



## Décision dans l'affaire 3249/2008/(BEH)KM - Rejet partiel d'une demande de paiement dans une affaire contractuelle

Décision

**Affaire** 3249/2008/(BEH)KM - **Ouvert le** 22/12/2008 - **Décision le** 22/11/2010

Une association allemande a organisé une exposition portant sur 28 régions européennes situées entre Bordeaux et Kiev et a obtenu un financement de la Commission dans le cadre d'un programme relatif à l'élargissement de 2004. En 2005, l'association a introduit une demande de modification de budget étant donné que l'exposition était présentée dans un nombre de villes supérieur à celui initialement prévu. La modification pouvait être opérée par un amendement formel de la convention de subvention ou par une notification écrite de la modification à la Commission lorsque les réaffectations entre les rubriques budgétaires ne dépassaient pas 10 %.

Les modifications proposées ont été approuvées par un fonctionnaire de la Commission. Cependant, lorsque la plaignante a demandé le paiement du solde, la Commission a estimé ce solde à 52 035 EUR au lieu des 62 556 EUR réclamés. La plaignante a protesté, signalant que ce solde avait probablement été calculé sur la base de l'ancien budget.

La Commission a expliqué qu'elle avait uniquement accepté les modifications inférieures à 10 % par rubrique budgétaire étant donné qu'il n'y avait pas eu d'amendement formel du budget. Lorsque la plaignante a rappelé que le budget modifié avait été approuvé par la Commission en 2005, la Commission a accepté ce nouveau budget et a versé un montant complémentaire de 4 495 EUR. Elle a par contre refusé d'accepter toute autre réaffectation effectuée par la plaignante, au motif qu'elle n'en avait pas été dûment informée.

La plaignante s'est adressée au Médiateur en soutenant que la Commission avait réduit à tort le paiement final de 6 396 EUR.

Le Médiateur a constaté que les modifications acceptées par la Commission en 2005 englobaient également une réaffectation supérieure à 10 % d'une rubrique budgétaire et que la Commission n'avait pas insisté sur la nécessité d'un amendement formel de la convention de subvention. Il a également observé que la Commission avait accepté des réaffectations budgétaires inférieures à 10 % même lorsqu'elle n'en avait pas été dûment informée au préalable. Le Médiateur n'a pas compris pourquoi une exigence avait été jugée négligeable par la Commission lors du premier calcul du solde et avait soudain acquis une importance décisive lors du deuxième calcul de ce solde. Il a par conséquent conclu que la Commission n'avait pas donné d'explication cohérente et raisonnable sur la façon dont elle



avait traité la demande de paiement de la plaignante.

Dans une proposition de solution à l'amiable, le Médiateur a donc demandé à la Commission de réexaminer la demande de paiement de la plaignante. La Commission a accepté cette proposition et a versé à la plaignante le solde restant dû de 6 025 EUR (respectant ainsi le montant maximal de financement fixé dans la convention de subvention) ainsi que des intérêts d'un montant de 1 586 EUR.

Le Médiateur a noté avec satisfaction qu'une solution à l'amiable avait pu être trouvée et a classé l'affaire.

The background to the complaint

**1.** The complainant, a German association, carried out a project under the Commission-funded PRINCE programme, an information programme designed to increase public awareness of the European Union's main political priorities, such as the Euro or enlargement. The central element of the project was a mobile exhibition entitled "Via Regia - what we are, we are through others, too". It highlighted the history and present status of 28 European regions along the "Royal Road" from Bordeaux to Kiev. Under the terms of the grant agreement, the Commission agreed to contribute 71.61% of costs amounting to no more than EUR 291 183.06, that is, a maximum of EUR 208 520.27 [1].

**2.** The grant agreement ('the Agreement') between the complainant and the Commission contained two provisions on which changes to the terms of the Community contribution could be based:

(i) Article II.13 of the General Conditions annexed to the Agreement provides that changes to the terms of the Community contribution require a written amendment to the Agreement to be signed by the parties.

(ii) Article I.3.4 of the Special Conditions stipulates that, as an exception to Article II.13, reallocations of up to 10% per budget heading can be made from one budget heading to another, provided that the Commission is informed accordingly in advance.

