

## Decision of the European Ombudsman closing his inquiry into complaint 940/2011/JF against the European Commission

Decision

**Case 940/2011/JF - Opened on 22/06/2011 - Decision on 30/09/2013 - Institution concerned** European Commission ( No further inquiries justified ) |

The complainant co-ordinated a consortium which was awarded a Commission grant to undertake an action in the field of eco-friendly construction. In the course of carrying out the action, the consortium requested reimbursement of the eligible costs incurred during the different reporting periods, in accordance with the contract signed with the Commission. The Commission, however, agreed to pay only 45.75% of those costs. The complainant considered that the Commission was wrong to limit its reimbursements to the above rate and complained to the European Ombudsman.

The Ombudsman found that, under the contract, the 45.75% reimbursement rate applied to the overall Union contribution to the action. The contract made no reference to any rate for interim payments. Furthermore, before the consortium requested payment of the costs incurred during the first reporting period, a Commission official informed it that interim payments could be made at different reimbursement rates. The Ombudsman therefore proposed a friendly solution to the Commission, inviting it to (i) properly explain why it applied the above-mentioned rate to interim payments to the consortium; and (ii) ensure that it pay the consortium the balance, in accordance with the contract, once the action was over.

The Commission argued that it systematically applied the 45.75% rate to interim payments in order to ensure sound financial management of the EU budget and to avoid future complicated recovery procedures. The Ombudsman was not satisfied with that reply. He pointed out, among other things, that the Commission could have drawn up guidelines that would have enabled the consortium correctly to interpret the contract in that respect. Nevertheless, since all grant agreements now include a very clear provision indicating that interim reimbursements will be made at the rate applicable to the Union's overall contribution to the action, the Ombudsman concluded that no further inquiries in this respect were justified. Finally, in a further remark, he invited the Commission to inform him how it complied with its assurances that it would pay the consortium all outstanding amounts at the end of the action.



## The background to the complaint

1. The complainant is the Managing Director of a company acting as co-ordinator of a Consortium (the 'Consortium') composed of a number of public agencies and private, small and medium-sized enterprises ('SMEs'), based in France, Germany, Norway, Poland and the UK (the 'beneficiaries').

2. On 20 October 2008, the complainant contacted by e-mail the European Commission's Directorate-General for Enterprise and Industry ('the Commission'), in order to ask a question regarding Call for Proposals Europe INNOVA-EN-CIP-09-C-N01S00 entitled "*European platform for transnational cluster cooperation, knowledge-intensive services, eco-innovation and the promotion of novel tools and services concepts for innovation support*" (the 'Call'). The complainant wished to know whether the sample budget attached to her e-mail could be compatible with the "*EC contribution of 65%? => not each partner gets EC contribution of 65%, but the overall budget.*"

3. On 29 October 2008, a Commission official ('Official M') replied, among other things, that

*"[t] he partners can get different % of contribution: the individual % can be either higher or lower than 65%. The only rule is: the overall contribution to the project can not exceed 65%."*

4. On 12 November 2008, the Commission launched the Call. The Consortium, headed by the complainant, was among the highest-ranking applicants and was awarded a grant.

5. On 3 November 2009, the complainant, acting on behalf of the Consortium, signed with the Commission Grant Agreement for an Action with Multiple Beneficiaries number 245585 (the 'Agreement') to undertake an action titled "*Greening the Construction Sector - Towards a Value-added Service Industry*" (the 'Action'). The Agreement entered into force on 1 September 2009 and the Action was meant to run until 31 August 2012.

6. On 17 March 2010, the complainant contacted Official M by e-mail. The complainant emphasised that the EU funding rate for the Action had been set at "*45%*". She pointed out that the Consortium applied different reimbursement rates to different activities and beneficiaries of the Action. In this respect, the complainant referred to the two tables enclosed with her e-mail, one relating to personnel costs and the other relating to "*vouchers*". She underlined that the Consortium only claimed personnel and travel costs. The complainant asked Official M to explain how the Consortium should fill in its financial report relating to the EU contribution since the percentages listed in the first table were higher than the EU funding rate of 45%.

7. On 19 March 2010, official M replied that she had discussed the matter with another Commission official ('Official Z') and that they

*"[s] aw that Art. II.18 of the grant agreement talks about the last payment as the occasion to see how much the EC reimbursed so far and make the final calculation and compensation to respect the EC co-financing rate. This means that before it can be paid more or less than that %. This*



*means that we will present for reimbursement your 75 and 90%, in the basis of the co-financing forms of the contract. Therefore, it is possible to get higher % now and lower in the future: the last payment will be the occasion to make the average: the grant agreement even foresees that in case of higher amounts paid, the EC simply asks for payment back. This will apply to ... all projects ".*

**8.** On 7 April 2010, the complainant submitted to the Commission the Consortium's report concerning Period 1 of the Action. The eligible costs amounted to EUR 240 762.18. The complainant requested payment of EUR 208 052.93, a sum equivalent to 86.41% of the above costs.

