European Ombudsman

Decision of the European Ombudsman closing his inquiry on complaint 1564/2006/(PB)(BM)VIK against the European Commission

Decision
Case 1564/2006/(PB)(BM)VIK - **Opened on** 08/08/2006 - **Decision on** 15/12/2008

THE BACKGROUND TO THE COMPLAINT

1. The present complaint concerns a recovery order issued by the European Commission in relation to a project X. The complaint was filed on behalf of a company working in the field of social science, which was a partner in a Consortium set up in order to implement the above project. The project's aim was to propose long-term solutions capable of allowing families with low incomes to have access to adequate housing.

2. The implementation of the project in question was to be financed by the European Commission, and six demonstration houses were to be built in 3 different EU Member States. The work on the project was to be carried out through nine so-called 'work packages' ('WP'). The complainant was due to take part in three of them. Its responsibilities were to:

(a) conduct an analysis of the needs of low-income persons prior to designing the houses (WP1);

(b) develop and conduct surveys on the buildings' inhabitants (WP7); and

(c) assess the project and the usefulness of its results (WP8).

The present complaint only concerns the work of the complainant under WP1 and WP7.

3. The project in question was governed by a contract, which was signed by the Commission's Directorate-General for Energy and Transport and the partners of the Consortium. Annex I (Part A) to the contract consisted of financial forms; Annex I (Part B) contained a description of the work to be performed by the partners ('Description of the work'). Annex II laid down the general conditions for the implementation of the project ('the General Conditions').

4. Due to administrative problems encountered in the course of the project's implementation, it

became evident that the demonstration houses could not be erected. The failure to build the houses meant that the contract had to be terminated and the Commission had to assess how much Community aid would have to be repaid by the Consortium's partners. The Commission concluded that it would recover from all partners a certain amount of money which had previously been transferred to them by the Commission. Concerning the complainant, the Commission decided that it should recover an amount of EUR 36 250.54.

5. The complainant strongly disagreed with the Commission's decision. With a view to clarifying the situation, it first addressed its grievances to the project coordinator. The coordinator replied to the complainant, informing it of his understanding of the situation. He submitted that the Commission official responsible for the project ('the technical officer') had two choices: (i) either to carry out a very detailed analysis of the project work completed by each of the Consortium's partners, or (ii) to reach a compromise solution. Carrying out a detailed analysis of the work completed would have been a more complicated and time-consuming option. It would also have entailed the risk of further reducing the Commission's financial contribution. The compromise solution, on the other hand, was a rapid solution in which the work packages from the work plan would be taken at face value. According to the coordinator, the Commission opted for the compromise solution. In this regard, he also stated that the Consortium's partners had three options: (i) " *all the partners refuse the decision of the EC [* European Commission *], and claim a detailed analysis with the risks above mentioned* "; (ii) " *all the partners accept the EC compromise* "; or (iii) " *each partner can reach EC at his own [* sic *] and discuss with [* the Commission official *]* ".

6. The complainant then turned to the Commission's technical officer and protested strongly against the Commission's conclusion. It argued that it had undertaken and completed more work under WP1 and gave a detailed account of how the work had been shifted between the partners. The complainant insisted that it had always provided the relevant supporting documents for its work, and essentially asked for a detailed analysis of the work and the individual partners' entitlements. The complainant reiterated its disagreement with the Commission's decision in two letters addressed to the Commission on 20 May 2005 and on 5 September 2005 [1] .

7. On 13 April 2006, the complainant submitted a formal complaint to the Commission for breach of the European Code of Good Administrative Behaviour. The complainant alleged that it had not yet received a reply to the above mentioned letter sent on 5 September 2005. According to the complainant, this constituted a clear breach of Article 14 of the aforementioned Code [2] . It also expressly pointed out, among other things, that it had requested information on possible forms of redress.

8. On 26 May 2006, the complainant filed the present complaint with the Ombudsman.

9. On 29 May 2006, the Commission replied to the complainant's letter sent on 5 September 2005. The Commission's answer, which provided the institution's final position on the matter, stated the following:

" *Further to your letter of 5 September 2005, the Commission replied on 28 November 2005 and 6 February 2006, as foreseen in the contract clauses, to the co-ordinator of the contract. In their responses, the Commission services confirmed the decisions taken on the evaluation of the final report, as there were no new elements to reconsider the terms of the evaluation. On that basis the Commission proceeded with the recovery of undue advance payments.*

According to Art. 5(2) of the contract: the Court of First Instance of the European Communities and, in the case of appeal, the Court of Justice of the European Communities shall have sole jurisdiction to rule any disputes [sic *] between the Community, on the one hand, and the contractors, on the other hand, as regards the validity, the application or any interpretation of this contract.*

[...] The grounds for the rejection of parts of the costs claimed by [the complainant *] are on the opportunity and finality of the claimed work and associated expenditure rather than on the very fact of the expenditure. It is clear for the Commission that [* the complainant *] pursued with expenditure in staff costs [* sic *] although it was evident that the project was not going to be carried out as planned.*

The contract is a grant rather than a provision of services. It is well proven that [the complainant *] was well aware of the lack of necessary permit to erect the buildings, since those problems are well reflected in the minutes of the various co-ordination meetings held by the Consortium. While the other partners stopped their work, [* the complainant *] seemingly decided to continue working on actions which were of no use, considering that the buildings would not be erected. The Commission is not liable for the time [* the complainant *] claim[* s *] to have spent in tasks which did not have any purpose. Applying a bona-fide principle, the Commission accepted all claimed costs incurred before any evidence of project abandonment but cannot accept any claim for costs incurred afterwards.* "

10. According to the brief summary of the allowable costs for the period between 1 January 2000 and 15 December 2003, the total costs claimed by the complainant for its work on the project were EUR 93 984.59. This amount included staff costs, travel and subsistence expenses, indirect costs and adjustments.