**3.** Article II.13 of the General Conditions provides that a request for an amendment has to be submitted to the Commission at least one month before the end of the project. It further stipulates that no changes are permissible that would call into question the Community's decision to grant funding for the project concerned or that would not be in conformity with the duty to treat applicants equally. Article I.3.4 provides that the relevant reallocations must not result in the overall amount of costs exceeding the maximum amount foreseen in the Agreement.

**4.** On 25 August 2005, the complainant requested an amendment of the budget pursuant to Article II.13. According to the complainant, this amendment was necessary because of the unexpected success of the above-mentioned exhibition, which was shown in 50 locations instead of the five originally foreseen.



**5.** On 26 September 2005, the complainant repeated its request for a budget amendment. It also informed the Commission that certain adjustments to the expenses incurred in the framework of the ongoing exhibition tour would have to be made at a later stage. It expected to be able to conclude the project successfully on the basis of amendments made to budget headings in accordance with Article I.3.4 of the Special Conditions [2] . In his reply of 24 October 2005, Mr A., the Deputy Head of Unit B.3 of the Commission's Directorate-General for Enlargement (DG Enlargement), who was the operational Task Manager responsible for the Agreement, agreed to the changes in the budget plan submitted by the complainant. The Commission noted that these changes did not affect the overall amount of costs foreseen under the Agreement and listed the changes for each budget heading.

**6.** On 10 July 2006, the complainant submitted a request for payment of the sum that it believed was still owed to it, namely, EUR 62 556.00 [3] . On 12 December 2006, Mr B., an official within the Financial Execution Unit E.3 of DG Enlargement, informed the complainant that it would be paid EUR 52 035.24. Mr B. suggested that the complainant could turn to another official, Mr C., the Financial Initiating Agent, if it had any questions. Payment of the accepted sum, that is, EUR 52 035.24, was made on 15 December 2006.

**7.** In a letter dated 18 January 2007, the complainant submitted that the Commission had agreed to an amended budget, but based its calculations on the original budget. It therefore asked the Commission to review its position and to pay the remaining EUR 10 520.76. The complainant also asked the Commission how to claim for interest on account of late payment.

**8.** On 6 February 2007, Mr D., Head of Unit E.3 within DG Enlargement, replied accepting the complainant's claim for interest, albeit only in relation to the amount which the Commission had accepted (EUR 52 035.24). As regards the complainant's request for a re-examination of the further claim, Mr D. explained that Article I.3.4 of the Special Conditions provided for the possibility to reallocate expenses between budget headings of up to 10% of the original amount per budget heading. Mr D. stressed that a reallocation in excess of 10% per budget heading was only possible after a formal amendment had been agreed between the contracting parties. In the case at hand, no such amendment had been agreed in Mr D.'s view. Therefore, the Commission had to reject any changes which went beyond the 10% threshold. Mr D. added that the complainant should contact Mr B. if it had any questions or comments.

**9.** On 18 February 2007, the complainant drew Mr D.'s attention to the fact that it did apply for an amendment and that, on 24 October 2005, Mr A. approved it.

**10.** On 29 March 2007, Mr B. informed the complainant that the Commission had decided to pay it a further amount of EUR 4 495.26. He stated that the Commission considered that it was not obliged to pay the full sum claimed on account of "pre-information missing on budget overflow (see Article I.3.4)". Mr B. further took the view that the complainant was not entitled to any interest on account of late payment, since the 85-day suspension of payment was due to the fact that the complainant changed account numbers without informing the Commission. The complainant was advised to turn to Mr C. should it have any questions or



comments.

**11.** On 23 April 2007, the complainant pointed out that, to its knowledge, when it requested an amendment to the Agreement, it also invoked Article I.3.4 of the Special Conditions. On 14 May 2007, Mr B. replied that there was no evidence to show that, after the new budget had been agreed, the complainant informed the Commission that there would be an overflow on a budget heading before such a change was made. The official also stated that the Financial Unit could do nothing more for the complainant. However, he advised it to discuss the matter with the Operational Unit to see whether it would accept the overflow as eligible expenses. Mr B. advised the complainant to turn to Mr F. in this regard.