**9.** On 19 May 2010, Official Z asked the complainant to provide additional information as regards the said costs, and emphasised that:

*"[a] ll beneficiaries exceed their requests for EC contribution substantially: 75 - 90%. Please note that the EC financing rate of the action has been agreed at 45.75% of the eligible costs for the Consortium. It is up to the Consortium to distribute interim payments proportionally to what was decided and reflected in Annex II [to the Agreement]."*

**10.** Official M then reminded Official Z, by e-mail copied to the complainant, that they

*"[h] ad agreed to apply the provision of the grant agreement where it says that all calculations to respect the co-financing rate can be done at the end of the project, meaning that more reimbursement can be given in some moments and less will be given afterwards. "*

Official M asked Official Z to "[p] lease confirm that this is still valid ".

**11.** The following day, Official Z replied that she had consulted the Commission's financial services who considered the interpretation provided in her last e-mail to be the only acceptable one in light of the basic principles of equal treatment, transparency and sound financial management.

**12.** On 6 July 2010, the complainant resubmitted the Consortium's report concerning Period 1 of the Action.

**13.** In an e-mail sent to the complainant on 22 July 2010, Official Z expressed further concerns as regards the costs.

**14.** The following day, the complainant provided the requested explanations by e-mail.

**15.** Official Z then replied that she had no further questions on the financial statements regarding reporting Period 1 of the Action. She explained that, upon Official M's return from her holidays, she would ask her officially to approve the above reports and pay the complainant accordingly. Official Z emphasised that



"[t] he requested EC contribution for P1 will be limited to the rate specified in article I.4.3 of the GA ... " [1] .

**16.** By letter dated 4 August 2010, Official M informed the complainant that the total eligible costs for Period 1 of the Action were EUR 240 761.92. The complainant had requested an EU contribution in the amount of EUR 208 052.92. This amount exceeded the benchmark by EUR 97 904.34. Therefore, the Commission could only contribute a maximum of EUR 110 148.58 for Period 1 of the Action. The Commission would pay the above amount to the complainant, who would then make the necessary payments to the beneficiaries.

**17.** On 4 October 2010, the complainant wrote a letter to the Commission's relevant Head of Unit (the 'HoU'). She explained that the Consortium faced problems as a result of the Commission's refusal to accept different co-financing rates for different beneficiaries. She emphasised that the Commission had previously confirmed that this was acceptable. According to the Agreement, the Consortium could claim reimbursement of a maximum of 45.75% of eligible costs. The beneficiaries understood that percentage to apply to the entire duration of the Action, and not to each of its reporting periods. Nevertheless, the Commission regarded each reporting/financial period separately and once the beneficiaries received 45.75% for Period 1, they could not make any adjustments in the later reporting periods. The complainant went on to state that certain beneficiaries, namely, public agencies, could not accept EU financing of 45.75% for 100% nationally-financed "*innovation vouchers*". Other beneficiaries, namely, private expert organisations, should have been co-financed at a rate substantially higher than 45.75%. In summary, by applying a co-financing rate of 45.75% to each of the beneficiaries in each of the financial periods, the Commission jeopardised the Action's financial management. The complainant asked whether the Consortium was allowed to claim actual, different, co-financing rates for each individual beneficiary for a given period. She further requested that the Consortium be allowed to recover EU contributions once the final balance calculated at the end of the Action would be paid. In the complainant's view, this would be fully in line with the Agreement.

**18.** On 12 October 2010, the complainant discussed the above matters with Official Z over the telephone.

**19.** On 20 October 2010, the complainant asked the HoU, by letter copied to Officials M and Z, to confirm that her understanding of the financial aspects of the Project, set out below, was correct.

**20.** In that letter, the complainant, first, referred to the table included in her letter and emphasised that the rates indicated in that table for each beneficiary were different from the overall EU funding rate, that is, 45.75%, provided for in the Agreement. The Consortium calculated the Action budget using different reimbursement rates for different costs. According to the Call, public beneficiaries financed fully the "*innovation vouchers*" out of their own budgets. The EU thus contributed 0%. On the other hand, as regards personnel costs, all beneficiaries received an EU contribution ranging from 10% to 100%, depending on the beneficiary and the activity (for instance, management was reimbursed at the rate of 100%).



Each beneficiary declared its eligible costs for each reporting period and could request that a particular EU funding rate be applied in its regard, in accordance with the table mentioned above.

**21.** Second, the complainant noted that the Commission released EU funding on the basis of the individual costs claimed by the Consortium and approved by the Commission for each reporting period. Consequently, it reimbursed the Consortium at a rate of 45.75% of the total eligible costs approved when it requested an amount equivalent to, or higher than, that rate. If the Consortium requested less, the Commission paid the requested EU funding. In this respect, the complainant emphasised that, as regards reporting Period 1, the Consortium asked the Commission for a EU contribution of EUR 208 052.92, which corresponded to 86.41% of the total eligible costs of EUR 240 761.92. The Commission paid EUR 110 148.58, which corresponded to 45.75% of the eligible costs.