11. Prior to the recovery order, the Commission had paid the complainant EUR 80 950.54. The complainant considered that the Commission had wrongly recovered EUR 36 250.74 [3] from it. Furthermore, it agued that the Commission owed it an additional amount of EUR 8 733.44 for the work it had completed for the project. The complainant calculated its total claim after the recovery order to be EUR 44 984.18. This sum included travel and subsistence expenses, as well as indirect costs.

12. As regards the work under WP1, the Commission accepted to pay the complainant EUR 35 500, which was the maximum amount envisaged for its work under WP1. The complainant claimed, however, that, since it had completed more work under WP1, it was entitled to receive a higher amount. In its view, the Commission had to pay a total of EUR 45 300 for its work under WP1.

13. Concerning WP7, the Commission accepted to pay 20 % (EUR 9 200) of the maximum amount foreseen for the complainant's work under WP7 (EUR 46 000). The complainant, however, argued that it had completed almost 50 % of the work under WP7 and therefore claimed that it should have received EUR 21 150 from the Commission for its work under this work programme.

THE SUBJECT-MATTER OF THE INQUIRY

14. In its complaint to the Ombudsman, the Ombudsman identified the following allegations and claim.

15. The complainant alleged that the Commission had wrongly decided to recover funds paid to the complainant. In this context it argued:

(a) that the Commission's decision did not take into account that the relevant costs had been incurred before it was clear that the demonstration houses would not be built;

(b) that the Commission wrongly failed to base its recovery decision on actual rather than estimated costs, although the relevant applicable Community regulation requires that accepted costs must be actual costs;

(c) that the Commission had wrongly concluded that the transfer of work between the 'work packages' of the project had not been endorsed (expressly or implicitly) by the Commission.

16. The complainant further alleged that the Commission initially failed to provide it with information on possible means of redress (Article 19 of the European Code of Good Administrative Behaviour).

17. The complainant claimed that the Commission should revoke its recovery decision and pay it in full for the actual hours worked by the person who directly carried out the scientific work and produced the deliverables submitted to the Commission.

18. The complainant also alleged that the Commission failed to reply to its letter of 5 September 2005 and thereby violated Article 14 of the European Code of Good Administrative Behaviour. Given that, on 6 June 2006, the complainant informed the Ombudsman that the Commission had, in the meantime, replied to the above letter, the Ombudsman, pursuant to Article 195 of the EC Treaty, considered that there was no longer any need to take this allegation up for inquiry.

THE INQUIRY

19. By letter of 8 August 2006, the Ombudsman opened an inquiry into the complainant's allegations and claim, set out in paragraphs 15-17 above. Accordingly, he asked the

Commission to submit an opinion on the matter, which it did on 6 March 2007. The opinion was forwarded to the complainant with an invitation to make observations, which it presented on 19 April 2007.

20. After examining the Commission's opinion and the complainant's observations, the Ombudsman considered it necessary to conduct further inquiries, by requesting certain clarifications from the Commission. The Commission's further opinion on the questions raised by the Ombudsman was forwarded to the complainant for observations, which the latter sent on 9 June 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

As regards the scope of the Ombudsman's review

21. 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 institution or bodies.* " The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle binding upon it. Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

22. 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.

23. 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.

As regards the complaints allegedly submitted by other members of the Consortium

24. In its further opinion, the Commission remarked that none of the Consortium's other members had had any problems with the Commission's recovery order or supported the complainant's claim. In its further observations, the complainant pointed out that this statement

was a deliberate attempt on the part of the Commission to mislead the Ombudsman, since the Commission had, in fact, received complaints from four of the Consortium's other partners as well. Although these contractors had complained to the Commission, it was only the complainant that ultimately decided to challenge the Commission's decision before the Ombudsman.

25. The Ombudsman notes that the above-mentioned issue is not immediately relevant for the examination of the present complaint. It is also not clear whether the complainant wished to make a further allegation concerning this issue. In any event, the Ombudsman considers that there is no need for him to examine the relationship between the Commission and other members of the Consortium, since this relationship clearly falls outside the scope of the present inquiry. The Ombudsman therefore takes the view that the issue raised by the complainant does not need to be examined in the present inquiry. Nevertheless, any attempt by a Community institution or body to mislead the Ombudsman would clearly constitute a serious instance of maladministration. The Ombudsman will therefore ask the Commission to provide him with further information concerning this issue, so as to enable him to decide whether any further action is needed.

As regards the Ombudsman's approach

26. The Ombudsman notes that the complainant's first allegation consists of 3 sets of arguments. The first two, presented in paragraph 15 points (a) and (b), appear to concern the work of the complainant under WP7. The last one, summarised in paragraph 15 point (c), concerns the larger workload claimed by the complainant under WP1. The Ombudsman considers that he should therefore examine this allegation by first addressing the arguments put forward by the complainant and by the Commission related to WP1 and then the ones related to WP7.

