 1) the approval of the budget; 2) the handling of the interim financial report; and 3) the time aspect. These points are dealt with in parts 2, 3 and 4 of the decision below.

1.3 Parts 5 and 6 of the decision refer to matters that are outside the scope of the original complaint, but which were raised during the course of the inquiry. Part 5 deals with the complainant's objections to the Commission's findings on travel, translation, audit and evaluation costs, and part 6 deals with the Commission's alleged failure to pay attention to the fact that the participating company staff time was separately itemised next to staff costs.

1.4 The Ombudsman notes that the original complaint, at least in part, appears to concern an alleged breach of contract by the Commission. According to Article 195 of the EC Treaty, the



European Ombudsman is empowered to receive complaints concerning instances of maladministration in the activities of the Community institutions or bodies. Maladministration may also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned. However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. In particular, the Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

1.5 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration. This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

2 The approval of the budget

2.1 According to the complainant, the Institute stipulated in its bid that it was using the participating companies' staff time. It was clearly indicated in the proposal that EUR 850 200 was attributable to participating company staff time, and not to the delivery and management staff of the applicant, which was separately itemised. The Commission approved the project and did not in any way indicate that "in kind" staff time was ineligible, which indicated to the Institute that it was in order to proceed as per the application. The Institute acted in good faith in expending its resources to complete the project. By approving a grant on the basis of a calculation including EUR 850 200 for participating company staff time, the Commission created the legitimate expectation that, subject to the production of the necessary time sheets etc., such costs should be allowed.

Again according to the complainant, its final claim was submitted in May 2001, including all necessary supporting documentation, such as time sheets for the participating companies' in kind match funding. To provide timesheets is the normal method for confirming time spent on projects, particularly in kind time. The Institute argues that it only claimed actual costs, which included time spent by participating companies in helping with the research. The participating companies, i.e. the SMEs, were not guaranteed or promised any benefits from taking part in the project and their participation would have been a direct cost to them. The Institute further argues that the SMEs are also beneficiaries of the project/contract. The Institute requires that "participating company staff time" should be acknowledged as an expense incurred by the "beneficiaries of the contract" and that it should be treated as in-kind funding.

2.2 According to the Commission, it did approve the budget, including the "funding in kind (staff-time)" as proposed in the Institute's bid. The budgetary post for "personnel fees" consisted, amongst others, of "participating company staff time" (in later correspondence referred to as "company match funding") for which an amount of EUR 850 200 was budgeted.



However, the acceptance by the Commission of the budget proposal in the Institute's bid should merely be read as an approval upon the budgetary posts for project costs that would be actually incurred in the course of action. The fact that there was a budgetary post foreseen for "participating company staff time/company match funding" does not make these costs eligible a priori. It is obvious that there has to be evidence that these costs have also actually been incurred. No evidence has been provided that, for the budgetary post "participating company staff time/company match funding" actual expenditure would have been incurred. Only attendance lists or time sheets of people trained under the project ("participants") have been provided to justify this "expenditure". Since the Institute itself, in its letter of 31 January 2003, stated that it "has never paid any monies to the companies for their participation", it explicitly confirms that staff time of the trainees was not an expenditure for the Institute or for any one of the subcontractors or the other beneficiaries. Since the "participating company staff time" was not a real cost for the Institute, invoicing it as an eligible cost would have made the project profitable, which, according to the grant agreement, was not allowed. Therefore, in this project, staff time of the SMEs participating in the project, i.e. the trainees, cannot count as eligible expenditure.

The major part of the project budget consisted of "personnel fees" and the "participating company staff time" was part of these "personnel fees". Therefore, in approving the budget, the Commission considered the concerned part ("participating company staff time") of the "personnel fees" as expenditures ("fees") for services rendered by staff of the Institute or associated contractors. In any case, it would be contrary to any reasonable meaning of the term "fee" to use it to designate the "presence" in training of people that are external to the beneficiary companies. Within this context and under this wording and given the provisions of Articles 2(i), 2(h) and Article C 1 of annex 2 of the grant agreement, the Commission approved the budget.

The Commission recognises that one might argue that, when approving the budget, it did not pay attention to the fact that the "participating company staff time" was separately itemised next to "staff costs". The Commission acknowledges that it is true that, for reasons of clarity, it might have raised questions on this issue before adopting the budget. The Commission argues, however, that it was clear from the grant agreement that costs are eligible only insofar as they have actually been incurred for services actually rendered by the beneficiary. The Commission points out that the Institute explicitly confirmed that it never paid the trainees and that the Institute never provided any reasonable argument or evidence proving that time spent by trainees represents an in-kind expenditure (i.e. a non-monetary "cost") on the Institute's behalf.