**12.** The complainant telephoned Mr F. on 23 May 2007 and was told to turn to Ms E. Ms E. subsequently informed the complainant that she had left the unit and suggested that the complainant should turn to Ms G. However, in a telephone conversation with the complainant on 29 May 2007, Ms G., Head of the Communications Unit of DG Enlargement, stated that she could not deal with the matter. She thus referred the complainant back to Mr B. in the Financial Unit. However, in an e-mail dated 7 June 2007, Mr B. reiterated that there was nothing more the Financial Unit could do for the complainant and that it should turn to the Head of the Operational Unit, Ms G. He explained that if this unit agreed in writing to consider the overflow as eligible expenses, the Financial Unit might have grounds to reconsider its position.

**13.** In this e-mail of 7 June 2007, Mr B. also explained the approach followed by the Commission in this matter. It initially interpreted the complainant's letter requesting an amendment of the budget as the information needed to reallocate sums not exceeding 10% per budget heading between different budget headings under Article I.3.4 of the Special Conditions. It therefore only accepted changes up to 10% as regards each budget heading, since, in its view, there had been no formal amendment to the budget in accordance with Article II.13 of the General Conditions. Subsequently, however, when the complainant objected to this interpretation and drew the Commission's attention to the letter sent by Mr A., it was found that Mr A. had also accepted changes which went beyond 10% per budget heading. Mr B. noted that the Commission thereupon decided to treat this letter as "*a valid contract amendment*" and considered that the budget as set out in that letter had become the "*new budget*".

**14.** Mr B. stressed, however, that the expenses that were ultimately declared by the complainant differed from this "*new budget*". According to Article I.3.4 of the Special Conditions, differences of up to 10% per budget heading were only permissible if the Commission was informed in advance. However, given that the Commission had no proof that the complainant informed it in advance, it could only accept expenses up to the amounts foreseen in the new budget. The official further explained that it was not enough for a beneficiary simply to mention that it might have to make transfers between budget headings. Instead, clear figures had to be provided for the transfers and budget headings involved.

**15.** On 20 June 2007, Ms G., who had been contacted by the complainant, stated in an



internal e-mail sent to Mr B. and others that she did not have time to deal with this matter and, therefore, asked the Financial Unit for an opinion. Ms G. stated that if Mr. B. considered that this was a "*pretty classical case*", and that the request for additional payment could be met "*without running a big risk*", then they should await the return of Ms E., who was on holiday at the time, before taking a decision. If, on the other hand, Mr B. were to advise against making this payment, the complainant should be informed promptly and the file should be closed. Ms G.'s e-mail of 20 June 2007 was also sent to the complainant, presumably by mistake.

**16.** On 10 September 2007, yet another official, Mr H., explained to the complainant that the Commission could not pay more than what was foreseen in the (new) budget. According to the initial financial plan, budget heading A6 amounted to EUR 163 470. According to the new budget, it amounted to EUR 171 906.40. However, in the complainant's final request for payment, this heading amounted to EUR 180 254.04 [4], which was more than had been agreed.

**17.** According to Mr H., the complainant applied the 10% rule of Article I.3.4 at the time it requested an amendment to the budget. The Commission had accepted these changes and made its payment accordingly. However, the Commission could not accept any further claims because this would involve making a retroactive change which was not possible. Mr H. stressed that the complainant could not rely on Article I.3.4 twice. As regards the question of interest on account of late payment, Mr H. stated that this would only be paid in relation to sums which had actually been paid and reminded the complainant that it had two months to submit a request in this regard. He invited the complainant to turn to his Head of Unit (Mr D.) if it was not satisfied with this reply.

**18.** On 17 September 2007, the complainant stated that it failed to understand why the Commission did not distinguish between the formal amendment to the budget and reliance on Article I.3.4, but considered instead that it, that is, the complainant, had relied on the latter provision twice. In an e-mail dated 1 October 2007 and sent by Mr D., the Commission stated that its position, as expressed in prior correspondence, remained unchanged. The subject matter of the inquiry

**19.** Against this background, the complainant turned to the Ombudsman and made the following allegations:

1) Contrary to the Agreement, the Commission reduced the final payment with regard to the project by EUR 6 396.19. In particular, it failed to give reasons for its decision not to accept the complainant's reliance on Article I.3.4 of the Special Conditions, which it previously had accepted in writing.

2) The Commission failed properly to correspond with the complainant by repeatedly indicating different contact persons who provided it with contradictory information.

