

Cinneadh i gcás 703/2010/MHZ - Moilleanna i láimhseáil deontais taighde tairgthe ag an gCoimisiún le hOllscoil Polannach

Cinneadh

Cás 703/2010/MHZ - Tosaithe an 06/05/2010 - Moladh faoi 16/06/2011 - Cinneadh an 23/11/2011 - Institiúid ábhartha An Coimisiún Eorpach (Dréachtmholadh glactha go páirteach ag an institiúid) |

Rinne an gearánach tionscadal taighde a chomhordú faoi chumhdach deontais AE bronnta ag an gCoimisiún ar Ollscoil Polannach. Le linn cur i gcrích an tionscadail, chuir an Coimisiún moill ar fhaomhadh tuarascálacha tréimhsiúla na hOllscoile. Lena chois sin, tar éis comhlíonta rathúil an tionscadail agus tar éis don Ollscoil a tuarascáil dheiridh agus costais iniúchta a chur faoi bhráid an Choimisiúin, costais a bhí cothrom leis na méideanna réamhíoctha ag an gCoimisiún, rinne an Coimisiún réamhíocaíocht amháin eile. D'áitigh sé nach gciallaíonn réamh-mhaoiniú maoiniú roimh thabhu na gcostas ach ranníocaíocht sula dtugann an Coimisiún faomhadh i leith costais thabhaithe. Níor aontaigh an gearánach agus chuaigh sé i gcomhairle an Ombudsman, ag líomhnú go ndearna an Coimisiún neamhrialtachtaí riaracháin éagsúla nuair a bhí an deontas á láimhseáil.

Bhain an tOmbudsman de thátal as go raibh dá chás drochriaracháin i gceist. Bhain ceann acu le moill an Choimisiúin agus, go háirithe, an réamh-mhaoiniú déanach dá chuid ag tráth nach bhféadfaí na méideanna íoctha a úsáid níos mó don tionscadal, agus bhain an ceann eile leis an teip maidir leis an ngearánach, mar chomhordaitheoir an tionscadail, a chur ar an eolas i dtaobh comhfhreagras díreach an Choimisiúin le Reachtaire na hOllscoile. Rinne an tOmbudsman dréachtmholadh ag sonrú gur cheart don Choimisiún litir a sheoladh go Reachtaire na hOllscoile inar cheart dó leithscéal a ghabháil leis an ngearánach agus leis an Ollscoil as ucht a mhoilleanna, go háirithe maidir leis an tríú íocaíocht réamh-mhaoinithe déanach agus 'gan mhaith', agus inar cheart dó a shonrú nach raibh tionchar dá laghad ag obair an ghearánaigh mar Chomhordaitheoir Tionscadail ar mhoilleanna an Choimisiúin. Lena chois sin shonraigh an tOmbudsman gur cheart go dtabharfadh an Coimisiún aitheantas, sa litir, d'obair an ghearánaigh agus na hOllscoile maidir le bheith ábalta an Tionscadal a chríochnú le torthaí fiormhaithe ag úsáid níos lú maoinithe AE ná mar a réamh-mheasadh ar dtús. Ghlac an Coimisiún leis an gcuid rithábachtach de dhréachtmholadh an Ombudsman agus sheol sé litir chuig an Reachtaire. Dhún an tOmbudsman an cás dá réir sin.



The background to the complaint

1. The complainant, a Polish professor, is the Head of the Department of Genetics at the Polish University (the 'University').
2. On 25 June 2004, the University entered into a contract [1] with the Commission (the 'Contract'), on the basis of which the latter awarded it the Marie Curie Host Fellowships grant (the 'Grant') for a project entitled " *Genomic approaches for crop improvement* " (the 'Project'). The complainant was designated to act as Project Coordinator on the behalf of the University.
3. The Contract outlined that the maximum EU contribution to the Project would be EUR 336 677. Detailed payment modalities were provided in the Contract's second Annex, entitled 'the General Conditions'.
4. The Contract stated that the Project would start on 1 June 2004 and run until 31 May 2008, a total of 48 months. The Project was divided into four reporting periods with the following durations: P1, ending on 30 May 2005 (months 1-12); P2, ending on 30 May 2006 (months 13-24); P3, ending on 30 May 2007 (months 25-36) and P4, ending on 30 May 2008 (months 37-48).
5. In accordance with Articles 4 and 5 of the Contract, the University had to submit to the Commission a report for each period. This had to occur within 45 days of the respective period's end date. Article 6.1.b of the Contract, in conjunction with Article II.7.2.b of the General Conditions, foresaw that the University had to submit a complementary report if it needed additional pre-financing not foreseen at the end of the above periods. The Project Coordinator had to submit the reports online using the Commission's SESAM system. He also had to print the reports and send them by post.
6. On 4 August 2004, the Commission paid the University the first pre-financing for the Project (EUR 95 079).
7. On 15 July 2005, the complainant submitted the first report (Report P1) to the Commission, which the latter approved on 18 October 2005. Given that the costs claimed were less than 70% of the first pre-financing, in accordance with Article 6.1.b.ii of the Contract [2] , no payment was made by the Commission in relation to period P1.
8. On 15 November 2005, the Commission received the University's complementary reports. On 22 December 2005, it approved them and paid the second pre-financing of EUR 107 322.64 because the University had in the meantime spent 70% of the first pre-financing.
9. On 15 July 2006, the complainant submitted the report on the second reporting period (Report P2), which was approved by the Commission on 10 October 2006. Since the costs claimed were less than 70% of the second pre-financing, no payment was made in relation to period P2.



