

## Decision of the European Ombudsman closing his inquiry into complaint 2411/2011/OV against the European Commission

Decision

**Case** 2411/2011/OV - **Opened on** 23/01/2012 - **Decision on** 12/11/2013 - **Institution concerned** European Commission ( No maladministration found ) |

### The background to the complaint

1. The present complaint, submitted by X, concerned alleged inconsistencies between the European Commission's policies in relation to the assessment of eligible research costs under, on the one hand, the Sixth and Seventh Framework Programmes for Research and Technological Development (FP6 and FP7) [1] and, on the other hand, the European Regional Development Fund (ERDF) [2] [3] . The complainant stated that these inconsistencies harm the interests of Flemish universities and similar institutions which receive EU funding for research projects.

2. Belgian tax law provides for a professional withholding tax (" *bedrijfsvoorheffing* " or " *précompte professionnel* "). Companies withhold this tax from the salaries paid to their employees and pay the amount directly to the Belgian treasury. However, on the basis of Article 275/3 of the Belgian Income Tax Code (BITC), universities and similar institutions are exempt from paying 75 % of the withholding tax on the salaries payable to postdoctoral researchers. The present complaint relates to whether the exempt withholding tax could be considered as an eligible research cost under the Framework Programmes **and** under the ERDF.

3. Flemish universities receive funding under both the Research Framework Programmes and the ERDF. In their relations with the Belgian *regional* authorities - which are responsible for education - both DG REGIO and DG RTD questioned whether the exempt withholding tax was a real research cost (if it were a real research cost, it would be an eligible cost). DG REGIO, in particular, took the view [4] that the exempt part of the withholding tax did not fall within the definition of "eligible costs". It argued that, in order to be eligible, expenditure needs to be genuinely and definitely borne by the beneficiary and actually paid, which is not the case for the exempt withholding tax (in DG REGIO's view, the exempt withholding tax was simply an "incentive" for research [5] which is kept by the employer to finance research activities other than those supported under the ERDF).



4. In contrast, DG RTD took the view that the exempt withholding tax was an "eligible cost" under the Research Framework Programmes [6] .

5. On 30 September 2011, the law firm representing the complainant wrote to the Director-General of DG REGIO to ask why the positions of DG RTD and DG REGIO were different with respect to the eligibility of the research costs. It referred to the Interpretative Law of 21 December 2009 (see footnote 5) and to DG RTD having subsequently accepted the exempt amounts as eligible costs. In this context, it also asked to be informed of the legal basis for this difference in treatment of costs.

6. On 11 November 2011, DG REGIO replied confirming its earlier position. As regards the legal basis, DG REGIO explained that for expenditure to be eligible, Article 56(2) of the ERDF General Regulation 1083/2006 [7] requires that: i) it must be in line with national eligibility rules; ii) it has to be duly justified by invoices or equivalent supporting documents; and iii) in the case of contributions in kind, the co-financing from the EU funds must not exceed the total of eligible expenditure without the in-kind contributions. Moreover, Article 60(b) of the Regulation provides that the managing authority should verify that the expenditure declared by the beneficiaries has actually been incurred. DG REGIO concluded that it followed from the above rules that the expenditure must be verifiable, that is to say, it must have been incurred and actually paid and the amount must be justified by invoices or other supporting documents. It argued that, since the exemption of researchers from the professional withholding tax is essentially a reduction of the costs of the employer, the expenditure cannot be considered as having been incurred and/or paid in the context of the implementation of the project. It is therefore ineligible for ERDF funding. As regards the difference in position between it and DG RTD, DG REGIO explained that the implementing instruments of the Research Framework Programmes projects follow their own eligibility rules, whereas funding by ERDF is governed by Regulation 1083/2006.

7. Remaining unsatisfied with the above reply, the complainant turned to the Ombudsman.

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

### **The allegation**

8. The Ombudsman opened an inquiry into the allegation that the Commission infringed the principles of legitimate expectations and consistency when it considered research costs that were exempt from the Belgian professional withholding tax as ineligible for ERDF funding, thereby treating these costs differently in comparison with their treatment under the Sixth and Seventh Research Framework Programmes.

### **The inquiry**



9. The complaint was made on 1 December 2011. The Commission sent its opinion of 22 May 2012. The complainant sent its observations on the Commission's opinion on 25 June 2012.

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

### **A. Alleged infringement of the principles of legitimate expectations and consistency**

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

10. In support of its allegation, the complainant argued that it had initially received information from the competent bodies, in particular, via the website of the Managing Authority of the Flemish ERDF programme (EFRO), that the exempt part of the professional withholding tax was an eligible cost under the ERDF. It noted that it was subsequently informed that these costs were not eligible. The complainant also argued that that eligibility conditions under the Sixth and Seventh Research Framework Programmes and the ERDF are almost identical and that, therefore, the eligibility of the relevant costs should be the same under both schemes.