**20.** The complainant claimed that the Commission should pay it the outstanding amount of EUR 6 396.19, plus interest.

The inquiry



**21.** The complaint was submitted on 19 December 2008. On 22 December 2008, the Ombudsman opened an inquiry and asked the Commission for an opinion on it.

**22.** The Commission sent its opinion on 4 May 2009. On 12 May 2009, the Commission's opinion was forwarded to the complainant for observations. No observations were received from the complainant.

**23.** On 12 March 2010, the Ombudsman made a proposal for a friendly solution. The Commission replied to this proposal on 23 July 2010. The Commission's reply was forwarded to the complainant for observations, which it submitted on 5 August 2010. The Ombudsman's analysis and conclusions

## **A. Alleged wrongful reduction in the final payment, alleged failure to give reasons and related claim**

### Arguments presented to the Ombudsman

**24.** The complainant argued that, when it realised that some elements of the project would require more funds than initially foreseen, it submitted a reasoned application for an amendment of the Agreement to the competent Commission official. It did this within the relevant time-limits and the Commission accepted these changes, in writing, before the end of the project. The complainant argued that this acceptance brought a new budget into force.

**25.** By the time it submitted its final payment request, further changes had been made to the new budget. In its view, these changes remained below the 10% threshold permitted by Article I.3.4 of the Special Conditions. The complainant emphasised that it had announced these changes, and its wish to rely on Article I.3.4 of the Special Conditions, on 26 September 2005, in other words, in good time for the purposes of the said provision.

**26.** The complainant drew attention to the fact that the Commission initially stated that it applied Article I.3.4 of the Special Conditions when assessing the complainant's request for payment. However, when the Commission finally accepted that a new budget had been agreed in 2005, it distanced itself from this analysis and instead concluded that the complainant could not rely on Article I.3.4 of the Special Conditions. Referring to the Commission's letter of 10 September 2007, the complainant stated that it did not understand why the Commission chose not to separate the two changes to the budget that were made, but instead interpreted the two changes as both being based on Article I.3.4 of the Special Conditions.

**27.** In its opinion, the Commission submitted that the complainant, in its e-mail of 26 September 2005, merely informed it of its intention to reallocate certain amounts between subheadings without changing the total planned expenditure. This intention was, in principle, accepted by the Commission in its letter dated 24 October 2005. However, this proposal for change was never followed by a formal request for amendment. The Commission therefore never formally amended the Agreement.



**28.** Thus, when examining the final payment request that the complainant submitted on 10 July 2006, it was the initial budget that served as the basis for its calculations. The Commission argued, however, that it had accepted transfers between different budget headings of up to 10% per heading, without insisting on the requirement of prior notice for such transfers as provided by Article I.3.4 of the Special Conditions.

**29.** The Commission added that, when the complainant drew its attention to the 'new budget', it "*decided ex gratia to apply the proposed new budget*" and had thus analysed the situation again. However, in the course of this new analysis, it also applied the rule set out in Article I.3.4 of the Special Conditions, namely, that the complainant has to inform the Commission in advance of any transfers between budget headings made in accordance with that provision. The Commission argued that between 24 October 2005 and 10 July 2006 (when the complainant sent the final payment request), the complainant did not inform it of any such transfers. The complainant was therefore not entitled to rely on Article I.3.4 of the Special Conditions to justify these changes. The Commission therefore applied the figures set out in the 'new' budget without allowing any further modification and, accordingly, paid the complainant a further EUR 4 495.26.

**30.** The Commission submitted that it treated the letter of 24 October 2005 as an amendment to the Agreement and had thus "*exercised as much flexibility as was legally acceptable*". In its view, there was "*no further margin for manoeuvre*".

**31.** In relation to the complainant's request for interest on account of late payment, the Commission initially acknowledged the complainant's claim, albeit only in relation to the amount it considered to be due to the complainant, that is, EUR 52 035.24. However, it then turned out that the complainant had closed the bank account mentioned in the Agreement, but did not inform the Commission of this fact until 14 September 2006 [5]. Payment was therefore suspended. It thus appeared that the complainant did not have a right to receive interest on account of late payment.