10. On 12 and 15 July 2007, the complainant submitted a report on the third phase of the Project (Report P3).
11. On 18 March 2008, the Commission requested the complainant to make some corrections in Report P3.
12. On 16 June 2008, the complainant submitted the completed version of Report P3. The Commission approved Report P3 on 17 June 2008.
13. In the meantime, the Project ended on 31 May 2008. The University thus ordered an audit covering the entire duration of the Project (from 1 June 2004 to 31 May 2008) [3] .
14. The auditor issued the final conclusions on 12 July 2008 (the 'Audit Certificate'). In the certificate, the auditor referred to the Commission's two financial contributions (the first and second pre-financing, amounting to EUR 202 897.46). The auditor certified that the University spent EUR 201 898 on the entire Project.
15. On 15 July 2008, the complainant submitted the report concerning period 4 (Report P4), the Final Report and the above Audit Certificate via SESAM. On the same day, it sent these reports and the Audit Certificate by post. The reports and the Audit were received by the Commission on 23 July 2008.
16. On 5 September 2008, the Commission asked the complainant by e-mail to introduce some corrections in Report P4 and the Final Report. In its email, it referred to the Audit Certificate. The complainant sent the corrected reports on 15 September 2008.
17. On 1 December 2008, the Commission transferred to the University the sum of EUR 66 940.14. The Commission considered this payment to be the third pre-financing of the Project, which was based on Report P3.
18. On 6 January 2009, the Commission approved Report P4 and the Final Report.
19. In the University's view, the amount of EUR 66 940.14, paid by the Commission into the University's account on 1 December 2008, constituted the final payment of the Grant. As a result, in March 2009, the University spent this amount for its own research not related to the Project.
20. On 18 June 2009, the Commission asked the auditor for clarifications concerning her fees, which she provided on 21 June 2009.
21. On 15 July 2009, the Commission informed the rector of the University of its intention to start a recovery procedure for the EUR 66 940.14 paid on 1 December 2008. A copy of the Commission's letter was sent to the complainant by post [4] . The Commission asked the University to return the above payment " *because the amount [spent by the University on the Project] justified and accepted was less than the pre-financing.* "



22. Acting on behalf of the University, the complainant challenged the above decision in a number of subsequent letters sent to the Commission (dated 17 July, 30 July, 31 July, 11 August, 29 September and 3 November 2009).

23. The complainant's letter dated 17 July 2009 outlined his consideration that the third pre-financing made in December 2008 was the final payment. The Commission replied on 28 July 2009 and 11 September 2009. In these replies, it stated that the complainant was wrong to consider that the payment made on 1 December 2008 was the final payment. This was because *" the denomination pre-financing does not mean a financing prior to the incurring of costs but a contribution prior to the approval by the Commission of costs incurred. The third period report P3 was approved by the European Commission on 17 June 2008. This third pre-financing of EUR 66 940.14 paid on 1 December 2008 was calculated taking into account data declared in the third periodic report and not in the final report which [the complainant] had also submitted in the meantime (23 June 2008). The latter was only approved on 9 January 2009. "* [5] The Commission further argued that, on the basis of the Final Report, it emerged that the costs claimed by the University and certified by the auditor amounted to EUR 201 989.18, which was less than all the Commission's contributions. The Commission accepted to cover the costs of the audit (EUR 3606.56). However, the Commission had still paid the University EUR 64 332.82 too much.

24. On 11 August 2009, the complainant addressed letters to Commissioner Potocnik and the Director-General of DG Research. He complained about the overall financial management of the Project by the Commission's services.

25. In its letter dated 11 September 2009, the Commission regretted the misunderstanding which occurred in its contacts with the complainant and admitted that, to *" a certain degree "*, this was caused by delays on the Commission's part regarding the scientific and administrative processing of Report P3 and the Final Report. The Commission stated that the first delay occurred *" in August 2007, after the complainant had submitted the Report P3 "* and subsequently in mid-March 2008, when the Commission first requested the complainant to make corrections.