11. In relation to the alleged breach of the complainant's legitimate expectations, the Commission first pointed out that the complainant had referred to a change in position, not by the Commission, but by the "*competent bodies*", which it assumed was the Managing Authority of the Flemish ERDF programme. It stated that DG REGIO had not changed its position on non-eligibility. The Commission noted that it had reiterated and justified its position consistently on several occasions to various parties, lastly in its letter of 11 November 2011. The Commission therefore did not understand what legitimate expectations the complainant may have as regards the Commission's actions.

12. The Commission argued that any legitimate expectations that the complainant may have are with respect to the actions of the competent national authorities, since the ERDF programme is managed jointly between the Commission and Member State authorities. Any legitimate expectations arising from the actions of the Managing Authority of the Flemish ERDF programme would not fall within the Commission's remit. According to established case-law of the Court of Justice, the Commission has relations with the Member State and not with its regions. Under the shared management principle, beneficiaries of the ERDF co-financed projects, such as universities, have contacts and legal relationships with the Member State authorities in charge of programme implementation and not directly with the Commission.

13. The Commission concluded this aspect of its opinion by noting that the requirements for a legitimate expectation to arise are threefold. First, precise, unconditional and consistent assurances must originate from authorised and reliable sources and be given by the EU authorities to the person concerned. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the



assurances given must comply with the applicable rules [8] . The Commission considered that these conditions were not met in this case, since DG REGIO had kept a common and constant position on the matter. The Commission did thus not raise any legitimate expectations on the part of the complainant. The complainant should instead have raised the issue with the Member State, in accordance with Article 56(4) of Regulation 1083/2006 [9] .

**14.** The Commission then responded to the complainant's argument of the alleged inconsistency between DG REGIO and DG RTD regarding the eligibility of the exempt professional withholding tax.

**15.** Firstly, the Commission pointed out that there is no obligation for the same eligibility rules to be applied in different policy areas. It noted that it is for the EU legislator to set eligibility rules for each spending programme in accordance with the policy objectives pursued.

**16.** Secondly, the Commission noted that, even if the general cost eligibility principles are largely comparable, differences exist in the detailed rules for implementation of the Research Framework Programmes and the ERDF.

**17.** On the one hand, projects eligible for funding by the ERDF are governed by Regulations 448/2004 [10] and 1083/2006 for the programming periods 2000-2006 and 2007-2013 respectively. The requirements for the two programming periods did not change: taxes and charges (in particular, direct taxes and social security contributions on wages and salaries) which arise from co-financing by the Structural Funds do not constitute eligible expenditure, except where they are genuinely and definitively borne by the final beneficiary, or individual recipient [11] . Article 56(1) of Regulation 1083/2006 states that eligible expenditure must be actually paid. Therefore, for both programming periods, the exempted part of the Belgian professional withholding tax is eligible for co-financing from the ERDF only if it is subsequently definitely incurred by the beneficiary for the purpose of the same co-financed ERDF project.

**18.** By contrast, the EU budget available under the Research Framework Programmes is subject to centralised management, in accordance with Article 53(a) of the Financial Regulation [12] . The Commission carries out its budget implementation activities without the involvement of, or transfer of responsibility to, the Member States or public authorities of third countries in which the recipients of Union funding are established ("direct centralised management"). The implementing instruments of these Framework Programme projects have their own eligibility rules: research projects under the FP6 are governed by Regulation 2321/2002 [13] , while projects under the FP7 are subject to Regulation 1906/2006 [14] .

**19.** Specific eligibility rules are laid down in Article II.19 of the FP6 Grant Agreement and in Article II.14 of the FP7 Grant Agreement. According to these rules, costs need to be actually incurred. Therefore, for FP6 and FP7 projects, the Commission's DG RTD accepts as eligible the exempt part of the Belgian professional withholding tax because of the obligation to reinvest the amount in additional research projects.

**20.** The Commission thus concluded that the complainant's allegation of an inconsistent



approach under the FP6 and FP7, on the one hand, and the ERDF, on the other hand, was unfounded.

**21.** In its observations, the complainant did not make comments concerning the alleged infringement of the principle of legitimate expectations, but only concerning the alleged infringement of the principle of consistency.

**22.** The complainant argued that the Commission's position seemed to suggest that the granting of aid under the Structural Funds takes place in a completely different legal context than the granting of aid under the Research Framework Programmes. The complainant stated that this was incorrect. It pointed out that the basic rules applicable to subsidies from the Structural Funds are the Financial Regulation and the Implementing Rules. The complainant quoted Article 155(1) of the (old) Financial Regulation 1605/2002 (in force until 31 December 2012): "*Parts one and three of this Regulation shall apply to expenditure effected by the authorities and bodies referred to in the regulations governing the Structural Funds ..., save as otherwise provided in this title.*" It stated that the basic rules concerning subsidies in parts one and three of the Regulation are also applicable to Framework Programmes. Thus, the eligibility of costs under the Structural Funds is determined in the first place by the Financial Regulation. It was thus not clear why the Commission gave the impression that only Article 56 of Regulation 1083/2006 matters for DG REGIO. The complainant argued that this Article only contained additional rules, which did not change the applicable rules of the Financial Regulation and the Implementing Rules.