**32.** The Commission added, however, that it had re-examined this point when preparing its opinion on the present complaint and concluded that the complainant was entitled to interest on account of late payment. It received the final payment claim on 14 July 2006, and made the final payment to the complainant on 15 December 2006, which took a total of 154 days. The maximum periods for review and payment were 45 days per category, and the payment was suspended for 40 days, due to the change in the complainant's account number. Accordingly, late payment interest was due for 24 days. The Commission stated that it had made a corresponding payment.

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

### Introductory remarks



**33.** The present case concerned a dispute over payment obligations arising from a contract.

**34.** The Ombudsman considers that the scope of the review he can carry out in cases concerning the interpretation of contractual obligations entered into by an institution is necessarily limited. In particular, the Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

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

## **As regards the final payment due under the Agreement**

**36.** In its opinion, the Commission stated that, at first, it reimbursed the complainant on the basis of the initial budget (since it had no records of an amendment to the Agreement), but allowed for reallocations between budget headings of up to 10%. However, upon closer examination, it appeared that this description was not entirely correct. This can be seen from Table 1 below, which sets out: (i) the amounts indicated in the Agreement (the 'old budget'); (ii) the revised figures accepted by Mr A. in his letter of 24 October 2005 (the 'new budget'); (iii) the costs declared by the complainant on 10 July 2006 (the 'actual costs'); and (iv) the figures on which the Commission based its calculations on the amounts due in its letter of 12 December 2006 (the 'first calculation').

Table 1: The first calculation [6]

### **Budget heading**

#### **Old budget**

#### **New budget**

#### **Actual costs**

#### **1 st calculation**

A1





74 137.70

72 316.92

65 948.46

65 948.46

A2

11 316.00

19 062.00

18 314.36

12 447.60

A3

23 210.00

8 850.00

8 105.83

8 105.83

A4

0.00

0.00

0.00

0.00

A5

0.00

0.00

0.00



0.00

A6

**163 470.00**

171 906.41

182 654.04

**171 906.41**

subtotal

272 133.70

272 135.33

275 022.69

258 408.30

A7

1 9 049.36

19 049.47

19 083.59

18 088.58

subtotal

291 183.06

291 184.80

294 106.28

276 496.88

71.61%

208 516.19

10



208 517.44

210 609.51

197 999.42

pre-financing

145 964.18

145 964.18

145 64.18

145 964.18

**Total**

**62 552.01**

**62 553.26**

**64 645.33**

**52 035.24**

**37.** The above figures show that the Commission accepted the actual costs claimed by the complainant as regards budget headings A1 and A3, which did not exceed the corresponding amounts set out in either the old or the new budget. No costs were claimed by the complainant as regards budget headings A4 and A5. These budget headings thus did not need to be considered in the inquiry. Budget heading A7 represents the so-called "indirect costs". According to Article I.3.2 of the General Conditions, the Commission's contribution was limited to 7% of the total eligible costs under budget headings A1 to A6. The fact that the Commission did not accept the full amounts of costs claimed by the complainant for these budget headings explained why the amount it calculated under budget heading A7 differed from the one put forward by the complainant. However, given that the costs the complainant could claim from the Commission under this budget heading were a direct result of the costs that were accepted under budget headings A1 to A6, the issue of budget heading A7 could be set aside at first.

**38.** In relation to budget heading A2, the Commission did indeed accept costs amounting to 10% more than what was foreseen in the old budget. However, it did not use the same approach as regards budget heading A6. If the Commission had calculated the amount for this budget heading in the same way as that for budget heading A2, it would have had to accept costs of EUR 179 817.00. The sum which the Commission actually accepted under this budget heading (EUR 171 906.41) corresponded instead to the relevant figure set out in the



new budget.

**39.** On the basis of the calculation set out in its letter of 12 December 2006, the Commission accepted a total of EUR 276 496.88 as eligible costs. Since its contribution to those costs was set by the Agreement at 71.61%, it thus considered that the complainant was entitled to receive a total of EUR 197 999.42. Subtracting the EUR 145 964.18 already paid by way of pre-financing, the Commission therefore calculated that the sum still due amounted to EUR 52 035.24.

**40.** The Ombudsman noted that, following the complainant's objections, the Commission decided to review its approach. Thus, on 29 March 2007, it decided, "*ex gratia*", to accept the new budget that was agreed between the complainant and Mr A. Table 2 shows the result of this calculation. For the sake of convenience, it also includes the figures already set out in Table 1.