26. In the same letter, the Commission further explained that, after the operational unit received Report P4 and the Final Report at the end of July 2008, which were completed in September 2008, the scientific officer of this operational unit requested an external review of the Final Report (a standard practice for Marie Curie Host Fellowships). This review was completed at the end of November 2008, and evaluated the Project as *" good to excellent "*. In January 2009, the Project was transferred from the operational unit to the Administration and Finance Unit. After analysing the Final Report, the Administration and Finance Unit established that the costs claimed by University and certified by the auditor, were less than the Commission's contributions. The Commission concluded that *" in any case, if you believed that the payment made by the Commission on the 26 November 2008 and which it transferred to you in the beginning of December 2008, was the final payment and not the pre-financing corresponding to the 3rd Reporting period, you should have contacted the Commission and returned the amount*



received in excess, since the EC contribution cannot under any circumstances result in a profit for the contractors. Only when the final payment was processed did the Commission realise that there had been an overpayment. "

27. The complainant reacted to the Commission's above views on 29 September 2009. He reiterated that, in its replies, the Commission did not take a position on his statement regarding the third pre-financing that, pursuant to the Contract, the third pre-financing could not relate to Report P3 because during that project the complainant did not spend 70% of the money received. Moreover, there was no request from the complainant for additional payments. The complainant agreed that EU grants should not be used for profit by their beneficiaries. However, the grants should not cause losses as well. Given that the Commission failed to inform the complainant what the payment of 1 December 2008 actually was, this money was used by the University for research. Paying this money back would result in the closure of the University's Department of Genetics. The Commission also caused harm to the complainant's and his department's reputation because it informed the Rector of the University (who informed the Dean of the faculty) that there had been "*irregularities in the Project's implementation.*"

28. In its reply of 23 October 2009, the Commission stated that it did not understand how it could have created any legitimate expectations on the part of the University that it was entitled to spend EUR 269 341.60. The University claimed and audited costs amounting to EUR 202 897.46 and the Commission approved EUR 205 504.74 (the above costs plus the costs of auditing).

29. In its further reply of 19 November 2009 to the complainant's further letter dated 3 November 2009, the Commission stated that it would not engage in further correspondence with the complainant concerning the grant. It stated that the debit note for the recovery of the overpayment of EUR 64 322.82 would be sent to the University's legal representative. The complainant then turned to the Ombudsman.

The subject matter of the inquiry

30. The Ombudsman opened an inquiry into the following allegations and claims:

Allegations

1. The Commission committed a series of administrative irregularities when handling the grant.
2. The Commission's online reporting system SESAM is defective.

Claims

1. The Commission should admit and apologise for its errors.



2. The Commission should pay the complainant compensation for damages amounting to EUR 100 000.

The inquiry

31. The complaint was submitted on 12 March 2010. The Ombudsman forwarded it to the Commission on 6 May 2010, with a request for an opinion by 31 August 2010. The Commission sent both its opinion and its translation into Polish on 25 October 2010, which was forwarded to the complainant with an invitation to make observations. The complainant sent his observations on 14 January 2011. On 16 June 2011, the Ombudsman issued his draft recommendation to the Commission. On 27 September 2011, the Commission replied to the draft recommendation. The translation of that reply into Polish was forwarded to the complainant with an invitation to submit observations by 31 October 2011. The complainant did not submit observations.

The Ombudsman's analysis and conclusions

A. Alleged administrative irregularities when handling the grant and related claims

Arguments presented to the Ombudsman

32. In support of his allegation, the complainant submitted a series of arguments in his complaint. He first argued that the Commission made the " *third pre-financing* " payment even though the University (i) had not complied with the contractual requirement of having spent 70% of the Commission's prior contributions, and (ii) had not submitted any complementary reports to show such expenditure. In addition, the Commission made the third pre-financing payment after the Project had ended and the Final Report had been submitted. This made it impossible for the University to spend this contribution on the Project. As a result, the Commission wrongly induced the complainant to believe that the third pre-financing payment was the last payment. (*First argument*)

33. He also argued that the Commission failed to comply with contractual deadlines for assessing and approving the third and fourth periodic reports (Report P3 and Report P4) and the Final Report. (*Second argument*)

34. Moreover, the Commission failed to inform the complainant in a timely and accurate manner that Report P3 had been approved and that, based on this report, the third pre-financing payment would be made. The complainant found the Commission's interpretation of pre-financing misleading. In his view, Article II.1 point 16 and Article II.21 of the General Conditions to the Contract define the pre-financing as the contribution paid in order to allow the



Project to continue. (*Third argument*)

35. The complainant also argued that the Commission entered into direct contacts with the auditor and Rector of the University, whereas, in accordance with Article 9.1 and 2 of the Contract, it should have first liaised with the Project Coordinator (the complainant) regarding all project related matters. (*Fourth argument*)

36. Finally, the Commission failed properly to reply to the complainant's letters dated 11 August 2009 to DG Research and to Commissioner Potocnik. It also did not reply to the complaint he sent to the following e-mail address: sg-plaintes@ec.europa.eu. He pointed out that the Commission failed to inform him that the external experts had assessed the Final Report as "*good to excellent*". (*Fifth argument*)

37. The complainant claimed damages and "*official*" apologies. In support of his claim for financial compensation, the complainant argued that the Commission's third pre-financing payment obliged him to spend eight months corresponding with the institution and to study the Commission's financial rules instead of carrying out scientific work, writing academic texts – for which he could earn additional money – and applying for other grants.