**23.** The complainant pointed out that DG REGIO deduced from Article 56(1) of Regulation 1083/2006 that costs could only be eligible if they had actually been paid by beneficiaries. This interpretation, which suggests that a cash transaction needs to take place, is incorrect. The complainant stated that Article 56(1) only concerned the period in which costs need to be incurred, but did not foresee an additional eligibility criterion: "*Expenditure, including for major projects, shall be eligible for a contribution from the Funds if it has actually been paid between the date of submission of the operational programmes to the Commission or from 1 January 2007, whichever is earlier, and 31 December 2015*". The complainant argued that the wording "*actually been paid*" in this Article did not mean that there must have been a cash transaction. This was confirmed by the next paragraph (Article 56(2)), which provides that "*in-kind contributions, depreciation costs and overheads may be treated as expenditure paid by beneficiaries ...*" (emphasis by the complainant). The complainant pointed out that even though it was clear that depreciation costs and overheads are not paid during a project, they could still be eligible costs.

**24.** The complainant thus maintained its position that, as beneficiaries of European aid, universities should be able to rely on a consistent interpretation of the basic rules by the same institution. It argued that is not acceptable for the application of the basic rules on eligible costs in the Financial Regulation and the Implementing Rules to change in function of the Directorate-General which applies them.



## The Ombudsman's assessment

25. As regards the complainant's argument that the Commission infringed the principle of the protection of legitimate expectations, the Ombudsman notes that, in its observations, the complainant no longer relied on this part of the allegation. In fact, it appears that in its correspondence with the Belgian regional authorities (namely, on 21 August 2009, 15 October 2010, 24 January, 12 May and 11 November 2011), DG REGIO maintained the same position, that is to say, that the exempt part of the professional withholding tax was not an eligible cost under the ERDF. The Ombudsman thus concludes that the Commission has not raised a legitimate expectation that it would treat such costs as eligible costs under the ERDF. The Ombudsman thus finds no instance of maladministration by the Commission in relation to the first aspect of the allegation.

26. As regards the aspect of the allegation concerning the infringement of the principle of consistency, the Ombudsman is of the view that it is entirely possible and acceptable for the Commission to establish different rules for the implementation of the Research Framework Programmes and the implementation of the ERDF.

27. The Ombudsman notes in this respect that Article 156(1) of the (old) Financial Regulation provides that payment by the Commission of financial contributions from the Structural Funds is to be made in accordance with the regulations governing the Structural Funds. The Financial Regulation itself thus allows for more specific rules (including on the eligibility of the costs) to be set out in the regulations governing the Structural Funds. Similarly, Article 160 of the Financial Regulation refers to the Research Framework Programmes to be adopted by the Council.

28. The Ombudsman notes that projects eligible for funding by the ERDF are governed by Regulation 1083/2006 (for the programming period 2007-2013), which contains a specific Chapter entitled: "*Eligibility of expenditure*". First, Article 56(1) states that expenditure shall be eligible for funding if it has *actually been paid* (between certain dates). Then, Article 56(2) adds that "*[b]y way of derogation from paragraph 1, in-kind contributions, depreciation costs and overheads may be treated as expenditure paid by beneficiaries ... under the following [three] conditions*". Those three conditions are: 1) the expenditure must be eligible under the national eligibility rules; 2) it must be justified by invoices or equivalent accounting documents; and 3) in the case of in-kind contributions, the co-financing from the Funds must not exceed the total eligible expenditure excluding the value of such contributions. As DG REGIO correctly pointed out in its letter of 11 November 2011 to the complainant, the exempt part of the professional withholding tax for researchers constitutes, in fact, a reduction of the costs of the employer (namely a reduction in direct taxes) and the expenditure **cannot be considered as having been incurred and/or paid in the context of the implementation of the project**. Therefore, the Ombudsman agrees with the Commission that the exempt part of the Belgian professional withholding tax will be eligible for co-financing from the ERDF *only* if it is subsequently definitely incurred by the beneficiary for the purpose of the *same* co-financed ERDF project. He understands that it could well be the case that the money saved through the Belgian exemption on withholding tax could be reused on the *same* project. In such circumstances, the new expenses could be covered by the ERDF funding. However, if the money saved through the



Belgian exemption on withholding tax were not reused on the *same* project, it would rightly not be considered an eligible expense **in the context of that ERDF project** .