A. Concerning WP1 and the transfer of work between work packages (paragraph 15 point (c) above)

Arguments submitted to the Ombudsman

27. In its complaint to the Ombudsman, the complainant noted that work-related shifts between budget lines and work packages were allowed under Article 22(5) of the General Conditions. It submitted that it had carried out most of the work under WP1 and that this was duly reflected in the minutes of the Consortium's kick-off meeting of 14 January 2000, as well as in the financial documentation, in the deliverables produced by the complainant and in the technological implementation plan.

28. On 20 May 2005, the Commission sent an e-mail to the Consortium's partners. In this e-mail, it explained that no deviations from WP1 could be accepted unless a prior request had been submitted to, and accepted by, the Commission. The Commission stressed that it never received such a request. In this context, it pointed to the amendment of the contract, in which

the Consortium did not propose any modifications to WP1.

29. In its reply to the above e-mail, the complainant argued that the transfer of the work between the work packages was carried out in accordance with the relevant rules. Given that the work deviation under WP1 was a minor one (amounting to approximately 12 %), there was no need for a letter from the project coordinator to justify the transfer or amendment to the contract. This procedure was only applicable for deviations exceeding 20 %. The complainant took the view that, since permission from the Commission was not required for such minor deviations, the Commission should have simply analysed the actual work done by each partner. According to the complainant, the Commission failed to do this. As a result, some partners were not paid for the work that they completed, whereas other partners were paid for work that they never carried out.

30. The complainant further argued that the introductory comments on the four deliverables under WP1, which were submitted to the Commission on 11 June 2001, clearly showed that it had produced all four of them.

31. The Commission took the view that:

" *it [* was *] not possible at this stage to accept more costs than those negotiated in the contract and relevant for the WP1 & 2 since no such request for a budget shift was submitted to the Commission during the duration of the contract. It must be made clear that in case of a deviation of less than 20 % over the beneficiary's budget there is no need for an amendment, but there is still need for a prior information notice, as explained in Article 22.5 of Annex II of the contract, General Conditions* " (Commission's letter of 20 July 2005).

32. The Commission also recalled that, in accordance with Article 3 of the contract [4] , it had to fund the eligible costs of the project up to a maximum amount specified in the contract.

33. In its observations, the complainant argued that the Commission deliberately refrained from referring to the minutes of the early project meetings, for example, the minutes of the kick-off meeting of 14 January 2000. These minutes constituted a valid and legal tool for informing the Commission about deviations from the planned work. By admitting the existence of this document, the Commission would have acknowledged that it had been fully informed about the deviation and the greater amount of work completed by the complainant under WP1. The minutes of the meetings, the periodic progress reports and the deliverables accepted by the Commission were sufficient in order to inform the Commission of the relevant work-related shifts. The Commission, however, failed properly to analyse this documentation. It thus wrongly decided to pay some partners for work that they never did and never claimed and failed to pay the complainant for the extra work it completed and rightly claimed under WP1.

34. Following the analysis of the information provided, the Ombudsman considered that further information was needed concerning this aspect of the complaint. The Commission was therefore asked to provide a reply to the following question:

Could the Commission please comment on the complainant's arguments that the Commission had been duly informed (in accordance with Article 22(5) of the General Conditions) of the work-related shifts under WP1 and of the greater work accomplished by the complainant in this regard by means of minutes of meetings, progress reports, financial documents and the technological implementation plan?

35. In its supplementary opinion, the Commission reiterated that, contrary to Article 22(5) of the General Conditions, the contractors did not inform it of any work-related deviations.

36. In its further observations, the complainant referred to Article 4 of the General Conditions, which obliges the coordinator to submit periodic reports containing information about the progress of the work, the resources employed, departures from the schedule and results. Minutes of the meetings, periodic progress reports, financial documentation and the technological implementation plan were duly submitted to the Commission. Article 4 specifies that " *in the absence of observations by the Commission, the project deliverables (...) shall be deemed to be approved within two months of their receipt* ". According to the complainant, the Commission would have been in breach of its own procedures, had it accepted the closing project document, that is, the technological implementation plan, without examining the work that had been carried out by each individual project partner. The Commission accepted all the relevant project documentation, from the minutes of the meetings to the technological implementation plan.

37. According to the complainant, the Commission's interpretation of Article 3 of the contract was wrong, since the maximum amount specified there for the Community's contribution did not refer to the individual work packages, but to the contract as a whole.

The Ombudsman's assessment

38. The Ombudsman notes at the outset that, in accordance with Article 22(5) of the General Conditions to the contract, the contractors shall be authorised to transfer among themselves the budget set out in the table of the indicative breakdown of estimated eligible costs, provided that: (i) " *they inform the Commission of such transfers upon signing an agreement confirming that the scope of the project and the conditions of participation (...) are not fundamentally altered* "; and that (ii) " *the total amounts transferred do not exceed 20 % of the amount allocated to the beneficiary in the table of the indicative breakdown of estimated eligible costs.* "

39. In accordance with Article 2(1)(g) of the General Conditions, the coordinator was in charge of the administrative coordination of the project. More specifically, the coordinator's role was to inform the Commission of " *transfers in the budget set out in the table of the indicative breakdown of the estimated eligible costs between contractors and between categories carried out in compliance with Article 22(5) of this Annex upon notification of those concerned.* "

40. Following from Article 2(2)(f) of the General Conditions, the contractors were supposed to " *inform the coordinator of transfers in the budget set out in the table of the indicative breakdown of the estimated eligible costs between them and between categories as soon as they have*

carried out such transfers in compliance with the conditions set out in Article 22(5) " of the General Conditions.