**22.** Third, the complainant referred to pre-financing, as specified in the Agreement. She emphasised that the Commission automatically made a first pre-financing payment of 20% of the grant after the Agreement was signed. The Consortium could request further pre-financing payments in the course of the Action, provided that at least 70 % of the previous pre-financing payments had been used up. In the event that the Consortium requested further pre-financing payments, it could distribute those payments to beneficiaries whose individual EU financing rates were higher than 45.75%. The total amount of the pre-financing payments received had to be cleared in the last two payments: the first 50% was to be deducted from the last interim payment following reporting Period 5, and the remaining 50% would be deducted from the payment of the balance.

**23.** Finally, the complainant referred to the balancing of the total costs claimed against the total EU funding paid. She expressed the hope that the Commission would establish the amount of EU funding to which the Action was entitled after the last reporting period. To this end, the Commission would (i) consider the total amount of eligible costs declared by the Consortium and the total amount of EU funding received by the Consortium up to that date; and (ii) compare these amounts with the EU funding rate of 45.75% provided for in the Agreement. If the total amount which the EU had paid the Consortium until then was lower than 45.75% of the total declared eligible costs, the EU would pay the balance. If the total amount which the EU paid the Consortium was higher than 45.75% of the total eligible costs declared, the EU would recover the balance. The 'balancing exercise' would be carried out in accordance with the provisions of the Agreement.

**24.** The complainant requested the HoU to confirm that her understanding of the relevant rules as outlined above was correct and to ensure that the Commission would establish the final balance on the basis of the total eligible costs and not "*punish*" the Consortium for having requested, at different reporting periods, an EU contribution lower than 45.75%.

**25.** By letter dated 19 November 2010, the HoU replied, confirming that (i) the maximum EU contribution per beneficiary per reporting period was limited to the rate provided for in Article I.4.3 of the Agreement; (ii) the content of the complainant's letter of 20 October 2010 correctly



reflected the discussions held with the Commission's staff; and (iii) the rules and processes described were applicable to the payment requested by the Consortium.

**26.** On 14 December 2010, the complainant submitted the report relating to Period 2 of the Action. The Consortium claimed overall costs in the amount of EUR 310 862.36 and requested payment of EUR 256 634.47, equivalent to 82.56% of the above costs.

**27.** In February 2011, the Commission informed the complainant that the requested EU contribution again exceeded the agreed reimbursement rate. The suggested rate varied between 73% and 94.25%, depending on the beneficiary incurring the costs.

**28.** On 14 April 2011, the complainant resubmitted the report relating to the costs incurred by the Consortium during Period 2 of the Action.

**29.** On 18 August 2011, the Commission informed the complainant that it would pay it EUR 128 061.68, corresponding to 45.75% of the eligible costs relating to reporting Period 2 of the Action.

**30.** In the meantime, on 21 April 2011, the complainant turned to the European Ombudsman.

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

**31.** The complainant alleged that the Commission failed to respect the Agreement.

**32.** The complainant claimed that the Commission should respect the Agreement and pay EUR 354 539.18 to the Consortium.

## **The inquiry**

**33.** On 22 June 2011, the Ombudsman forwarded the complaint to the President of the Commission for an opinion.

**34.** On 28 November 2011, the Ombudsman received the Commission's opinion, which he forwarded to the complainant for her observations.

**35.** On 31 January 2012, the Ombudsman received the complainant's observations.

**36.** After a careful analysis of the Commission's opinion, the Ombudsman was not satisfied that the Commission had responded adequately to the complaint. He therefore proposed a friendly solution to the dispute, in accordance with Article 3(5) of his Statute.

**37.** On 20 August 2012, the Ombudsman received the Commission's opinion, which he forwarded to the complainant with an invitation to submit observations. He received the



complainant's observations on 1 October, 14 and 28 November 2012, and 7 August 2013.

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

### **A. Allegation of failure to respect the Agreement**

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

**38.** The complainant argued in substance that the Commission was wrong to apply the maximum reimbursement rate of 45.75% to the eligible costs declared by each beneficiary in the Consortium for each activity and reporting period under the Action. According to the complainant, the Agreement provided only for a maximum Commission contribution to the total budget of the Action. The Commission had confirmed to the complainant that beneficiaries could claim higher reimbursements as long as the Action's overall reimbursement did not go beyond the agreed percentage. The complainant then submitted requests for financing in accordance with that confirmation.

**39.** In its opinion, the Commission rejected the complaint. It, first, emphasised that the Agreement provided for a single reimbursement rate of 45.75%. This rate applied to the Action's eligible costs, as reported by the complainant and accepted by the Commission. No other rates had been agreed to with the complainant.

**40.** In particular, the Commission argued that the 45.75% reimbursement rate applied to the eligible costs accepted in accordance with Article I.4.3 of the Agreement. This agreed reimbursement rate applied to all costs, irrespective of the budget item or the activity concerned, the beneficiary incurring the costs, and/or the reporting period. Neither the Agreement nor any of its annexes provided for any rate different from that of the overall reimbursement rate of 45.75%.

**41.** According to the Commission, it contributed to the funding of the entire Action and, therefore, to the costs incurred by all beneficiaries considered collectively, that is, as a Consortium. The beneficiaries could agree on how they would distribute the Commission's contribution among them, depending on their own individual contributions to the Action. In principle, it would have been possible for different reimbursement rates to apply to different beneficiaries. However, the Consortium's proposal, as set out in Annexes I and II to the Agreement, did not provide for any such different reimbursement rates. The Agreement referred to a single and overall reimbursement rate of 45.75%.