**29.** On the other hand, the Ombudsman notes, Research Framework Programme projects are governed by different legislation with its own eligibility rules, namely Regulation 2321/2002 (FP6) and Regulation 1906/2006 (FP7). The specific eligibility rules are set out in these Regulations [15] and in the General Conditions of the FP6 and FP7 (model) Grant Agreements [16] . According to these rules, the costs in the framework of FP6 and FP7 projects must also have been " *actual* " and have been incurred during the duration of the action. However, the Commission (DG RTD) accepts as eligible the exempt part of the Belgian professional withholding tax due to the obligation, foreseen in Belgian legislation, to reinvest in additional research projects. The Ombudsman considers that this difference in treatment is entirely reasonable and logical since the purpose of the Research Framework Programmes is to promote research in general.

**30.** On the basis of the above, the Ombudsman concludes that, while there is clearly a difference in treatment of the evaluation of eligible costs under the ERDF and under the Research Framework Programmes, this absence of consistency is entirely justified and legal.

**31.** There was thus no maladministration by the Commission with regard to the second aspect of the allegation.

## B. Conclusion

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

**There was no maladministration by the Commission.**

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

Emily O'Reilly

Done in Strasbourg on 12 November 2013

[1] The European Commission operates Framework Programmes for Research and Technological Development. The current programme, FP7, runs from 2007 to 2013. It gives grants to research actors to co-finance research, technological development and demonstration projects.

[2] The Commission also funds research and innovation projects under the ERDF, which aims to strengthen economic and social cohesion in the European Union by correcting imbalances





between its regions.

[3] The Commission's Directorate-General for Research and Innovation (DG RTD) is responsible for the Research Framework Programmes, whereas aid received from the ERDF falls under the responsibility of the Directorate-General for Regional Policy (DG REGIO).

[4] Letter from the European Commissioner for Regional Policy to the Walloon Region dated 10 April 2009; letters from the Director-General of DG REGIO to the Council of Rectors of the Belgian French-speaking universities of 21 August 2009, 15 October 2010 and 24 January 2011.

[5] On 21 December 2009, the Belgian legislator adopted an Interpretative Law (amending Article 275/3 of the BITC), according to which institutions exempt from paying the withholding tax may not use the relevant amounts for financing the ongoing research qualifying the institution for the exemption, but must, instead, invest the amounts in further research projects.

[6] In a letter to the Belgian Permanent Representation of 22 November 2010, the Director-General of DG RTD stated: "*On the basis of the clarifications received and given the interpretative law ..., I have the pleasure to inform you that the European Commission considers that no doubt remains on the exempted part of the withholding tax being actually incurred during the implementation of the project and therefore being eligible*" (emphasis added by the complainant).

[7] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ 2006 L 210, p. 25.

[8] Case T-347/03 *Branco v Commission* [2005] ECR II-2555, paragraph 102.

[9] Article 56(4) states: "*The rules on the eligibility of expenditure shall be laid down at national level subject to the exceptions provided for in the specific Regulations for each Fund. They shall cover the entirety of the expenditure declared under the operational programme.*"

[10] Regulation (EC) No 448/2004 of 10 March 2004 amending Regulation (EC) No 1685/2000 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the eligibility of expenditure of operations co-financed by the Structural Funds and withdrawing Regulation (EC) No 1145/2003, OJ 2004 L 72, p. 66.

[11] More precisely, for the 2000-2006 programming period, paragraph 5 of Eligibility Rule No 7 in the Annex to Regulation 1685/2000 states that taxes and charges are eligible only where they are genuinely and definitively borne by the final beneficiary or individual recipient. For the 2007-2013 period, under which the Member States have the principal responsibility to adopt eligibility requirements, Article 56(1) of Regulation 1083/2006 states that eligible expenditure has to be actually paid.





[12] At the time of the facts, the applicable Financial Regulation was Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1. However, since 1 January 2013, the *new* Financial Regulation has been applicable: Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ 2012 L 298, p. 1.

[13] Regulation (EC) No 2321/2002 of the European Parliament and of the Council of 16 December 2002 concerning the rules for the participation of undertakings, research centres and universities in, and for the dissemination of research results for, the implementation of the European Community Sixth Framework Programme (2002-2006), OJ 2002 L 355, p 23.

[14] Regulation (EC) No 1906/2006 of the European Parliament and of the Council of 18 December 2006 laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007-2013), OJ 2006 L 391, p. 1.

[15] For instance, Article 31 ("*Reimbursement of eligible costs*") and Article 32 ("*Direct eligible costs and indirect eligible costs*") of Regulation 1906/2006.

[16] For instance, Article II.14 ("*Eligible costs of the project*") and Article II.15 ("*Identification of direct and indirect costs*") of the General Conditions of the FP7 Grant Agreement.