38. He further argued that if he had been aware earlier that the pre-financing relating to Report P3 was possible, his department could have spent this money on the Project, claimed that money in accordance with the Contract, and thus have avoided its current financial difficulties. The University wished to submit a complementary report after period P3 to show that, in the meantime, it had spent 70% of the EU contribution. However, it could not do so because the Commission delayed its assessment and approval of Report P3. Given that the University could not finance the Project using its own funds, it had to limit its expenditure on the Project to the sums that were prepaid by the Commission.

39. Moreover, the Commission's direct contacts with the Rector of the University put into doubt the complainant's reputation as Project Coordinator.

40. In its opinion , the Commission first stated that its third pre-financing payment was accompanied by a message from the Commission's financial system (ABAC). This message indicated the University, the name of the complainant, the contract number and the project acronym. It also outlined that the payment concerned Report P3. The Commission admitted, however, that, as claimed by the complainant, he may not have received this message. DG Budget informed DG RTD that, depending on banking practices in the different Member States, such accompanying messages may be truncated. Consequently, the Commission has introduced a corrective measure and the service in charge now routinely sends an e-mail to the project coordinator when it makes each pre-financing payment. Nevertheless, the Commission observed, in this respect, that the complainant was in constant contact with the Project and Financial officers of the Commission and "*could easily have asked about the progress of the file.*"

41. As regards the assessment of the Final Report, the Commission stated that the external



review is a standard procedure for all Marie Curie Host Fellowships, which allows the Commission to assess the research progress during the entire lifespan of the contract. The review assessed the Final Report as "*good to excellent*" which was expressed in the Commission internal documents (Project Assessment Report and Project Review Report). This information is kept for the internal assessment of the programme and therefore not provided to the coordinator unless he/she requests it.

42. As regards the difference between the pre-financing and the final payment, the Commission explained that the term "*pre-financing*" is defined by the contractual provisions, namely, Article II.1.16 of the General Conditions to the Contract. This definition is further explained in the FP6 Guide to Financial Issues (pages 81 and 82.). "*[It] indeed targets any partial contribution to allow the project to continue, paid in advance - but by reference to justification of the costs incurred during the previous period, not by reference to the costs to be incurred [during the further phase]*". Article 6.1 d of the Contract defines the term 'final payment' as "*[a] ny payment at the end of a reporting period accompanied by an audit certificate shall be considered as final.*" The final payment is thus the payment for the costs actually incurred. The pre-financing belongs to the Commission and may be considered as a final payment only when the costs claimed are previously approved by the Commission. The pre-financing is used by the contractors but "*remains the property of the Commission.*" The pre-financing becomes the property of the contractor only for the amount of the pre-financing which is covered by the costs claimed by the contractor. These costs have to be certified by the auditor and accepted by the Commission.

43. The Commission underlined, with respect to the above explanation, that the complainant had attended the training sessions it organised in Warsaw and in Cracow in May 2007. This training focused on financial issues, such as the difference between the pre-financing and payments made following the justification of costs. Furthermore, in the transfer of Knowledge Scheme, specific funds are foreseen to enable the beneficiaries to hire specialists to follow up and supervise the financial issues. However, the University only used 10% of these funds.

44. The Commission further argued that its contractors/grant beneficiaries are responsible for checking that its payment under the Contract is correct. If the payment is higher than the costs incurred, they should contact the Commission and return the amount received in surplus. "*The EC contribution cannot in any circumstances produce a profit for the contractors.*"

45. The Commission clarified that, even if the University did not spend 70% of the Commission's earlier pre-financing, the third pre-financing was justified. This was because of the relevant change in the EC Implementing Rules of the Financial Regulation (Article 180.1), which was introduced in the meantime. On 3 December 2007, all coordinators of the Marie Curie FP6 (including the complainant) were informed about this change.

46. The Commission regretted that the third pre-financing payment and its handling of Reports P3 and P4 and the Final Report were subject to administrative delays, notably due to "*the administrative overload associated with the setting up of the Research Executive Agency (REA).*" The Commission apologised for these delays in its opinion and recalled that it had already



apologised in a letter to the complainant dated 11 September 2009 and signed by the Director of DG Research.