**42.** The Commission then took the view that it had established the amounts of the EU contributions for Periods 1 and 2 in line with the Agreement. It had acted correctly by limiting the interim payments when the request for payment exceeded the reimbursement rate provided for in Article I.4.3 of the Agreement. The Commission emphasised that it had accepted the





Consortium's costs as eligible. It had found those costs to be in line with the eligibility criteria provided for in the Agreement and the estimated budget in its Annex II. It also considered the reports sufficient to show implementation of the Action and to establish the eligible costs. This resulted in its releasing interim payments, in accordance with the Agreement. It, finally, further accepted the costs reported in the individual financial statements provided by the beneficiaries.

**43.** The Commission emphasised that it had repeatedly informed the complainant that any difference in the reimbursement rate was not supported by the Agreement. It added that, ever since the submission of the costs statement for Period 1 and also in subsequent communications, it had clearly expressed its view on the reimbursement rate that it would apply to the eligible costs. It went on to state that it was somewhat surprising that, in its costs claim relating to Period 2, the complainant again requested percentages higher than the 45.75% rate laid down in the Agreement.

**44.** The Commission acknowledged, however, that it gave the complainant "*dissenting*" information on one occasion in the course of the Action's implementation. This information implied that "*different rates could be deducted from the own resources each individual beneficiary had agreed to invest in the Action.*" This information, provided during the "*informal exchange by e-mails*" between the complainant and a project officer between 17 and 19 March 2010, that is, before the complainant submitted the reports relating to Period 1 and requested payment for that Period, was based on fragmentary information provided by the complainant. It was not sustained in any other Commission communication to the complainant or to other beneficiaries. Nor was this interpretation applied to any other beneficiaries of the 20 grants awarded following the same Call.

**45.** The Commission, finally, guaranteed that its payment procedures would fully respect the Agreement. It emphasised that it never stated that it will refuse to establish the final amount at the end of the Action and/or to proceed to the payment of the balance. The Commission added that it would review the total eligible costs incurred by the Consortium throughout the Action, in accordance with the Agreement, on the basis of a request for payment of the balance submitted by the Consortium at the end of the Action. It would determine the final amount of the EU contribution by applying the co-financing rate of 45.75% to all eligible costs incurred during the Action. Provided those costs are not less than the estimated eligible costs in the Action's budget and without prejudice to the application of any other relevant provisions of the Agreement regarding the establishment of the final amount of the grant, the procedure for the payment of the balance could result in payment of the maximum amount of the EU contribution to the Action, as stated in Article I.4.3 of the Agreement. By means of this payment procedure, it is possible to reach the overall contractual funding rate of 45.75 %.

**46.** In her observations, the complainant argued that the Consortium's proposal, the Agreement and the annexes to the Agreement, all allowed for different reimbursement rates to be applied to beneficiaries. This could clearly be concluded from the budget table in Annex II to the Agreement. The "*equation of costs per beneficiary, own contribution and EU contribution per beneficiary contained in the budget table*" allowed for individual reimbursement rates to be applied to each beneficiary. In addition, it was also clear that 100% of the costs of innovation





vouchers would be financed by national agencies. It is therefore incorrect to state that the Agreement did not provide for any reimbursement rate other than that of 45.75%. By way of example, the complainant referred to the estimated budget of the Action, provided for in Annex II to the Agreement. According to the estimated budget, the expected eligible costs for one beneficiary amounted to EUR 199 184.80 and the EU contribution to that beneficiary's costs was estimated to amount to EUR 149 988.55. This corresponded to a reimbursement rate for that beneficiary of 75.3%.

**47.** According to the complainant, the Agreement only provided for an overall 45.75 % funding rate for the entire Action. It did not state that this maximum reimbursement rate applied to each beneficiary, each activity, and/or each reporting period. She added that it is possible to respect fully the maximum overall reimbursement rate even when applying different, that is, higher and/or lower, reimbursement rates. With a view to alleviating risk, the Agreement provided for the possibility of recovering overpaid sums or paying a balance at the end of the Action. The Commission failed to pay regard to the nature and activities of the Action when, in breach of the Agreement, it decided to apply one single reimbursement rate to each and every reporting period.

**48.** The complainant emphasised that the refusal to accept different funding rates for individual beneficiaries has given rise to severe cash-flow problems, in particular for beneficiary non-profit organisations and SMEs participating in the Consortium. If the Commission were to apply that same reimbursement rate until the end of the Action, the Consortium could realistically expect all outstanding monies to be paid, at best, in early 2013. However, the outstanding balance relating to Period 2 alone amounted to EUR 212 319.19. According to the complainant, this threatened the very survival of beneficiaries involved in the implementation of the Action. Some SMEs could be forced to take bank loans to pay salaries and suppliers. The complainant added that the beneficiaries would thus continue claiming their individual funding rates in accordance with Annex II of the Agreement. She went on to state that, even if the Commission limits its payment to 45.75%, "*according to the Grant Agreement the partners have to report the costs as stipulated in the budget table*".