2.3 The Ombudsman notes that Article C 7 of Annex 4 to the grant agreement, which concerns contributions in kind (i.e. contributions other than monetary ones), underlines that "[t]he Commission's contribution may not exceed the amount of expenditure actually incurred by recipients and reflected in a genuine accounting entry". The Ombudsman further notes that Articles 4(b) and 7 of the grant agreement requires the recipient of a grant to submit to the Commission an accounting statement, accompanied by supporting documents stating the amount and nature of expenditures, and that if any expenditure is not eligible or if the recipient fails to submit supporting documents, the amounts in question have to be repaid to the



Commission.

2.4 In his observations, the complainant argues that the approval of the budget created the legitimate expectation that, subject to the production of the necessary time sheets etc., costs for "participating company staff time" should be allowed. However, on the basis of the provisions noted in paragraph 2.3 above, the Ombudsman considers that even if the Commission did approve the budget containing the separate post "participating company staff time", this cannot create the legitimate expectation that the post in question will be covered by the grant without the expenditure actually being incurred by the recipient and the appropriate supporting documents being provided.

As regards the present case, the Ombudsman notes that the supporting documents provided to prove the post "participating company staff time" appear to be time sheets showing the trainees' participation in the project. In the Ombudsman's view, these time sheets might prove costs incurred by the participating companies, the SMEs. However, such time sheets alone do not provide proof of any cost incurred by the Institute or its partners. The Institute seems to have provided no proof that the trainees' participation in the project represented an expenditure or a non-monetary cost for the Institute or its partners.

2.5 The Ombudsman also notes the Institute's argument that the participating companies, the SMEs, should be considered as "beneficiaries of the contract", and as such their expenses should be treated as in-kind funding. In the Ombudsman's view, this argument concerns the interpretation of the grant agreement. The Ombudsman recalls that the Commission argues that when the grant agreement refers to expenditure to be covered, this is to be read as expenditure incurred by *the recipient* of the grant. In the Ombudsman's view, this argument is supported by Article C 7 of Annex 4 to the grant agreement, to which the Commission refers when stating that no evidence has been provided that, for the budgetary post "participating company staff time/company match funding" actual expenditure would have been incurred by the Institute. The Ombudsman further notes from the grant agreement that the recipient of the grant in question is the Institute. In view of the above, the Ombudsman considers the Commission to have provided a coherent and reasonable account of both the legal basis and its reasons for taking the position that, according to the grant agreement, expenses incurred by the participating companies in having their staff trained under the project cannot be considered as in-kind funding to be covered by the grant.

On the basis of the above, the Commission appears to have breached no rule or principle binding upon it when declaring ineligible the budget post covering "participating company staff time". The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

2.6 As regards the complainant's claim that the rule of "promissory estoppel" should be applied in the case, this claim appears to have been modified in the complainant's observations to refer to "legitimate expectations". The Ombudsman has dealt with this claim in the first paragraph of 2.4 above.

3 The handling of the interim financial report



3.1 The complainant alleges that the Commission should have notified the Institute of the ineligibility of certain costs when it mid way through the project received the interim financial reports, in which expenditure according to the proposed budget was recorded.

3.2 The Commission argues that according to Article 2 of the grant agreement, it was entitled to contest the eligibility of the proposed costs either upon receipt of the interim reports and/or upon receipt of the final report. However, with reference to article 4(a) and Annex 4 of the grant agreement, it is evident that contractually only the final report may be considered as the financial report on the use of the subsidy. The interim reports were limited to a description of the impact of work already done and were not at all of a financial nature. The Commission had therefore no reason to react. The complainant incorrectly refers to the interim reports as "*interim financial reports*".

3.3 The Ombudsman notes that Article 2 of the grant agreement stipulates the conditions for the subsidy to be paid. Parts of the grant should be paid within a certain number of days following the receipt of the interim reports and the balance should be paid within a certain number of days following the receipt of the final report. However, the deadlines shall be suspended if the reports cannot be approved, for instance because one or other item of expenditure is not eligible. The Ombudsman also notes that according to Article A of Annex 2 of the grant agreement, the interim report must describe the work performed and the results obtained and shall also contain information on the schedule of work still to be completed, whereas Article 4(a) of the grant agreement states that the final report is on the use of the subsidy and, according to Annex 4, it must list the actual costs of the project.

3.4 Having carefully examined, in light of the relevant provisions in the grant agreement, the Commission's arguments as to why it did not question the eligibility of certain costs upon receipt of the interim reports, the Ombudsman concludes that the Commission has given a coherent and reasonable account of the legal basis for, and its reasoning behind, its actions. The Ombudsman further notes that the complainant has not presented any arguments to rebut the Commission's explanation. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

4 The time aspect

4.1 The complainant alleges that the Commission acted unreasonably when it only a year after the project had been completed decided that half of the budget was ineligible and should not have been approved.

