

Decision of the European Ombudsman closing the inquiry into complaint 1214/2013/EIS against the European Commission

Decision

Case 1214/2013/EIS - **Opened on** 19/09/2013 - **Decision on** 04/12/2014 - **Institution concerned** European Commission (No maladministration found) |

This complaint was submitted by a German company that operates in the field of natural engineering and cultural sciences and medicine. It concerned an EU project dealing with understanding mechanisms of cell cycle control and finding possible solutions to cell cycle related diseases. Following an audit of the project, the Commission decided not to accept certain expenses as eligible. The complainant objected to this decision and alleged that the way in which the Commission and its auditors handled the audit was incorrect, unfair and did not conform to good administrative practice. The Ombudsman inquired into the issues and found no maladministration in the Commission's conduct.

The background to the complaint

1. The complainant is a German micro company. In 2004, it became a partner in an EU project on cell cycle related issues and diseases.
2. On 15 and 16 November 2011, the Commission carried out an on-the-spot financial audit at the complainant's premises.
3. Following the audit and in accordance with the Commission's request, the complainant submitted further material and information on 29 November 2011. However, on 17 January 2012, the material was returned to the complainant stamped 'undelivered'. The complainant informed the Commission of this. The Commission replied that it had already been given three opportunities to submit the information and material that were deemed relevant for the purposes of the audit and that, in order to ensure equal and non-discriminatory treatment of all those who are audited, no fourth opportunity could be given. It suggested to the complainant that it submit observations on the draft audit report, once finalised.
4. On 24 January 2012, the complainant replied that it was not claiming a "fourth opportunity" to send the documents. Instead, the complainant argued that the Commission had provided it with



an incorrect post code. It contended that the post code provided by the Commission (B-1050) is not the address to which to send bulky packages containing documents. Instead, another post code (B-1049) should be used. According to the complainant, as the Commission itself admitted, the latter postcode allows proper security checks for packages received. For this reason, the complainant took the view that it had acted in good faith when sending the documents to an incorrect address (the B-1049 post code). Furthermore, it stated that due to the tight travel schedule of the auditors, it had not been in a position to provide the requested documents during the audit.

5. In reply, the Commission argued that the address it had provided was correct. Besides, it took the view that failures by mail service providers are outside its responsibility. It added that it informed the complainant on 2 December 2011 that no documents had been received but the complainant did not take any action in this regard.

6. The draft audit report was sent to the complainant on 29 February 2012. In the draft report, the Commission considered a number of costs claimed by the complainant to be ineligible and raised a number of concerns regarding project deliverables. It concluded that it was not in a position to reasonably assess the necessity and amount of the costs claimed for the implementation of the project.

7. On 23 March 2012, the complainant submitted comments on the draft report, arguing that it had made available to the Commission sufficient evidence about the costs approximately two weeks before the on-the-spot check took place. As regards personnel costs, the complainant argued that the evidence made available showed that the time spent on the project and the salary levels were appropriate. Furthermore, the draft report contained a number of factual mistakes, which the complainant suggested should be either removed or corrected.

8. On 23 May 2013, the Commission sent the final audit report to the complainant. The report concluded that the complainant should reimburse the amount of EUR 1 153 383.40 to the Commission. It also concluded that the complainant's criticism concerning a wrong postal address had to be rejected. In support of that view, the Commission pointed out that the company the complainant had used to deliver the package also provides services for the Commission itself. Thus, it considered it "unlikely" that the company was unable to deliver the package.

9. The complainant and the other project partners subsequently exchanged a number of e-mails with the Commission regarding the outcome of the audit.

10. Since it was dissatisfied with the Commission's decision, the complainant submitted a complaint to the European Ombudsman on 24 June 2013.

The inquiry

11. The Ombudsman opened an inquiry into the complaint and identified the following



allegation and claim:

- 1) The way in which the Commission and its auditors handled the audit carried out in the present case was incorrect, unfair and did not conform to good administrative practice.
- 2) The Commission should take appropriate remedial action.

12. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Alleged failures by the Commission when carrying out the financial audit

Arguments presented to the Ombudsman

13. In support of its allegation, the complainant put forward that (i) the auditors denied the complainant the possibility to re-send important documents in January 2012 after providing the complainant with an incorrect mailing address; (ii) the auditors unfairly refused to acknowledge the existence of a joint laboratory in the Czech Republic; (iii) the auditors did not take into account all the facts related to compounds used in the project; (iv) the auditors disregarded evidence or made false statements in the preparation of the final audit; and (v) the Commission did not address in an appropriate manner a discriminatory statement made by one of the auditors, which called into question the objectivity of the audit.

(i) The auditors denied the complainant the possibility to re-send important documents in January 2012 after providing the complainant with an incorrect mailing address

14. In its opinion, the Commission objected to the complainant's argument that it had provided an incorrect postal address. The address which the Commission provided, in an e-mail to the complainant dated 24 November 2011, included the post code B-1050. This was the address of the building in which the auditors were working at that time. The Commission explained that the post code B-1049 refers to " *the standard address labelling of the Commission* ".

15. The Commission argued that the auditors never denied the complainant the possibility to re-send the documents later.

16. It said that, in line with standard procedure, a letter announcing the audit that was sent to the complainant on 18 July 2011 stated that all the information should be made available at the beginning of the audit. Since not all the supporting documents were obtained during the on-the-spot audit, the Commission granted the complainant until the end of November 2011 to provide the missing documents. It noted that it was not until January 2012 that the complainant



contacted the Commission to inform it that the documents it had sent had been returned to it. Finally, the Commission pointed out that the complainant was also given the opportunity to provide additional information and evidence during the adversarial procedure [1] . All the information and evidence that the complainant wanted the auditors to take into account had thus been submitted to the Commission and had been taken into account in the final audit report.

17. In its observations, the complainant reiterated that the post code (B-1050) provided by the auditors was not correct and contended that it is clear from the Commission's own mailing instructions that the Commission's correct post code is B-1049. It pointed out that a reasonable line of action would have been to acknowledge the mistake and allow the documents to be re-sent.

18. The complainant also objected to the Commission's argument that the auditors never denied the complainant the possibility of re-sending the documents later. In its view, the e-mail exchange showed that the auditors had asked it to wait until the draft audit report was ready.

19. As regards the Commission's argument that all the important documents were taken into account during the adversarial procedure, the complainant stated that many of them were not taken into consideration and took the view that, once a draft report has been written, it is very difficult to change it.

20. Moreover, the complainant said that all the requested documents were provided at the start of the audit and that the documents in question were additional documents that had to be provided as a result of the audit which took place in November 2011.

21. Finally, the complainant acknowledged that the time given to provide additional documents is at the discretion of the auditor in question. It emphasised that it sent relevant documents on 29 November 2011 and would thus have provided them within the time limit had it not been for the wrong postal address. Because the time limit for providing additional documents is at the discretion of the auditor, it would have been reasonable and fair to allow these documents to be sent again before the draft audit report was prepared.

The Ombudsman's assessment

22. In its opinion, the Commission argued that B-1050 was the correct post code, whereas the complainant disputed this statement. While there continues to be disagreement in this respect, the Ombudsman notes that the Commission does not appear to dispute that the complainant sent the relevant documents to the address at post code B-1049 and that the package did not reach it. Given the circumstances, she takes the view that it would have been reasonable for the Commission to allow the complainant to re-send the documents when it became clear that they had not been delivered. The fact that the complainant contacted the Commission only after having received the documents back cannot be held against it. In fact, the complainant could not be expected to consider the possibility that a package, directed to an address known to be



one used by the Commission, would not reach its addressee. Besides, the complainant's argument, that documents submitted after the draft report has been drawn up may have less effect, is not entirely without merit. However, it is clear that, in this case, the Commission indeed took into consideration the documents that it finally received along with the complainant's observations on the draft audit report. In view of this, the Ombudsman concludes that there are no grounds for further inquiries in this respect.

(ii) The auditors unfairly refused to acknowledge the existence of the joint laboratory in the Czech Republic

Arguments presented to the Ombudsman

23. The complainant asserted that it provided extensive documentation in order to substantiate the existence of the joint laboratory and its direct links with the project. It took the view that the activities carried out at the joint laboratory were defined contributions in kind because no money transfers from the joint laboratory to the complainant took place. They could therefore not be listed under 'third party contributions'.