47. The Commission further underlined that each payment corresponds to different reporting periods and is processed separately. Despite the fact that the Commission had received the report for period P4 (Report P4) before it made the payment (following its approval of Report P3) for the previous period P3, it proceeded with the latter payment " *in order not to penalise [the University], as in most of the cases the balance is positive.* " Only after the analysis of Reports P4 and the Final Report did it become clear that the total contribution paid by the Commission, which should be equal to the actual costs claimed by the University, certified by the auditor and approved by the Commission, was higher than the total amount of pre-financing which the Commission had already transferred to the University. This difference amounted to EUR 63 836.86. Indeed, the claimed costs for the first period amounted to EUR 47 110; for the second period: EUR 51 967.27; for the third period: EUR 32 450.87; and for the fourth period: EUR 73 976.60 [6] , in total: EUR 205 504.74. The total pre-financing paid by the Commission was EUR 269 341.60. At the beginning of the Project, the Commission paid EUR 95 079; following the submission of the complementary report to Report P2, it paid EUR 107 322.46 and finally, as the third pre-financing, it paid EUR 66 940.14. As a result, a recovery order was made for the amount of EUR 63 836.86, plus interest of EUR 495.96.

48. In accordance with the Contract, the Commission addressed its correspondence concerning the Contract to the complainant. On 15 July 2009, it sent a letter to the former Rector of the University (who was the latter's legal representative when signing the Contract) to inform him of its intention to recover the amount due. The Commission sent a copy of this letter to the complainant. On 28 July 2009, the Commission sent a further letter to the complainant and a copy to the new Rector of the University. The Commission emphasised that it has never questioned the complainant's reputation as a coordinator.

49. The Commission stated that it had replied to all the complainant's letters and e-mails, and provided copies of its replies together with the opinion. As regards the complaint sent to e-mail address sg-plaintes@ec.europa.eu, the Commission checked its records and confirmed that it did not receive this e-mail. Indeed, the copy of the complaint, submitted together with the complaint to the Ombudsman and forwarded to the Commission, does not show the date and the time of dispatch in the relevant field.

50. The Commission concluded by referring to Article II.3 of the General Conditions of the Contract, which provides that " *the coordinator shall (b) ensure the efficient implementation of the project and take all necessary and reasonable measures to ensure that the project is carried out in accordance with the terms and conditions of this contract ...* " The Project Coordinator is responsible for the management of the funds once the contract is signed. He/she therefore has an obligation to be familiar with the relevant financial rules applicable to the project in question " *before and the duration of the project, in order to avoid problems at its end.* " He/she has an obligation to learn the Commission's rules relating to the project and the Commission facilitates these tasks by organising training and providing special funds to hire a professional project manager. The financial difficulties to which the complainant referred in his complaint derived



from the fact that he did not reconcile the costs incurred with the funds received. In accordance with the Contract, all monies paid by the Commission in excess need to be recovered.

51. The Commission went on to add in its opinion (Polish version) that it " *does not consider that it is justified to pay the complainant compensation since the complainant has EUR 63 836, 86 in its possession since December 2008 which belongs to the Commission.* "

52. In his observations , the complainant maintained all his original arguments and claims. He referred to the Commission's statement in paragraph 51, in which the Polish version of the opinion sent to him read: " *the complainant has EUR 63 836, 86 in his possession since December 2008* " (emphasis added). He found that the Commission made a serious and unfounded accusation against him, while it is clear that there were no legal possibilities for the complainant as coordinator to dispose of the Grant awarded to the University. Moreover, the complainant had already seen relevant documents showing that, on 9 December 2009, the University had paid the Commission back the amount of EUR 64 332.82 in two lump sums (EUR 55 307.33 and then EUR 9 025.49.)

53. Furthermore, the complainant found it unfair that the Commission implied that he lacked knowledge of the relevant financial rules and was incapable of reconciling the costs incurred with the funds received. In this respect, he recalled that the auditor did not find any irregularities. " *His problems* " started only after the Commission had unduly made the third pre-financing payment. He emphasised that the Commission itself assessed the Project he coordinated as being " *good to excellent* . "

The Ombudsman's assessment leading to a draft recommendation

The complainant has submitted five arguments in relation to his first allegation:

As regards the complainant's fourth argument that the Commission violated the Contract by communicating with others instead of him

54. Article 9.1 of the Contract provides that " *any communication foreseen by the Contract shall ... be submitted ... to the [complainant's address]*".

55. In his original complaint, the complainant argued that the Commission failed to respect this provision by sending: (i) a letter about the recovery order to the Rector of the University on 15 July 2009, and (ii) an e-mail to the Auditor asking her for an explanation about the Audit Certificate on 18 June 2009. The complainant added in his observations that, on 26 November 2009, the Commission sent the debit note to the Rector of the University, but did not send him a copy.

56. On the one hand, it appears that Article 9.1 of the Contract does not apply to the above



correspondence because it was sent after the final implementation date of the Contract. On the other hand, however, Article 2 of the Contract provides that the provisions set out in Article II.7 of the General Conditions apply also after the final implementation date. Article II.7 of the General Conditions establishes an obligation **for the contractors** to submit to the Commission reports and deliverables in accordance with Article 9.1 of the Contract. The Ombudsman considers that, even if Article II.7 of the General Conditions (and thus Article 9.1 of the Contract) applies only to the contractors, it would have been fair for the Commission to send its correspondence to the complainant's address (as provided in Article 9.1 of the Contract) also after the Contract had been completed. Ultimately, Article II.7 of the General Conditions was not individually negotiated and it appears that its application only to the contractors caused a significant imbalance in the parties' obligations arising under the Contract [7] .