41. The Ombudsman has carefully reviewed the minutes of the meeting of 14 January 2000, which include a brief description of the work that was to be implemented by the complainant under WP1. According to these minutes, the complainant had to " *undertake an external analysis (...) at a macro level in each of the 3 countries* " and to " *achieve the internal analysis in each country* " with the help of other partners.

42. According to the list of deliverables that were to be produced by the Consortium under WP1, the complainant was only responsible for the " *summary of needs analysis in the three countries concerned by the experiment* ", which was one of the four deliverables under WP1. The other three deliverables under WP1 were the needs analyses to be carried out in the three countries concerned. It was foreseen that carrying out these analyses would be the task of other project partners. It thus appears that the complainant indeed carried out more work under WP1 than was originally envisaged. However, the said minutes do not contain any explicit mention of the fact that work foreseen by other project partners was reassigned to the complainant and that the budget was to be adjusted accordingly.

43. The Ombudsman further notes that explicit information concerning work-related deviations among the partners in the framework of WP1 is also not contained in the introductory comments of the four deliverables under WP1, all four of which the complainant claims to have produced. It is, in addition, not contained in the description of the results achieved in the technical implementation plan. The complainant claimed that the Commission was duly informed of the work-related deviations through the financial documents approved and accepted by the latter. However, the complainant has not provided any concrete reference to a specific financial document in support of its statement.

44. It thus appears that the Commission was not sufficiently informed by the project coordinator concerning work and budget-related changes under WP1, as required by Article 2(1)(g) and Article 22(5) of the General Conditions. Besides, there is no evidence to suggest that the complainant wrote to the project coordinator, informing him about the work deviations under WP1 and asking that this information be forwarded to the Commission, as provided in the above-mentioned Article 2(2)(f) of the General Conditions.

45. Following from the foregoing considerations, the Ombudsman considers that the complainant's view that the Commission was properly informed of the work-related deviations under WP1, and that the latter endorsed (expressly or implicitly) the transfer of the work between the work packages of the project, cannot be considered as having been established.

46. The Ombudsman therefore finds reasonable the Commission's conclusion regarding whether or not it was duly informed of the work-related transfers under WP1 between the partners. Given these circumstances, the Commission's decision to pay to the complainant 100 % of the expenditure foreseen (EUR 35 500), but not the higher amount claimed by the complainant (EUR 45 300), appears reasonable as well.

B. Concerning WP7

Arguments presented to the Ombudsman

As regards the timing of the work performed (paragraph 15 point (a) above)

47. In its complaint to the Ombudsman, the complainant argued that the Commission's decision to recover funds from it was wrong, since it did not take into account that the relevant costs had been incurred *before* it was clear that the demonstration houses would not be built.

48. The Commission's position can be summarised as follows.

49. In late 2001 and in early 2002, it was clear that planning permission for the buildings on the UK site had not been obtained. In June 2002, it was clear that there was a number of problems with the French and Finnish sites; most importantly, the work had not started on any of them. It was evident that without an extension of the contract, the work could not be completed within the deadline foreseen by the contract [5] . All contractors knew that a positive decision regarding the extension of the contract by the Commission was not certain. From the coordination meeting held on 12 December 2002, it was clear that no construction work had taken place.

50. On 28 January 2003, the Commission agreed to support a request for an extension, subject to the condition that the administrative problems related to the construction of all sites (in the UK, France and Finland) were solved quickly. It was clear that the work foreseen by the contract could not be completed without the extension in question. At the time, it made no sense to carry out any work on the project until the contract amendment related to the extension was formally adopted. The complainant, however, continued to carry out some work. In the Commission's view, the costs claimed by the complainant with regard to this work were incurred after it was clear that the demonstration houses would not be built. Given this fact, it was impossible to conduct the surveys on the buildings' inhabitants [6] ; it was therefore useless to carry on working on their preparation. As a consequence of this, the Commission sent a pre-termination letter on 5 June 2003. The Commission remarked in this context that it made no sense to complete a deliverable that would not have the desired impact, only to ensure that the maximum Community contribution would be obtained. The Commission could thus not be held liable for the complainant's decision to go ahead with actions that would lead nowhere. In October 2003, the Commission informed the contractors that the contract was terminated. It further noted that the complainant did not inform it of any ongoing work prior to the submission of the final report.

51. Following from the above, the Commission took the view that this part of the complainant's first allegation was unfounded.

52. In its observations, the complainant advanced the following arguments.

53. The complainant could not inform the Commission of any ongoing work until the submission of the final report, since, in accordance with Article 2 and 4 of the General Conditions, it was the role of the project coordinator to transmit to the Commission all documents and correspondence related to the project. Therefore, the complainant would have been in breach of the contract and the relevant procedures, had it informed the Commission of any ongoing work.