24. In its opinion, the Commission stated that the auditors did not contest the existence of the joint laboratory but questioned the *eligibility* of related costs.

25. While the complainant was a beneficiary of the project, the joint laboratory was not. The contract did not mention the joint laboratory in question as a member of the consortium, as a subcontractor or as a third party directly participating in the project. The Commission explained that all entities participating in a Research Framework project should be contractors and that the possible participation of third parties is one of the issues contractors are specifically asked about during the negotiations prior to signature of the contract.

26. Moreover, the Commission put forward that the only reference to the laboratory in question was found in the technical annex to the contract, which stated that "*this work is done in a strong international collaboration with the Institute [...]*".

27. In its observations, the complainant pointed out that, "*although claimed as eligible costs to the project, [the costs] were not entered into [its] books*" because the contributions were provided free of charge. However, it noted that the costs of these contributions in kind were entered into the accounts of the partner institute, where they were documented. The complainant also pointed out that it had no laboratory facilities of its own and that the Commission was fully aware of this when it signed the contract.

28. Specifically, as regards the third party issue, the complainant reiterated that it had stated from the start of the audit that the costs generated were not a third party contribution. It also noted that there is no satisfactory definition of a third party in Annex II to the contract or in the Guide to financial issues for FP6 projects. Annex II defines third party resources and the general assumption in that definition is that any entity, legal or not, that is not part of the project



should be considered a third party.

The Ombudsman's assessment

29. The Ombudsman notes that it is not the existence of the joint laboratory that is disputed but the eligibility of related costs.

30. The Commission stated that it was the complainant, and not the partner institute, which was a member of the project and that the contract does not mention the partner institute as a member of the consortium, or as a subcontractor or as a third party directly participating in the project. It also submitted that the collaboration between the complainant and the partner institute was not formalised and thus remained without legal and financial consequences.

31. The complainant disputed this finding and alleged that costs related to the project were charged as "*contribution in kind costs*" and not as a third party contribution. However, the complainant did not dispute the fact that the joint laboratory was not mentioned in the contract. The complainant denied that the contribution of the joint laboratory was a third party contribution and argued that it was its own contribution. However, given that the costs of the laboratory's work were not the complainant's own costs, the Ombudsman considers that the Commission is right in saying that these are third party costs which were not envisaged in the contract and cannot be reimbursed. She thus finds the Commission's position reasonable.

(iii) The auditors did not take into account all the facts related to compounds used in the project

Arguments presented to the Ombudsman

32. This issue concerns the eligibility of certain compound-related costs that the complainant considered to be directly linked to the project, but which the Commission considered ineligible. The complainant argued that the payments made were directly linked to the project and were crucial. Without these payments, no compounds could have been used in the project and no publication would have been forthcoming.

33. In its opinion, the Commission argued that the costs charged concerned the extension of patents granted on the basis of applications submitted before the project start date, and not the payment of access rights held by a third party. Furthermore, the Commission considered that costs related to the extension to other countries outside of Europe of patents obtained prior to the start of the project cannot be accepted as eligible costs.

34. In its observations, the complainant pointed out that the continuing protection of the compounds was necessary in order to carry out the project and allow project members to use knowledge generated from the project.



The Ombudsman's assessment

35. This argument raises certain technical issues concerning the strict need to legally protect certain compounds essential to the project. The Ombudsman has repeatedly taken the view that in examining questions of this kind, she should not substitute her own assessment for that of the scientific experts [2] . The Ombudsman's review therefore is concerned with assessing whether the audit carried out in this case was correct, fair and conformed to good administrative practice.

36. It is clear from Article II.19.1a of Annex II to the contract that patent costs may be eligible if they relate to (a) new knowledge generated by and during the research project, and (b) existing (and patented) knowledge needed for the research project.