57. Against the above background, the Ombudsman noted that the University, represented by its Rector, was the Commission's contractor. For that reason, it was reasonable to address letters to the Rector to inform him about the recovery order. Similarly, it was reasonable to address the auditor directly as regards the Audit Certificate on the Project she had audited. In the Ombudsman's view, by sending a copy of the above letters to the complainant, the Commission acted fairly.

58. In his observations, the complainant argued that the Commission did not send him the correspondence it sent to the Rector of the University on 26 November 2009. The Ombudsman did not consider it useful to ask the Commission to comment on this new alleged fact. It is clear that the Commission wrote to the Rector following its decision to proceed with the recovery order, which was communicated to the complainant on 19 November 2009. This decision read as follows: "*I consider that the facts concerning the dossier are now well established and therefore I will not engage in further correspondence with you on this. To proceed with the recovery of the overpayment of 64 322.82 EUR, I have instructed my services to directly send the required debit note to the legal representative of the University.*"

59. In light of his findings in paragraphs 56 and 57, the Ombudsman took the view that, by failing to send to the complainant a copy of its letter dated 26 November 2009 to the Rector of the University, the Commission acted unfairly. This was a first instance of maladministration.

As regards the complainant's fifth argument concerning his correspondence with the Commission

60. The Ombudsman noted that, along with its opinion, the Commission submitted copies of its replies to the complainant's letters. These included its reply of 28 July 2009 to the complainant's letter dated 17 July 2009; its reply of 23 October 2009 to the complainant's letter dated 29 September 2009; its reply of 19 November 2009 to the complainant's letter dated 3 November 2009; and its reply of 11 September 2009 to the complainant's letters of 11 August 2009 addressed on the same date to both Commissioner Potocnik and DG Research [8] . It also explained why it could not find the correspondence allegedly sent by the complainant to the e-mail address of the Commission's Secretariat-General (paragraph 49 above). This



explanation is reasonable. In his observations, the complainant did not provide any clear evidence to show the time and date of when the e-mail in question was sent. The Ombudsman also considered reasonable the Commission's explanation concerning why it did not inform the complainant that the external experts assessed the Final Report as "*good to excellent*" (paragraph 41 above).

61. In his observations, the complainant clarified his fifth argument by stating that the content of the Commission's replies was, in his view, unsatisfactory. Since the subject of the complaint encompasses the content of these letters, and the Ombudsman's assessment leading to a draft recommendation encompasses the substantive aspects of those answers, the Ombudsman considered that no further inquiries are needed into the complainant's reformulated argument.

As regards the complainant's first, second and third arguments concerning the Commission's alleged delays and its third pre-financing payment

62. The Ombudsman pointed out that the complainant submitted Report P3 on 12 and 15 July 2007, and the Commission reacted to that report for the first time (by requesting amendments) on 18 March 2008. Point II.8.2 of Annex II "General conditions" to the Contract, which forms an integral part thereof, provides, however, that "*the Commission undertakes to evaluate [periodic] project activity reports ... within 45 days of receipt thereof.*" It goes without saying that the Commission exceeded the deadline of 45 days by taking approximately eight months to evaluate Report P3.

63. Moreover, this delay in evaluating Report P3 had a domino effect. First, the complainant could not introduce the required changes and submit the duly amended Report P3 until 16 June 2008. Second, the Commission approved the Report P3 only on 17 July 2008, that is, one year after its initial submission and receipt. Third, the Commission only paid the "*third pre-financing*" in relation to Report P3 on 1 December 2008 [9]. This was because the pre-financing could be made only "*upon approval of the relevant reports referred to in Article II.7 of Annex II (General conditions) to the contract.*" [10]

64. Furthermore, the Commission received the amended versions of Report P4 and the Final Report on 15 September 2008, but approved them only on 6 January 2009. This shows that the Commission again failed to comply with the 45-day contractual deadline to evaluate the reports.

65. The Commission justifies these delays by its own reorganisation ("*the administrative overload associated with the setting up of the Research Executive Agency*"). Such administrative convenience cannot, however, suffice to justify a delay of eight months in dealing with the complainant's first version of Report P3. The Ombudsman observes that the complainant, a scientist, was dealing with the management of the Grant on his own (as well as his scientific work), while the Commission had numerous specialised services carrying out its tasks. The Commission has sufficient means and resources at its disposal to ensure that an internal administrative reorganisation does not affect the interests of its contractors and grant



beneficiaries.

66. In light of the above, the Ombudsman took the view that the Commission's very serious and unjustified delays, in particular its delay in dealing with Report P3 , which, in turn, caused a delay in the payment of the third pre-financing, were in breach of its contractual obligations [11]

67. Moreover, everything indicates that the Commission made the third belated pre-financing **automatically** after it had belatedly approved Report P3. This was despite the fact that it was aware that the University could not and should not use such funding. If one considers only the wording of the provisions in Article II.1.16 of the Contract [12] , the pre-financing is clearly provided to cover the next phase of a project [13] . On 1 December 2008, no such next phase was possible because the Project in question had ended and the Commission was well aware of this fact.