Table 2: The second calculation [7]

**Budget heading**

**Old budget**

**New budget**

**Actual costs**

**1 st calculation**

**2 nd calculation**

A1

74 137.70

72 316.92

65 948.46

65 948.46

65 948.46

A2

11 316.00

19 062.00

12



18 314.36

12 447.60

**18 314.36**

A3

23 210.00

8 850.00

8 105.83

8 105.83

8 105.83

A4

0.00

0.00

0.00

0.00

0.00

A5

0.00

0.00

0.00

0.00

0.00

A6

163 470.00

13



171 906.41

182 654.04

171 906.41

171 906.41

subtotal

272 133.70

272 135.33

275 022.69

258 408.30

264 275.06

A7

19 049.36

19 049.47

19 083.59

18 088.58

18 499.25

subtotal

291 183.06

291 184.80

294 106.28

276 496.88

282 774.31

71.61%

14



208 516.19

208 517.44

210 609.51

197 999.42

202 494.68

pre-financing

145 964.18

145 964.18

145 964.18

145 964.18

145 964.18

**Total**

62 552.01

62 553.26

64 645.33

52 035.24

56 530.50

**Already paid**

52 035.24

**Left to pay**

4 495.26

**41.** As stated above, the Ombudsman had to examine whether the Commission had provided him with a reasonable and coherent account of the legal basis for its actions and why it believed that its view of the contractual position was justified.



**42.** For the reasons set out below, the Ombudsman took the view that the Commission failed to meet this standard in the present case.

**43.** As already mentioned, the Commission argued that when Mr A. accepted the figures put forward by the complainant on 25 August and 26 September 2005, the changes that were made were based on Article I.3.4 of the Special Conditions. This would have meant, however, that the relevant changes did not exceed 10% per budget heading. Whereas this condition was fulfilled for budget headings A1 and A6, this was clearly not the case for budget headings A2 (which increased from EUR 11 316.00 to EUR 19 062.00) and A3 (which decreased from EUR 23 210.00 to EUR 8 850.00). These changes could therefore only have been based on Article II.13 of the General Conditions. It also had to be noted that the new budget resulted in an increase of the maximum overall amount of eligible costs foreseen in the Agreement (from EUR 291 183.06 to EUR 291 184.80). Even though this increase was very small, it seemed clear that it could only be based on Article II.13 of the General Conditions.

**44.** It thus followed that the changes resulting in the new budget were not based on Article I.3.4 of the Special Conditions alone, but on both Article I.3.4 and Article II.13. The complainant referred to both of these provisions in its e-mails of 25 August and 26 September 2005.

**45.** The Ombudsman noted that the present case did not make it necessary for him to examine whether the formal requirements set out in Article II.13 of the General Conditions were respected on this occasion. It appeared true that no formal amendment was drawn up when the new budget was accepted. The Ombudsman noted, however, that the Commission official dealing with the matter at that time did not see any problems in accepting the new budget.

**46.** When first calculating the final amount due to the complainant, the Commission nevertheless disregarded the figures set out in the new budget, with the exception of the amount foreseen for budget heading A6. The fact that this figure appeared in the Commission's calculation showed that the figures set out in the new budget must have been known to the Commission at that time. The Ombudsman therefore considered it obvious that the approach adopted by the Commission during the first calculation was not consistent with the one it adopted when agreeing to the new budget. Besides, at that stage of the procedure, the complainant was confronted with conflicting views as to the legal basis of the new budget put forward by the various Commission officials it contacted.

**47.** The Ombudsman noted that, when calculating the final amount due to the complainant the second time, the Commission tried to remedy the error or errors it had previously made. On this occasion, the Commission did indeed accept as relevant all the amounts that it had already accepted when agreeing to the new budget.

**48.** However, on the occasion of the second calculation, the Commission took the view that Article I.3.4 of the Special Conditions could only be applied if the complainant had informed the Commission in advance of any transfers between budget headings made in accordance





with that provision. The Commission argued that this had not been the case and that the said provision could therefore not be applied.