54. In reply to the Commission's comment that, following the problems with the project's implementation, the complainant should have known that it was highly unlikely that the work would be continued or completed, the complainant stated that the Commission " *did not advise or even give a hint to the consortium to stop any work in mid-2002.* " On the contrary, in January 2003, the Commission advised the Consortium to request an extension of 9 months and " *even at this point the Commission did not suggest suspending all work on the project* ". The formal notification of the cancellation of the contract was issued on 15 October 2003. The complainant decided, on its own judgment, to terminate its work on the project on 24 February 2003, that is, six months before the official project cancellation.

55. After analysing the information provided, the Ombudsman took the view that further inquiries appeared necessary concerning this aspect of the complaint. To that end, he requested the Commission to comment on the following question.

In view of the fact that the Commission appears to have accepted to support the request for an extension of the project on 28 January 2003 and that the complainant claims to have stopped working on the project on 24 February 2003 on its own initiative, could the Commission please specify when exactly the complainant should have known that the project would not be implemented and should have consequently stopped working on it?

56. In its reply, the Commission reiterated that, in its letter of 28 January 2003, it had indeed supported a request for an extention of the contract. However, this was subject to the condition that the existing administrative problems were solved quickly. As this condition was not fulfilled, the extension was not granted and the contract was terminated. The Commission reiterated its view that the complainant knew that the conditions to launch the work on the relevant sites had not been fulfilled. On 7 and 8 March 2002, the complainant attended a coordination meeting at which, as indicated in the pertinent minutes, these problems were already known. On 10 June 2002, the complainant, together with all other contractors, knew that the likelihood of obtaining an extension of the contract was very low. All other contractors acted prudently and stopped work on the project at that time, with the exception of certain coordination and contract management tasks, which were not related to the complainant. The Commission further pointed out that, in December 2002, it was evident that the complainant had not completed any work other than the preparatory tasks, which were accepted and paid by the Commission. In January 2003, it was still clear that it made no sense to carry out any work until the problems concerning administrative permits for all construction sites were solved. The complainant thus claimed to have done the work at a point in time when it was not sensible to do so.

57. In its further observations, the complainant submitted that the Commission did not explain why it did not terminate the project in 2001 and why it continued funding it for the next two

years. The complainant underlined that it was not disputed that the Commission only terminated the contract in October 2003 and not earlier, that is, in 2001 or 2002.

58. The complainant made reference to Article 7(6) of the General Conditions, which states that the " *principal contractors shall take appropriate action to cancel or reduce their commitments, upon receipt of the letter from the Commission notifying them of the termination of the contract (...)* " The notification of the cancellation of the contract was dated 15 October 2003. The complainant stopped working on the project in February 2003.

59. The complainant further disagreed with the Commission's statement that " *all other contractors stopped work already on 10 June 2002* ". In its view, the extension of the contract was not requested on 10 June 2002, nor did the Commission even hint in 2002 at the possible termination of the contract due to technical reasons. Furthermore, there was no Commission decision dated 10 June 2002. On this date, the Consortium held its regular annual meeting, at which partners discussed problems concerning the UK site. The request for the extension of the project was made in February 2003, following a meeting at the Commission's premises in Brussels, which took place in January 2003. According to the complainant, this was the point in time when the project partners froze activities related to the building sites. By that time, the complainant had already wrapped up its own work and waited for the Commission's decision.

As regards the actual and estimated costs (paragraph 15 point (b) above)

60. The complainant argued that all of its costs relating to the project were actual costs and that the Commission, in accordance with its own rules, should have reimbursed the complainant for this expenditure.

61. The Commission explained that it could only fund the eligible costs of the project. These were defined in Article 22 and 23 of the General Conditions. In order to be eligible, the costs had to be " *necessary* " for the project. The Commission pointed out that reimbursement of costs is under no circumstances an automatic exercise of paying any costs that are claimed. The technical officer in charge must always assess the necessity of the costs incurred for the implementation of the project. According to the Commission, " *to adopt a different approach would run counter to the principle of the sound financial management, in that the Commission would have to recognise and reimburse any actual costs, i.e. any cost the contractor claimed to have incurred.* "

62. The Commission took the view that the costs claimed by the complainant were merely a statement regarding the time allocated by the latter to the execution of tasks and that the complainant " *had failed to demonstrate the claimed actual costs* ". There was no way of positively checking the accuracy of the claim, but there were two elements allowing the Commission to assume that the claim was exaggerated. These were the following: (i) the work package foresaw the completion of a much larger number of tasks for the same budget, and most of the tasks were never undertaken; and (ii) when comparing the quality of the submitted questionnaires with those produced in other similar cases, it appeared that the complainant needed very little time to produce them.

63. As noted in paragraph 13 above, the Commission decided to accept 20 % (EUR 9 200) of the foreseen expenditure under WP7 (EUR 46 000) on a *bona fide* basis, " *assuming* " that the complainant could have spent the relevant amount of time when planning an action that it subsequently did not execute.

64. In its observations, the complainant advanced the following arguments.

65. All of its costs were " *necessary* " for the project throughout 2000, 2001, 2002 and until 24 February 2003. The technical officer in charge of the project did not make a single comment on the deliverables or financial claims in 2000, 2001 or 2002, and the fact that the complainant could not finalise its work in 2003 had nothing to do with its role in the project, but was related only to the fact that other partners had failed to erect the demonstration houses.