**49.** The complainant disagreed with the Commission's statement that it had provided sufficient information in writing. There was, according to her, no appropriate written documentation available "*that would guide participants in the financial management and help to cut red tape*" in the contract's implementation. Furthermore, there are no reliable audit guidelines, despite the fact that the Commission requests beneficiaries to submit audits even for the smallest of amounts.

**50.** Similarly, the complainant disagreed with the Commission's statement that it had communicated with her properly. In this respect, the complainant again emphasised that she had received confirmation from the Commission's officials that different funding rates could be applied per beneficiary as long as the overall EU contribution rate did not exceed "*65%*". At no occasion was the content of the e-mail confirming this revoked. The complainant could certainly not be held responsible for the fact that the Commission did not communicate this information to other potential applicants.



51. Finally, the complainant welcomed the Commission's assurances that it would pay a balance at the end of the Action and that it would take into consideration the total amount of the eligible costs when calculating that balance.

## **The Ombudsman's preliminary assessment leading to a friendly solution proposal**

52. In the Ombudsman's view, neither the provisions of the Agreement concerning the "*Financing of the Action*" nor those relating to "*Interim payments*" could properly justify the Commission's decision to apply the rate of 45.75% to the reimbursement of the eligible costs approved for each reporting period and/or for each beneficiary participating in the Consortium.

53. The Ombudsman stated that, indeed, Article I.4.3 of the Agreement does not appear to provide for any such justification. It simply states that "[t]he Commission shall contribute a maximum of EUR 1,777,916.13 equivalent to 45,75% of the eligible costs..." [2] .

54. Nor does Article II.15.2, that is, the provision of the Agreement specifically governing "*Interim payments*", provide a basis for any such justification because the procedure stipulated therein does not make reference to any applicable reimbursement rate, including that mentioned in Article I.4.3 [3] .

55. On the other hand, Article II.16, entitled "*Eligible costs*", clearly appears to indicate that, to be considered eligible, the costs of the Action must, among other things, be "*generated during the lifetime of the [A]ction as specified in Article I.2.2*", that is, during the "*36 months from 1 September 2009*" (emphasis in the Agreement). The Ombudsman took the view that this appears to reinforce the understanding that the reimbursement rate provided for in Article I.4.3 of the Agreement only concerns the Commission's overall contribution to the eligible costs of the Action taken in its entirety, that is, after it ends, and not to any and all eligible costs arising in a given reporting period, when the Action is ongoing.

56. In view of the Agreement's silence on the issue of the reimbursement rate applicable to interim payments, it was reasonable to consider that parties would normally agree on the interpretation of issues which were not explicitly provided for in the Agreement. The Ombudsman noted in this regard that the Commission, that is, the very drafter of the Agreement, made no reference to any guidelines that could have helped the complainant to interpret the Agreement.

57. It was therefore important to analyse the information which the Commission provided to the complainant in reply to her legitimate questions as regards the interpretation of the Agreement. The Ombudsman pointed out in this respect that any such information could only be provided in a 'formal' manner. The Commission official's e-mails were indeed addressed to the complainant in her capacity as, first, a prospective applicant, and later, a successful applicant, for the grant. The Ombudsman could not therefore understand why the Commission considered any such



e-mails to be " *informal* ". He emphasised that a 'culture of service' towards citizens implies that the authors of all communications issued by the Institutions to EU citizens must take responsibility for the content of such communications. The Commission's officials, even when acting without supervision, should feel responsible for what they say to the public. Their communications must therefore be accurate and complete [4] .

**58.** In the present case, Official M's e-mails of 29 October 2008 and 19 March 2010 could indeed have induced the complainant to believe that different reimbursement rates could be applicable. It therefore also appeared reasonable that the Consortium, guided by Official M's assurances of 29 October 2008 when submitting its successful proposal, included a budget which was compatible with those assurances and which was ultimately accepted by the Commission. It further appeared reasonable to assume that, had the Consortium been aware that the information provided by a Commission official was incorrect, it could have proposed a budget different to the one it proposed (and which was accepted) or some of the beneficiaries could even not have wished to participate in the Consortium at all.

**59.** Later, Official Z clarified the reimbursement rate that the Commission would apply to all interim payments made to the Consortium. In the correspondence exchanged on 19 and 20 May 2010, Official Z explained that the Commission's financial services considered that the only acceptable interpretation that was in accordance with the basic principles of equal treatment, transparency and sound financial management, was that:

*"[a] ll beneficiaries exceed their requests for EC contribution substantially: 75 - 90%. Please note that the EC financing rate of the [A] ction has been agreed at 45.75% of the eligible costs for the Consortium. It is up to the Consortium to distribute interim payments proportionally to what was decided and reflected in Annex II. "*

**60.** However, the Ombudsman went on to state, the above interpretation of the Agreement does not appear to be sufficient to justify the Commission's decision to limit the rate applicable to interim payments of the Consortium's eligible costs to 45.75%. Reasonably, the above interpretation merely appears to confirm that the Agreement provided for " *the EC financing rate of the [A] ction... at 45.75% of the eligible costs for the Consortium* " and that the Consortium was free " *to distribute interim payments proportionally* " between the beneficiaries. It does not appear to allow for an understanding, later expressed in the HoU's reply of 19 November 2010, that the 45.75% reimbursement rate applied to interim payments the Commission made to the different beneficiaries. In addition, the Commission did not explain how the above interpretation could properly justify the conclusion that principles of equal treatment, transparency and/or sound financial management necessitated the application of a reimbursement rate of 45.75% to the interim payments of the Consortium's eligible costs in each and every reporting period.