**49.** The Ombudsman took the view that the Commission's insistence on the formal requirement of advance notice set out in Article I.3.4 of the Special Conditions could not be criticised as such. In its opinion, however, the Commission also stated that, when it first calculated the final amount due to the complainant, it accepted transfers between different budget headings of up to 10% per heading, without insisting on the requirement of prior notice for such transfers provided for by Article I.3.4 of the Special Conditions. The Ombudsman failed to understand how a requirement that the Commission, as its opinion confirmed, felt able to disregard when it first calculated the relevant amount could suddenly become of decisive importance when it calculated this amount a second time. As mentioned above, if the Commission had applied the approach it claimed to have adopted for the first calculation to all budget headings, it would have accepted costs for budget heading A6 of up to EUR 179 817.00 (instead of the EUR 171 906.41 it did accept).

**50.** For the sake of completeness, the Ombudsman considered it useful to address a further argument that was mentioned by one of the officials the complainant contacted. Even though this argument was not used by the Commission in its opinion, the Ombudsman considered that the confusion caused by the Commission's handling would be alleviated if more clarity were shed on this issue. He recalled that, in his e-mail of 10 September 2007, Mr H. stressed that the complainant could not rely on Article I.3.4 twice. The said provision does not explicitly address this issue. However, if Article I.3.4 permitted reallocations of up to 10% per budget heading, it appeared logical to assume that the number of reallocations is irrelevant, as long as the overall amount that is reallocated does not exceed 10% of the amount initially set out per budget heading.

**51.** In view of the above, the Ombudsman could not but conclude that the Commission failed to provide a coherent and reasonable account of how it dealt with the complainant's claim for payment.

**52.** The Ombudsman regretted that the above conclusion was reinforced by the manner in which the Commission dealt with the complainant's claim for interest. Even though the final result obtained by the Commission in this regard appeared to be, for the most part (though not entirely), reasonable (see paragraphs 57 seq. below), the fact that the Commission twice changed its opinion on whether or not such interest was due meant that its approach could hardly be called consistent.

**53.** In view of the above, the Ombudsman made a preliminary finding that the way in which the Commission calculated the payment due to the complainant in the present case could constitute maladministration. Therefore, in accordance with Article 3(5) of the Statute of the European Ombudsman, he made a friendly solution proposal, inviting it to reconsider the complainant's claim for payment.

**54.** The Ombudsman considered it useful to add that this proposal focused on the complainant's claim as regards budget heading A6. As mentioned above (see paragraph 38),



the Ombudsman considered that, if the Commission had accepted changes of up to 10% per budget heading in relation to heading A6 in the same way as it did in relation to the other budget headings, it could have accepted costs for this budget heading of up to EUR 179 817.00 (instead of the EUR 171 906.41 it did accept). Any change made as regards this budget heading would obviously have had a small impact on budget heading A7 as well.

**55.** It had to be underlined that any reallocations under Article I.3.4 of the Special Conditions could not have the effect of increasing the maximum overall amount of costs that the Commission accepted as being eligible in the new budget. The Ombudsman noted that the amount of costs declared by the complainant appeared to exceed this threshold slightly and that the Commission would clearly be entitled to disregard any such excess costs.

**56.** The Ombudsman gathered from the information submitted to him that the complainant carried out the project successfully. In fact, the unexpected success of the exhibition that formed part of the project appeared to have been the main reason behind the complainant's reallocations between budget headings. The Ombudsman considered that the success of the project could usefully be taken into consideration by the Commission when deciding on how to deal with his proposal for a friendly solution.

## **As regards interest on account of late payment**

**57.** The Ombudsman noted that 154 days lapsed between 14 July 2006, when the Commission received the complainant's payment request, and 15 December 2006, when the Commission made a payment of EUR 52 035.24. The Commission stated that it had 45 days to review the payment request and 45 days to make the payment. These 90 days should therefore be disregarded. This appeared to be in conformity with the provisions of the Agreement.

**58.** The Commission further argued that a delay of 40 days was due to the fact that the complainant changed account numbers. It emphasised that this period should therefore also be disregarded. As a result, there was an effective delay of 24 days, for which interest was due and which it had duly paid.

**59.** From the documents submitted to the Ombudsman, it emerged that the complainant did indeed change bank accounts without informing the Commission. The Commission could not be blamed for any delay in its payment which was due to problems caused by the complainant. There was no clear evidence that the delay caused by the complainant did in fact amount to 40 days. However, the complainant had not challenged the Commission's explanations concerning this aspect of the case. The Ombudsman therefore considered that his examination should be based on the undisputed information provided by the Commission. On the basis of this information, the delay for which interest was due did indeed amount to 24 days.