66. The complainant pointed out that the Commission made a formal error by stating that the complainant claimed EUR 46 000 for WP7. It submitted that this clearly indicated that the Commission failed properly to analyse the financial documents. The amount claimed by the complainant for the WP7 was actually EUR 21 150; this factual mistake seriously undermined the credibility of any calculation made by the Commission in relation to the accepted costs and the requests for reimbursement. The complainant considered to have implemented around 49 % of the work that it was supposed to do under WP7, since, in its view, the development of a sociological surveys in general takes at least the same amount of time as the follow-up comparative analysis of the data. According to the work foreseen under WP7, the implementation of the surveys and the national analysis were supposed to be carried out by other partners. What the complainant had to do, but was unable to for reasons beyond its control, was the comparative analysis of the data once the above-mentioned national reports had been completed by other partners. The Commission's conclusion to accept only 20 % of the foreseen expenditure was therefore, in the complainant's view, completely arbitrary.

67. The complainant further remarked that the Commission failed to provide any proof that its calculations of accepted costs and amounts to be reimbursed were based on " *actual* " rather than " *estimated* " costs. For example, the Commission admitted that the complainant needed to attend meetings with other contractors and had to spend certain days travelling, but failed to refer to any figure concerning these expenses and to how they were calculated *vis-a-vis* the accepted amount of EUR 9 200. It had to be acknowledged that these costs for travel were real and had been duly recorded in the Commission's financial accounts. The complainant therefore reiterated that the Commission should have accepted the relevant costs it had incurred for the deliverables, for travel expenses and for indirect costs (overheads).

68. The complainant strongly disagreed with the Commission's conclusion that there was no way of positively checking the accuracy of the claim and stated that Article 25 of the General Conditions explained clearly how the justification of costs should have been determined.

69. Following the analysis of the information provided, the Ombudsman took the view that further inquiries appeared necessary concerning this part of the complaint. He therefore asked

the Commission to reply to the following questions:

In its observations, the complainant disagreed with the Commission's opinion that "there was no way of positively checking the accuracy of the claim" submitted by it. Could the Commission, please, comment on that?

Could the Commission please also comment on the complainant's observation that the Commission had made a formal error as regards the amount claimed by the complainant? In this context, could the Commission, please comment on the discrepancies between the figures provided by the complainant and those of the Commission?

70. In its further opinion, the Commission submitted that the complainant's financial claim consisted of a statement concerning how many man-hours the latter spent on the project. The Commission could only check the claim on an *ex post* basis. Most of the work claimed was based on the complainant's staff time and there were no certified timesheets, invoices or any other elements on the basis of which the Commission could check the actual expenditure. The Commission therefore could only evaluate the claimed workload on the basis of the work presented and on the basis of the estimates contained in the contract's work programme.

71. As regards the work claimed by the complainant, the Commission noted that it emerged from the questionnaire presented by the complainant that all the questions it developed were general apart from one (question 003). The added value of the work should have been in the interpretation of the questionnaires, once all the replies had been received. The questionnaires were obviously never filled in by anybody because there was nobody to receive them. There was thus no point in claiming work-related expenses for that. The claim of 423 man-hours was, in the Commission's view, completely unacceptable.

72. As regards the calculations, the Commission argued that it had committed no formal error, since it had agreed to pay the complainant a lump sum for preparatory tasks accomplished under WP7. As for the rest of the work, there was no proof that it had been accomplished.

73. In its further observations, the complainant reiterated that the Commission did not use the actual costs in its evaluation of the work carried out under the project but relied on estimates instead. It was not clear how the Commission could estimate that the complainant's work corresponded to 20 % of the value of WP7, without taking into consideration the certified time sheets.

74. The complainant further referred to Article 23 and 25 of the General Conditions, which lay down the obligations on the part of the contractors and the way the Commission should exercise its control.

Article 23 (1)(a) reads as follows:

" *All the working time charged to the contract must be recorded throughout the duration of the project, or, in the case of the coordinator, no later than two months after the end of the duration*

of the project, and be certified at least once a month by the person in charge of the work designated by the contractor (...) or by the duly authorised responsible financial officer of the contractor. "

Article 25 reads as follows:

" *Eligible costs shall be reimbursed where they are justified by the contractor. To this end, the contractor shall maintain, on a regular basis and in accordance with the normal accounting conventions of the State in which he is established, the accounts for the project and appropriate documentation to support and justify in particular the costs and time reported in his statements. This documentation must be precise, complete and effective.* "

75. The complainant strongly disagreed with the Commission's conclusion that it did not have certified timesheets. It argued that its timesheets had, in accordance with the Commission's rules, been certified by the person in charge of the work and by the duly authorised financial officer. The complainant insisted that it complied fully with its obligations under the contract and kept certified timesheets, which could have been verified by the Commission at any point in time, during and after the project. The complainant further remarked that the Commission had chosen not to verify the certified timesheets of the project partners. The Commission refused to do that, even when the complainant specifically asked for it in 2005. The Commission had thus chosen to base its decision on estimates, without clear rules and without a proper and timely peer review. It did not even take into consideration the specific travel costs for project meetings, which were documented by flight and train tickets. The Commission's overall estimate was a quick solution, which, in fact, penalised the smallest partner in the Consortium, that is, the complainant, both in absolute and relative terms.