4.2 The Commission argues that the complainant seems to confuse the approval of the budget and the eligibility of costs. In line with good financial management and in accordance with the relevant contractual provisions, the Commission has the obligation to ensure that Community funds are spent in accordance with the provisions of the contract and notably with the approved budget. This means that the Commission verifies the eligibility of the proposed costs. Following the Institute's submission of an incomplete final report, the Commission systematically requested clarifications, but the complainant never provided proof to justify the main part of the ineligible costs, the "company match funding". The fact that the decision to recover the concerned amount was taken some time after the completion of the project only shows that the



Commission gave the Institute the necessary time to react.

4.3 The Ombudsman notes from the Commission's account of the background of the case, which has not been disputed by the complainant, that it several times, both before and after the on-the-spot audit, requested clarifications from the Institute regarding its final report. In view thereof, the Ombudsman considers reasonable the Commission's explanation of the time span from the completion of the project to the recovery decision. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

5 Travel, translation, audit and evaluation costs

5.1 In its observations on the Commission's opinion, the Institute objects to the Commission's findings on travel, translation, audit and evaluation costs. It states that it is self-evident and can be sustained from the documentation examined by the Commission that the Institute incurred such costs. The Commission's reasons for disallowing part of these items were flawed and the Institute's explanations were ignored.

5.2 In its response to the Ombudsman's further inquiries, the Commission argued that, as regards those parts of the budget related to travel, audit and evaluations that have been found ineligible, appropriate justifications have been put forward in the audit report. The Institute never provided satisfactory evidence to the contrary. As concerns "translation", the total amount was found ineligible because of serious irregularities in the tender procedure for translation. In the audit report, serious doubts about the authenticity of two rejected bids were expressed. The audit report concluded, therefore, that the concerned declared costs were ineligible. The Institute has never provided satisfactory evidence about the authenticity of the concerned bids.

5.3 The Ombudsman notes that the complainant brought forward his objections in his observations on the Commission's opinion. The objections in question do not, therefore, constitute part of the original complaint. Having examined the arguments put forward by both parties regarding the matter, the Ombudsman does not find, at this stage, enough supporting evidence to suggest that the Commission has acted unreasonably. In order not to delay a decision on the original complaint, the Ombudsman will therefore not investigate the matter further. However, if the complainant considers himself to possess evidence of maladministration by the Commission in this regard, he could submit a new complaint regarding the matter.

6 The Commission's alleged admission of maladministration

6.1 In its observations on the Commission's reply to the Ombudsman's further inquiries, the Institute asserts that the Commission admits to maladministration by its statements that it "did not pay attention to the fact that the participating company staff time was separately itemised next to staff costs" and that "for reasons of clarity, the Commission might have raised questions on this issue before adopting the budget". According to the Institute, these statements show that the Commission was not thorough enough in its deliberations on the approval of the budget.

6.2 The Ombudsman notes that the complainant's original allegation concerned alleged legitimate expectations created by the Commission's approval of the budget; the Commission's alleged failure to notify the Institute of the ineligibility of certain costs when receiving the interim reports; and the alleged unreasonableness in disapproving the budget only a year after the project had been completed.



6.3 The Ombudsman takes the view that the complainant's assertions of maladministration in that the Commission should have: 1) paid attention to the fact that the participating company staff time was separately itemised next to staff costs; and 2) raised questions on this issue before adopting the budget, constitute new allegations not covered by the Ombudsman's inquiries into the original complaint.

The Ombudsman considers it appropriate for the complainant to approach the Commission directly in relation to the subject matter of these allegations and he will therefore not inquire into them within the scope of this case. The Ombudsman considers it useful to point out that such an approach by the complainant could take the form of seeking to negotiate with the Commission, taking into account the points set out in paragraph 6.4 below. The complainant retains the possibility to make a further complaint to the Ombudsman, if necessary.

6.4 The Ombudsman notes that in the Commission's view, the total eligible costs of the project are EUR 416 574.88. Furthermore, the Ombudsman notes that the Commission has acknowledged that for reasons of clarity, the Commission might have raised questions on the post "participating company staff time" before adopting the budget, but that it did not do so. In addition, the Commission does not appear to question the Institute's good faith regarding the eligibility of the "participating company staff time". In view of these exceptional circumstances, and without taking a position on costs still under dispute between the parties, the Ombudsman suggests that the complainant could seek to negotiate with the Commission concerning the exact amount of the grant to be recovered. The Ombudsman will make a further remark in this regard.

7 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

FURTHER REMARK

In view of the exceptional circumstances of the case, and without taking a position on costs still under dispute between the parties, the Ombudsman suggests that the complainant could seek to negotiate with the Commission concerning the exact amount of the grant to be recovered.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Small and medium-sized enterprises.



(2) Case T-113/96, *Edouard Dubois et Fils SA v. Council and Commission* [1998] ECR II-125.