**60.** The Ombudsman therefore reached the conclusion that there was no maladministration in relation to the Commission's calculation of late payment interest on the sum of EUR 52



035.24.

**61.** However, the situation was different as regards the additional payment of EUR 4 495.26 made on 29 March 2007. As was shown above, the Commission proceeded to make this payment with a view to correcting the error, or errors, it made when first calculating the sum due to the complainant. The Ombudsman therefore did not share the Commission's view that the additional payment constituted an *ex gratia* payment. If the Commission had, as it ought to have done, respected the new budget when it first calculated the sum due to the complainant, the complainant should have received the additional payment at the same time the payment of EUR 52 035.24 was made. Interest on account of late payment would thus also have been due as regards the additional payment of EUR 4 495.26. As regards this additional payment, further interest would have accrued between 15 December 2006 and 29 March 2007.

**62.** The Ombudsman noted, however, that the resulting amount of interest would be relatively small. He took the view that this aspect of the case would no longer need to be pursued if the Commission were to accept his proposal for a friendly solution.

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

**63.** In its reply to the friendly solution proposal, the Commission informed the Ombudsman that it accepted his proposal. It had therefore decided to accept the costs claimed by the complainant in its final report submitted on 14 July 2006, up to the maximum amount foreseen in the grant agreement, namely, an amount of EUR 6 025.59. Further, the Commission accepted that its second payment (made on 29 March 2007), as well as the third (which it made in response to the Ombudsman's friendly solution proposal), were due at the same time as the first payment, and that interest on account of late payment was therefore due, as requested by the complainant.

**64.** The complainant informed the Ombudsman that it had received two payments of EUR 6 025.59 and EUR 1 568.47, respectively, and it thanked the Ombudsman for his assistance in this matter.

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

**65.** In light of the parties' submissions, the Ombudsman concludes that a friendly solution has been brought about. The Ombudsman applauds the Commission's willingness to conduct a thorough review of the matter, and its acceptance of his friendly solution proposal.

## **B. Allegation of failure to correspond with the**



complainant in a proper and consistent manner

## Arguments presented to the Ombudsman

**66.** The complainant alleged that, throughout the five months it communicated with the Commission with a view to resolving the disagreement on the final amount to be paid, it was directed to seven different contact persons in different units. Some of the officials concerned were not familiar with the issue, and some gave information or advice which contradicted statements previously made.

**67.** In its opinion, the Commission recalled that the service in charge of dealing with matters relating to the Agreement was DG Enlargement. The Commission submitted that the information given to the complainant reflected the Commission's position at the relevant time and had nothing to do with the individual official providing that information.

## The Ombudsman's assessment

**68.** The Ombudsman considered it obvious that an administration should provide citizens with clear and consistent advice.

**69.** In the present case, this was patently not the case. Given that the lack of consistency in the Commission's position has been discussed above, there is no need to go into further details in relation to this matter.

**70.** The Ombudsman considers, however, that this aspect of the case is of secondary importance for the complainant. Given that the Commission has accepted his proposal for a friendly solution, he takes the view that this aspect of the case no longer needs to be pursued.

## C. Conclusions

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

**A friendly solution has been achieved in this case.**

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

P. Nikiforos Diamandouros

Done in Strasbourg on 22 November 2010



[1] According to Article I.3.2 of the Special Conditions attached to the Agreement. In fact, 71.61% of 291,183.06 is 208,516.19.

[2] In the original German: "Da es in der gegenwärtigen Ausstellungstournee zu akuten Änderungen von Ausgaben kommen muss, werden wir mit den geänderten Kostenstellen im Rahmen des Artikels I.3.4 das Projekt erfolgreich abschließen können."

[3] The Commission had already made some payments to pre-finance the project before its conclusion.

[4] This figure was based on calculations made by Mr H., who appears to have made a typographical error. The sum claimed by the complainant was, in fact, EUR 182 654.04.

[5] The Commission's opinion erroneously refers to this letter as having been sent on 14 September 2007.

[6] Amounts in EUR.

[7] Amounts in EUR.