76. According to the complainant, the Commission affirmed that it could only evaluate the workload on the basis of deliverables and the estimates contained in the contractor's work programme. The Commission thus confirmed that it used estimated costs rather than actual costs incurred during the project's implementation. However, the actual costs were the only legal basis for the Commission's acceptance of costs [7] . Failure on the part of the Commission to apply the rules related to actual costs was the key reason for the present complaint.

77. In the complainant's view, the Commission committed a factual error in its initial opinion on the complaint, by confirming that the complainant had claimed EUR 46 000 for WP7 and that this amount was " *superior to the total amount foreseen in case the whole work was done* ". In its further opinion, the Commission did not explain its previous calculation errors.

78. The work carried out by the complainant under WP7 was not " *peer-reviewed* " within the time foreseen by the Commission's procedures. Five years after the closure of the project, the Commission attempted to open a debate on the quality of the complainant's work, that is, on the specific questions from the questionnaire developed by the complainant under WP7. If the Commission had concerns about the content of the questionnaire, it had 60 days to express them and not five years. Within these 60 days, the Commission could have rejected the methodological work under WP7, but it did not.

The Ombudsman's assessment

79. The Ombudsman notes at the outset that, in accordance with Article 7(1)(a) of the General Conditions, the Commission may terminate the contract " *for major technical or economic reasons substantially affecting the project (...)* " In this case, following from the text of Article 7(6) of the General Conditions, the Community's financial contribution shall cover " *eligible costs relating to project deliverables approved by the Commission* " and " *eligible costs subsequently incurred in good faith* " before the date of the contract's termination.

80. The Ombudsman understands that, due to the termination of the contract, there were no deliverables completed under WP7. This was because the demonstration houses were not erected. There were consequently no inhabitants living in them and no sociological surveys could therefore be performed [8] . Following from Article 7(6) mentioned above, the Ombudsman should seek to determine whether, by continuing to work on the project between June 2002 and February 2003, the costs incurred by the complainant were made in " *good faith* " and whether they were " *eligible* " for the project.

Concerning the issue of good faith

81. The Commission argued that the partners, acting in good faith, had already terminated their work on the project in June 2002, following the meeting of the Consortium held on 10 June 2002. The complainant disagreed and remarked that the partners actually kept on working until at least February 2003, when the request for the extension of the project was filed. The complainant stressed that it terminated its work on the project on 24 February 2003 and that, therefore, all its costs were incurred before the Commission's formal cancellation of the project.

82. The Ombudsman considers that, in accordance with Article 7(6) of the General Conditions (see paragraph 58 above), there was indeed no formal obligation for the project partners, including the complainant, to cease working on the project before its formal cancellation (15 October 2003), which was preceded by the Commission's pre-termination letter (5 June 2003).

83. The Ombudsman has, however, carefully analysed the minutes of the meetings of the project partners and notes that, at the meeting held on 10 June 2002, it was clear that " *the project [* had *] again failed to gain planning approval* " for the UK site and that an appeal against the decision refusing planning permission would be lodged. The appeal process was expected to take several months, and the UK partner reserved the right to withdraw from the project if the appeal were to prove unsuccessful. The possibility of asking for an extension of the contract due to the difficulties with the UK site was considered. It was noted, however, that requesting an extension of the contract was " *a very long procedure and not sure to succeed* ". Concerning the construction of the French and Finnish sites, the conclusion was that an extension " *was not obligatory, but could be a breath* " for them. The partners agreed in principle to request an extension of the contract, but decided to wait 6 months before taking an official decision. The complainant noted that an extension of 6-9 months would be better than a 12 month extension.

84. In the minutes of the meeting held on 12 December 2002, it was noted that a " *nine month extension [* was *] now expected* " for both the French and Finnish sites and that an extension by 12 months was needed for the UK site. The project partners decided to meet with the Commission in order to discuss the possible extension of the contact. At the next meeting, held on 28 January 2003, it was agreed formally to request an extension from the Commission.

85. However, the extension of the contract by the Commission, which was discussed already in June 2002, was far from certain. The Ombudsman is therefore of the view that the project partners should have been cautious before incurring further expenditure for the project, because its successful completion was no longer certain. Regard should be had to the fact that a large part of the complainant's further work appears to have been dependent on the erection of the demonstration houses and that no construction had begun on any of the sites. The complainant correctly argued that at that point in time, namely, in mid-2002, there was no discussion about the cancellation of the project, which took place only in October 2003. However, the successful implementation of the project was clearly doubtful already in June 2002. The complainant therefore should have carefully considered whether it really made sense to carry out further work, taking into account the possibility that the problems would not be solved and that the project would not be implemented.

86. The Ombudsman considers, however, that there is no need to decide whether or not the Commission's suggestion that the complainant failed to act in good faith when continuing its work beyond the second half of 2002 is justified. The Commission does not appear to have rejected all the costs incurred by the complainant after mid-2002. Instead, it accepted part of the costs that had been declared by the complainant. The question whether the approach used in calculating the amount to be accepted was correct is discussed below (see paragraphs 87 onwards).