**61.** Therefore, the Commission, first, provided incorrect information as to how it interpreted the provisions of the Agreement relating to interim payments and, second, clarified that interpretation in an unconvincing way. Consequently, the Commission failed properly to justify its decision to apply the 45.75% reimbursement rate to interim payments made to the Consortium, both by reference to the provisions of the Agreement and the principles of equal



treatment, transparency and sound financial management. This could have constituted an instance of maladministration. The Ombudsman's Statute provides that, "[a] *as far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint* " [5] .

**62.** In this respect, the Ombudsman noted that, in sum, the complainant was satisfied with the Commission's assurances that it will proceed to pay the balance at the end of the Action. The Ombudsman also noted in this regard the provisions of Article II.15.3 of the Agreement, entitled "*Payment of the balance* ", which provide that the payment of the balance, which may not be repeated, is made after the end of the Action on the basis of the costs actually incurred by the beneficiaries in carrying out the Action.

**63.** The Ombudsman therefore put forward the following proposal for a friendly solution to the Commission, in accordance with Article 3(5) of his Statute: the Commission could (i) properly explain why it considers the 45.75% reimbursement rate to be applicable to interim payments, and (ii) ensure that, as soon as the provisions of the Agreement allow it to do so, it will proceed to pay the balance due within the shortest possible time. Quick payment could help avoid harm to some of the beneficiaries participating in the Consortium, to which the complainant referred in her observations. According to the complainant, successive interim payments at a reimbursement rate of 45.75% have caused and were causing considerable harm to the small businesses involved in the Consortium.

## **The arguments presented to the Ombudsman after his friendly solution proposal**

**64.** In its reply, the Commission acknowledged that the Agreement did not specify the terms of the interim payments and stated in this respect that this "*lack of clarity ... may be considered as retrospectively regrettable, and may lead to misunderstandings.* " It emphasised that, having regard to the need to ensure sound financial management of the EU budget and to avoid future complex recovery procedures, it "*usually* " applied the reimbursement rate mentioned in Article I.4.3 of the Agreement to interim payments [6] . Grant agreements signed after 2011 now specifically mention this in their Article I.5.2 [7] .

**65.** The Commission further stated that it will reassess its rules and internal procedures so as to make them "*as SME friendly as possible* ". It will also do its utmost to ensure that similar misunderstandings do not occur in the future. Furthermore, it will work to reduce the administrative burden for SMEs and to "*facilitat [e] smooth payments* " to them.

**66.** Finally, the Commission explained that the Action was to come to an end on 31 August 2012. The Consortium then had 45 days to submit its last interim report and to request payment of the balance, in accordance with Articles II.15. 2 and II.15.3 of the Agreement. The Commission stated that it was preparing instructions to the Consortium, which it would send to it one month before the end of the Action, in order to ensure swift submission of the required documents. It guaranteed that it would act to ensure that the request for payment of the balance



would be processed in a timely manner and without any unnecessary delays, in accordance with the Agreement.

**67.** In her observations on the Commission's reply, the complainant, in sum, repeated her complaint and requested that the Commission pay the Consortium EUR 342 078.03, corresponding to amounts outstanding due to the fact that the Commission capped interim payments at 45.75%. The lack of payment of the above amounts at the right time had already caused significant cash-flow problems to several partners of the Consortium.

**68.** The complainant also informed the Ombudsman that the Agreement was extended to 31 December 2012. In light of the fact that, in the meantime, the Commission announced an additional audit into the Action and that it applied new reporting rules to the Consortium's final report, the complainant expected the final payment to "*realistically*" take place only in June 2013.

**69.** Finally, the complainant noted the Commission's commitment to review its procedures. It stated in this respect that the Consortium has extensive experience of working on European projects and that its partners have never faced difficulties similar to those experienced in relation to the Action. The complainant expressed the view that the Commission adopted *ad hoc* decisions, adapted rules retroactively, and gave contradictory interpretations of the applicable rules. Furthermore, it raised the number of audits into the Action and subjected one Consortium partner to a desk audit for each report. Relatedly, besides requesting the Consortium to fill in a new, more detailed cost statement template in respect of its final report, the Commission also asked it to adapt its previous cost statements to the new template retroactively. The complainant stated that both the SMEs and the public agencies of the Consortium have voiced concerns over the Commission's bureaucracy and suspicions in their regard.