37. As regards possibility (a), the Commission explained in its opinion that the disputed costs concerned the extension of existing patent applications submitted **before** the project start date, and not the payment of access rights held by a third party. The complainant did not challenge this argument but submitted that applications for patent coverage in new regions were made during the project. Despite the complainant's argument that the costs were " *directly linked and crucial for the project* ", the Ombudsman concludes that the complainant did not provide sufficient evidence in support of its view that the costs related to **new knowledge** generated by and during the research project, as required by the terms of the contract. The Commission's position therefore appears to be fully in line with the terms of the contract.

38. As regards possibility (b), the Commission put forward that the fees in question concern intellectual property rights in third countries that were acquired before the project start date. The complainant argued that it had to undertake steps to protect knowledge in particular countries where such protection had not been applied for. Given that no tangible evidence proving that these fees were **necessary** for the project seems to have been submitted, the Ombudsman concludes that the Commission's position appears reasonable and in line with the terms of the contract in this respect also.

(iv) The auditors disregarded evidence or made false statements in the preparation of the final audit

Arguments presented to the Ombudsman

39. According to the complainant, the final audit report disregarded facts and contained damaging and incorrect allegations. In its opinion, the Commission rejected this allegation.

The Ombudsman's assessment

40. The complainant alleged that various statements made by the auditors were factually incorrect, untrue and contradictory. Moreover, the auditors disregarded facts and made damaging incorrect allegations in the audit report. The Ombudsman notes that these assertions



essentially repeat the allegations of the complainant discussed in previous points. Therefore, this argument does not need to be addressed separately.

(v) The Commission did not address in an appropriate manner a discriminatory statement made by one of the auditors, which called into question the objectivity of the audit.

Arguments presented to the Ombudsman

41. The complainant noted that, during the on-the-spot audit, it objected to a statement made by a particular auditor which it considered to be racist and discriminatory [3]. It emphasised that this issue was not, as the final audit report put it, a question of personal sensitivities, but a question of whether an EU representative should be allowed to make racist or prejudicial statements. In this respect, the complainant argued that it was unfair that the auditor in question was permitted to continue to be actively involved in the preparation of the final audit report, despite the complainant's request that he no longer handle the case.

42. The Commission submitted that the auditors denied that any discriminatory statement had ever been made during the audit and said that this question had already been discussed and dealt with in the final audit report.

43. In its observations, the complainant essentially reiterated its earlier arguments.

The Ombudsman's assessment

44. The Ombudsman notes that the complainant alleged that a discriminatory and potentially racist statement was made during the audit. The Commission expressly denies this. In the Ombudsman's view, the alleged statement, which has been quoted in footnote 3 above, should indeed be considered discriminatory, offensive and unacceptable if proven.

45. However, according to the final audit report, during the audit visit the complainant's representative was unaccompanied in the presence of the two auditors. Both auditors denied having made such a statement while the complainant maintains that it was made.

46. While there continues to be disagreement between the two parties in this respect, the Ombudsman notes that she has not been provided with tangible evidence that such an unacceptable statement was indeed made. The Ombudsman considers that any further inquiries into this issue cannot help her to establish the disputed facts with certainty.

47. In any event, even though there is a dispute as to whether or not the alleged statement was made, in the final audit report the auditors stated that "*should any contribution made by the two auditors during the on-spot verification indeed might have infringed on personal sensitivities of [the complainant's representative], the auditors regret that*". (Stet)



48. In view of all the foregoing, the Ombudsman concludes that any further inquiries into this issue are not justified.

Conclusion

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

On the basis of her findings concerning arguments (i) to (v) above, the Ombudsman concludes that there was no maladministration in the Commission's conduct. Consequently, the complainant's related claim cannot succeed.

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

Emily O'Reilly

Done in Strasbourg on 04 December 2014

[1] The term refers to a procedure during which the person subjected to an audit is invited to provide observations on the draft audit findings.

[2] See, for example, the Ombudsman's decisions in cases 875/2012/(ER)PMC, 2111/2011/RA and 1458/2011/(BEH)JN, available at: <http://www.ombudsman.europa.eu/en/cases/home.faces> [Link]

[3] According to the complainant, the statement was as follows: "*It seems we will have to fly to Israel. We all know Jews tell the truth.*"