Concerning the eligibility of the costs

87. From the arguments presented above, the Ombudsman understands that one of the main issues disputed in the present case is whether the Commission was able to base its decision on a comparison between the work foreseen and the work actually produced by the complainant under WP7 and accept only part of the costs claimed, or whether it had to conduct a detailed audit of the complainant's work.

88. As mentioned in paragraph 22 above, the Ombudsman considers that the scope of review that he can carry out in contract cases is necessarily limited. He will thus only seek to verify whether the Commission has provided a coherent and reasonable account of its position.

89. The Ombudsman notes that the Commission's decision to accept part of the expenditure claimed by the complainant, on the basis of a comparison of the work completed and the work foreseen, was made when it was clear that the implementation of the project had failed. It is also clear that no deliverables were produced under WP7 and that only some preparatory work was carried out. The Commission accepted to pay for the above-mentioned preparatory work, even though the work under the said work programme was clearly not finalised. The

Ombudsman considers that the Commission's decision to reimburse the complainant for its preparatory work under WP7 (that is, for the development of the questionnaires), by making an overall assessment of the work performed *vis-à-vis* the work foreseen was legitimate.

90. Concerning the complainant's argument that the work could not be finalised since the other contractors had failed to erect the houses, the Ombudsman notes that, in accordance with Article 6(3) of the General Conditions, the Community cannot be held liable for acts or omissions committed by the contractors involved in the implementation of the contract in question [9] .

91. As to the actual amount accepted, the Ombudsman notes that the Commission came to the conclusion that the claim of 423 man-hours for the development of the questionnaires was not justified. It considered that it could only accept 20 % of the total amount foreseen under WP7 (including overhead costs and travel expenses). The complainant disagreed with the above conclusion and took the view that the work it had accomplished under WP7 amounted to around 49 % [10] . It claimed to be reimbursed separately for its travel and subsistence expenses.

92. The Ombudsman notes that the parties disagree regarding what percentage of expenditure claimed by the complainant should have been accepted by the Commission. However, bearing in mind the arguments put forward by the Commission to justify its decision to accept only 20 % (EUR 9200) of the total amount foreseen under WP7, the Ombudsman takes the view that the Commission has put forward a reasonable and coherent account of its approach.

93. Following from the above considerations, the Ombudsman takes the view that the complainant's first allegation, namely, that the Commission wrongly decided to recover funds paid to the complainant has not been established.

C. As regards the complainant's second allegation

94. The complainant alleged that the Commission initially failed to provide it with complete information on possible means of redress. The Commission informed the complainant that it could bring the matter before the CFI. The Commission recognised that it did not mention the possibility of lodging a complaint with the European Ombudsman and accepted that it could have been more complete in its information on the means of redress.

95. In its observations, the complainant stated that it was satisfied with the Commission's recognition that it had failed to mention the possibility of lodging a complaint with the European Ombudsman.

The Ombudsman's assessment

96. Given that the Commission has recognised its omission to include the possibility of filing a complaint with the European Ombudsman as one of the means of redress available to the complainant, and in view of the fact that the latter had expressed its satisfaction with the

Commission's acknowledgement of the said omission, the Ombudsman takes the view that no further inquiries concerning this aspect of the complaint are necessary.

D. As regards the complainant's claim

97. The Commission maintained its position with regard to the decision of recovery.

98. The complainant maintained its claim and asked the Ombudsman to request the Commission to pay the net balance of EUR 44 984.18 in its favour.

The Ombudsman's assessment

99. In light of the conclusions arrived at in paragraphs 46 and 93 above, the complainant's claim must fail.

E. Conclusions

On the basis of the Ombudsman's inquiries into this complaint there has been no maladministration by the Commission as regards the complainant's first allegation and its related claim. As regards the complainant's second allegation, no further inquiries are justified.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 15 December 2008

[1] This letter is dated 2 September 2005 but was only sent on 5 September 2005.

[2] The European Code of Good Administrative Behaviour is available on the website of the European Ombudsman: http://www.ombudsman.europa.eu [Link].

[3] The figure referred to by the complainant, that is, EUR 36 250.74 differs slightly from the one that appears to have been recovered by the Commission, namely, EUR 36 250.54.

[4] Article 3 (2) of the contract reads as follows:

"The Community shall fund the eligible costs of the project in accordance with the table of the indicative breakdown of the estimated eligible costs which follows the signatures to this contract up to a maximum of EUR 600 000, 00 (six hundred thousand euro)."

[5] The duration of the contract was supposed to be 48 months, starting from 1 January 2000.

[6] The aim of the surveys was to evaluate the *a posteriori* suitability of the dwellings and the degree of satisfaction of their tenants or owners. To that end, an interview framework (consisting of three subsequent interviews), common to all three countries had to be developed and then adapted to each country.

[7] The reference to " *actual costs* " is made in Article 23 (direct costs) and Article 24 (indirect costs) of the General Conditions. Eligible costs were the costs defined in the above two articles, which also comply with the general principles of eligible costs set out in Article 22 of the General Conditions.

[8] According to the detailed description of the project, three deliverables had to be produced under WP7 (L19, L20 and L21). These deliverables were the surveys that were supposed to be conducted in the three different countries.

[9] Article 6(3) of the contract reads as follows: " *The Community cannot be held liable for acts and omissions committed by the contractors performing this contract (...)* "

[10] As stated in the complainant's letter of 20 May 2005.