68. The available evidence [14] indeed shows that, at least at the beginning of September 2008, that is, three months before the Commission made the third pre-financing relating to Report P3 covering period 3 , the Commission was aware of the content of the Audit Certificate dated 12 July 2008, which covered all periods of the Project and the costs claimed in all reports. Reasonably, the Report P4 and the Final Report, submitted at the same time as the Audit Certificate, could not and did not contain other data than the data contained in the Audit Certificate [15] . Once the Commission took note of the content of the Audit Certificate, there was no need to analyse Report P4 and the Final Report to conclude that, on 1 December 2008, the payment of the third pre-financing would have no *effet utile* .

69. In the Audit Certificate, the auditor certified that the Project ended on 31 May 2008 and that, by this time, the University had spent EUR 201 898 on all periods of the Project. It was clear from the Audit Certificate that the eligible costs incurred by the University for the Project were almost equal to the amount already paid to it by the Commission (the first pre-financing of EUR 95 079 and the second pre-financing of EUR 101 311.46, in total EUR 196 380.) The University did not spend any funds on the Project apart from those certified by the auditor in July 2008. Moreover, it did not claim any extra money from the Commission [16] . Therefore, in December 2008, the Commission had no reason to " *advance* " further EU funds in order " *not to penalise* " the University.

70. In light of the above, the Ombudsman considered that, by having paid the University the belated third pre-financing at a point in time when it could not be used for the Project anymore, the Commission committed a second instance of maladministration.

As regards the complainant's claims

71. The complainant claimed financial compensation amounting to EUR 100 000.

72. The complainant rightly argued that, as a result of the fact that the third pre-financing was



not paid during the lifetime of the Project, the Project ended in May 2008 having used EU funds which were 25% lower than originally planned (the total amount foreseen for the Project was EUR 336 677.)

73. It cannot be excluded that, if the third pre-financing had been paid at the correct time, the results of the Project could have been even better. This would have been to the advantage of both the University and its scientists working on the Project (including the complainant) and, ultimately, to the advantage of European science. Indeed, if the Commission had not been late in evaluating Report P3 and had respected the 45-day contractual deadline for making its evaluation, the same amount of EUR 66 940.14 could have been paid within the contractual deadline of 90 days from receipt of the corrected report [17], that is, by no later than the end of 2007. This would have been possible even if the complainant needed to introduce corrections. The Ombudsman noted that, starting from 16 July 2007, the rule that 70% of the previous financing should be spent in order to receive a new payment (the '70% rule') was no longer applicable [18]. Therefore, if the third pre-financing had been made available by the end of 2007, the University could still have used this amount for the Project. Such further spending could have been shown in the Audit Certificate drawn up at the end of the Project (May 2008). If the University could not use or did not need to use this amount, the Audit Certificate could have indicated the amount as a surplus for the Commission.

74. However, the evidence available in the file shows that, after having submitted Report P3, and until the end of the Project (May 2008), the University did not claim additional monies from the Commission for the Project (starting from December 2007, the complainant was aware that 'the 70% rule' was no longer applicable. [19]) The complainant stated in his observations that he had not made such a request. The University could have still submitted complementary reports and it could also have asked for an extension of the final implementation date of the Project if it considered that additional EU funds could help it to get better results. The relevant amendment to the Contract could then have been made [20]. Instead, the University was able to end the Project with a modest EU contribution and arrange for other, non-EU financing [21] in a way that the Project resulted in the Commission's assessment of "*good to excellent*". This should be praised, but does not entitle the University to claim damages.

75. In sum, the Ombudsman concluded that the complainant has not demonstrated that the University lost money due to the fact that the EU financing of the Project was limited to EUR 201 898.18.

76. Furthermore, the complainant argued that if the third pre-financing had not been paid on 1 December 2008, his dispute with the Commission would not have taken place. He considered, in summary, that the Commission's unjustified payment was the reason behind his claim for damages, which reflected the time and effort he had to invest in the dispute.

77. The Ombudsman observed, however, that the reason for the dispute was not only the belated and useless third pre-financing, but also the fact that this amount was spent by the University. The Ombudsman recognised that it is possible that the Commission did not inform the complainant properly about the nature of the EUR 66 940.14 it paid [22]. However, the



Ombudsman considered that it would have been reasonable for the complainant to ask the Commission about the reasons for this payment before the University spent the money (according to the complainant, the University started to spend this amount in March 2009 and it was repaid to the Commission in December 2009 [23]). Ultimately, the complainant and the Commission agree that grants should be used only to cover projects and not to produce a profit for the beneficiary. The University concluded the Project with the monies paid by the Commission before 1 December 2008.