**70.** In further correspondence, the complainant informed the Ombudsman about the Consortium's request to the Commission, dated 13 November 2012, for payment of the sum of EUR 342 078.03 and the latter's reply that it had agreed to the extension of the Agreement and expected the Consortium to deliver its final report and financial documents. The Commission assured the Consortium that it would handle the payment of the balance with due diligence. In her latest observations of 1 August 2013, the complainant informed the Ombudsman that the Action had ended on 31 December 2012 and that, despite the Consortium having complied with all its further requests and desk checks, the Commission did not yet pay the final balance. She considered this to run counter to the Commission's commitments and the Ombudsman's findings.

## **The Ombudsman's assessment after his friendly solution proposal**

**71.** There were two aspects to the Ombudsman's proposal for a friendly solution. On the one hand, the Ombudsman invited the Commission properly to explain why it considered the 45.75% reimbursement rate to be applicable to interim payments. On the other hand, he urged



it to ensure that, as soon as the provisions of the Agreement allowed it to do so, it would proceed to pay the balance due within the shortest possible time. The Ombudsman will analyse the Commission's replies to each of his above proposals, and the complainant's observations on those replies below.

## The Commission's explanations in respect of the application of the 45.75% rate to interim payments

**72.** The Commission explained its practice of applying the overall contractual funding rate of 45.75% to interim payments by referring to "[t] *he necessity to ensure sound financial management of the EU budget and to limit complex and uncertain later recoveries*". It added that "[t] *his standard approach has been followed systematically.*"

**73.** The Ombudsman understands the Commission to mean the following: "*we always apply the overall contribution rate to interim payments. If we paid more, we might later have to ask the contractor to repay. That would be troublesome for the contractor and for us. Also, we might not get the money back. In that case, the EU budget would suffer.*" Assuming that this is a correct interpretation, the Ombudsman considers it reasonable. However, it would have been better if the Commission could itself have used plainer language to express its meaning.

**74.** Second, the Ombudsman emphasises that, as the Commission has itself acknowledged, the Agreement did not provide any clear and unequivocal legal basis for the application of the above rate to interim payments. If the basis was the Commission's obligation of sound financial management, it would have been in line with principles of good administration for the Commission to issue guidelines accordingly. In the absence of such guidelines, the Ombudsman doubts whether it is entirely accurate for the Commission to say that it "*systematically*" followed this practice.

**75.** Third, the Ombudsman recalls that (i) one of the Commission officials provided the complainant with information which could reasonably lead her to believe that higher reimbursement rates could be applied to interim payments; and (ii) the Consortium submitted a proposed budget which was compatible with that information and which the Commission ultimately accepted, thereby confirming that belief. The Commission official's interpretation (at first also confirmed by another Commission official) thus clearly demonstrates that even the responsible services of the Commission were convinced that interim payments could be reimbursed at a higher rate than that applicable to the overall reimbursement of the Action. This would appear to run counter to the Commission's position that, in sum, it "*systematically*" applied the overall reimbursement rate to interim payments.

**76.** It follows from all the above that the Commission failed properly to explain, in the course of the Ombudsman's inquiry, why it applied the 45.75% overall reimbursement rate to the interim payments it made to the Consortium under the Agreement. Nevertheless, by changing the template of its grant agreements so as to make it clear how interim payments are made, the Commission admitted that its previous practice was doubtful and that clear rules were needed in





order to support it. The following provision is now included in all grant agreements: "[t] he amount of the interim payment shall be determined on the basis of the eligible costs actually incurred, as shown in the interim statement and validated by the Commission, to which shall be applied the percentage of the Union grant specified in Article I.4.3".

**77.** In light of the foregoing, the Ombudsman takes the view that the Commission has already harvested the lessons of the present case and that no further action by the Ombudsman is needed.

## The Commission's assurances concerning prompt payment of the balance

**78.** The Commission, in sum, assured the Ombudsman that it would proceed to payment of the balance as soon as the Agreement allowed it to do so, in accordance with the Ombudsman's proposal for a friendly solution. It therefore accepted this aspect of the Ombudsman's proposal and no further inquiries in this respect are justified.

**79.** The complainant, however, observed that the Commission was conducting audits and was applying new reporting rules which were, in her view, unnecessary. In sum, they had the effect of postponing the payment which the Commission promised to make without incurring unnecessary delays.

**80.** The Ombudsman has no reason to doubt the Commission's assurances that it would pay the balance as swiftly as possible. However, while acknowledging the Commission's powers to conduct checks and audits in respect of the Action [8], he is also mindful of the complainant's repeated argument that the SMEs forming part of the Consortium have already been adversely affected by the negative financial impact resulting from the misunderstanding in respect of the reimbursement rate applicable to interim payments. He, therefore, invites the Commission to explain how it complied with its own assurances that it would pay the balance to the Consortium at the end of the Action without incurring unnecessary delays. In its reply, the Commission is invited to demonstrate that it paid due regard to the Consortium's pleas for prompt payment of the balance in order to minimise the financial harm sustained by partner SMEs, in accordance with its assurances that it would work to ensure swift payment to SMEs. The Ombudsman notes in this respect that, according to the complainant, although she submitted the last set of the requested desk checks on 4 July 2013, in August 2013, the Commission did not yet pay the balance to the Consortium. The Ombudsman, therefore, makes a further remark below.

## B. Conclusion

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

**No further inquiries into the complaint are justified.**





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

## Further remark

**The Ombudsman invites the Commission to explain how it complied with its own assurances that it would pay the balance to the Consortium at the end of the Action without incurring unnecessary delays. In its reply, the Commission is invited to demonstrate that it paid due regard to the Consortium's pleas for prompt payment of the balance in order to minimise the financial harm sustained by partner SMEs, in accordance with its assurances that it would work to ensure swift payment to SMEs. The Ombudsman notes in this respect that, according to the complainant, although she submitted the last set of the requested desk checks on 4 July 2013, in August 2013, the Commission did not yet pay the balance to the Consortium.**

P. Nikiforos Diamandouros

Done in Strasbourg on 30 September 2013

[1] Article I.4.3 of the Agreement provides that: "[t] he Commission shall contribute a maximum of EUR 1,777,916.13 equivalent to 45,75% of the eligible costs ...".

[2] Article I.4.3 provides that "[t] he Commission shall contribute a maximum of EUR 1,777,916.13 equivalent to 45,75% of the eligible costs, with the project management activities costs limited to 10% of total eligible costs indicated in paragraph 2. Indirect costs are eligible for funding only when calculated as a flat rate of maximum 30% of the total eligible personnel costs, as specified in II.16.3. The final amount of the grant shall be determined as specified in Article II.18, without prejudice to Article II.20.

*The beneficiaries must provide proof for the amounts of co-financing provided. The co-financing may be provided either from the beneficiaries' own resources or from other sources of external finance.*

*The estimated budget in Annex II shall include a table of the estimated breakdown of budget and Community financial contribution per activity to be carried out by each of the beneficiaries under the action. Beneficiaries are allowed to transfer budget between different activities and between themselves in so far as the work is carried out as foreseen in Annex 1.*

*Prior to any adjustment made the coordinator shall notify the Commission in writing. The Commission reserves the right to reject any adjustment within 30 days of receipt of the*



notification. "

[3] Article II.15.2 provides that "[i]nterim payments are intended to reimburse the beneficiaries for expenditure on the basis of the detailed statement of the costs incurred, once the action has reached a certain level of completion.

*The coordinator is entitled to request an interim payment at the end of each reporting period except for the last reporting period. This request shall be submitted to the Commission no later than 45 calendar days after the end of the concerned reporting period. The request for interim payment shall be accompanied by the documents indicated in Article II.14.1, paragraph 1.*

*In all cases (with or without the audit certificate as defined in Article II.22), the beneficiaries shall certify on their honour that information contained in requests for payment is complete, reliable and true, that the costs declared are the actual costs, and that all receipts have been declared. They shall also certify that the costs incurred can be considered eligible in accordance with the grant agreement and that requests for payment are substantiated by adequate supporting documents that can be checked.*

*On receipt of these documents, the Commission may:*

- Approve the interim report on implementation of the action;*
- Ask the beneficiaries for supporting documents or any additional information if this deems necessary to allow the approval of the report;*
- Reject the report and ask for the submission of a new report.*

*Requests for additional information or a new report shall be notified to the co-ordinator in writing. The co-ordinator shall have 30 days to submit the information or new documents requested.*

*If additional information is requested, the time limit for scrutiny shall be extended by the time it takes to obtain this information.*

*Where a report is rejected and a new report requested, the approval procedure described in this article shall apply.*

*In the event of renewed rejection, the Commission reserves the right to terminate the agreement by invoking Article II.11.3(b). "*

[4] Article 12 of the European Code of Good Administrative Behaviour, entitled " Courtesy ", states as follows: " 1. [W]hen answering correspondence ... the official shall ... reply as completely and accurately as possible to questions which are asked. "

[5] Article 3(5) of the Ombudsman's Statute.



[6] The Commission stated as follows: "[c] onsidering the necessity to ensure sound financial management of the EU budget and to limit complex and uncertain later recoveries, the standard provision on interim payments as set out in agreements for grants taking the form of the reimbursement of a specified proportion of the eligible costs actually incurred, as is the case here, usually foresees application of the reimbursement rate set out in article I.4.3 of the grant agreement to the costs declared as actually incurred during the corresponding reporting period and accepted as eligible. This standard approach has been followed systematically. "

[7] According to the Commission, "[i] n order to ensure explicit reading of the provision, new grant agreements signed under the CIP programme in 2011 include the following statement in Article I.5.2 now: 'The amount of the interim payment shall be determined on the basis of the eligible costs actually incurred, as shown in the interim statement and validated by the Commission, to which shall be applied the percentage of the Union grant specified in Article I.4.3'. "

[8] Article II.21.1 of the Agreement provides that "[t] he co-ordinator undertakes to provide any detailed information requested by the Commission ... to check that the action and the provisions of the agreement are being properly implemented. Where the Commission so wishes, it may request such information to be provided directly by a co-beneficiary. " Similarly, Article II.21.3 of the Agreement provides that "[t] he beneficiaries agree that the Commission may have an audit of the use made of the grant carried out ... Such audits may be carried out throughout the period of implementation of the agreement until the balance is paid and for a period of five years from the date of payment of the balance. Where appropriate, the audit findings may lead to recovery decisions by the Commission. "