78. Given that the complainant never asked such a question, the Ombudsman could not support his claim for damages relating to his alleged losses due to his dispute with the Commission (*" eight months corresponding with the institution and to study the Commission's financial rules instead of carrying out scientific work and writing academic texts for which he could earn additional money or applying for other grants. "*).

79. However, the Ombudsman considered that, pursuant to his first and second findings of maladministration (paragraphs 59 and 70), the Commission should offer the complainant and the University its sincere apologies.

80. The Ombudsman noted, in this respect, that the Commission apologised for its delays in handling the reports. However, in his observations, the complainant did not accept these apologies. The Ombudsman understood the complainant's view.

81. First, in its opinion, apart from providing apparently incorrect information (as stated in point 79 above), the Commission made a mistake which led to the complainant's understandable indignation. In the Polish translation of the opinion, the Commission [24] made the wrong statement that *" the complainant has EUR 63 836. 86 in his possession since December 2008 "* (emphasis added). However, in the English version of the opinion, the same sentence read as follows: *" the complainant has EUR 63 836.86 in its possession since December 2008 "* (emphasis added). The possessive determiner *" its "* suggests indeed that in fact the Commission in fact wished to refer to the University. It is however regrettable that the Commission failed carefully to word such an important statement and also failed properly to check its own translations.

82. In its letters/e-mails addressed to the complainant, the Rector of the University and the Auditor, the Commission did not make comments which can reasonably be seen as putting into doubt the complainant's reputation. However, in its opinion in the present inquiry, the Commission appeared to do so. The Ombudsman considered that the Commission's comments on the complainant's knowledge of financial rules or on his capacity to manage the funds were completely unnecessary and void of purpose.

83. In light of the above, the Ombudsman made the following draft recommendation in accordance with Article 3(6) of the Statute of the European Ombudsman [25] : *" The Commission should send a letter to the Rector of the University in which it should apologise to the complainant and the University for its delays, in particular concerning the delayed and 'useless' third pre-financing payment. It should also state in this letter that the complainant's*



work as Project Coordinator had no impact whatsoever on the Commission's delays. Finally, it should recognise the work of the complainant and of the University for being able to complete the Project with very good results using lower EU funding than originally foreseen. " The Ombudsman also noted that, in his observations, the complainant insisted that these apologies should be " *official* " and clearly pointed out that the Commission and not the complainant was responsible for the delays.

The arguments presented to the Ombudsman after his draft recommendation

84. In its reply to the draft recommendation, the Commission stated that it agrees to a major extent with the Ombudsman's assessment of the case. As regards the last part of the draft recommendation, however, the Commission suggested describing the third pre-financing as " *delayed and undue* " and not as " *delayed and useless* ", as the Ombudsman did in his draft recommendation. Moreover, the Commission agreed to recognise in its letter to the Rector of the University that " *the Project was completed with very good results* " but not that these very good results were achieved " *using lower EU funding than originally foreseen.* " The Commission argued in this respect that, at the negotiation phase of a project, a correct estimation of the latter's costs is important and an overestimation of costs has as a consequence that the pre-financing payments received are higher than the amounts needed. Moreover, in such cases, the unused funds are blocked for the duration of the contract instead of being used for other projects. In this specific case, EUR 131 173 were blocked and unused for four years.

85. Pursuant to the Ombudsman's draft recommendation, the Commission decided to send a letter to the Rector of the University [26] , which is summarised below.

86. First, the Commission acknowledged its delays in the third pre-financing payment and in its handling of Reports P3 and P4 and the Final Report. The Commission offered sincere apologies to the University and the complainant for its delays.

87. Second, the Commission confirmed that the complainant's work as Project Coordinator had no impact whatsoever on the Commission's delays mentioned above.

88. Third, the Commission stated that it " *appreciates the fact that the complainant and the University were able to deliver very good results. The project deliverables were assessed by the external experts as 'good to excellent'. These good results were achieved using an amount of EUR 205 504. 74, which was approved by the Commission. It is to be noted however that this amount is considerably less than the original negotiated EU contribution of EUR 336 677 and the Commission would like to underline the importance of a correct estimation of costs in possible future negotiations.* "

89. The Commission concluded its letter by " *deeply regret[ting] the inconvenience caused* " and asked the Rector " *to kindly accept its apologies* ".



90. The complainant did not submit comments on the Commission's position outlined above taken in response to the Ombudsman's draft recommendation.

The Ombudsman's assessment after the draft recommendation

91. The Ombudsman welcomes the Commission's positive reaction to the draft recommendation and considers that its arguments to justify departing from the draft recommendation by substituting the word "undue" for "*useless*" and as regards the phrase "*using lower EU funding than originally foreseen*" are reasonable.

92. The Ombudsman appreciates that the Commission has sent to the Rector of the University an official letter signed by the Director General of DG Research and Innovation. This letter contained sincere apologies for the maladministration identified in the Ombudsman's draft recommendation and recognised the complainant's positive contribution to the Project.

93. In light of the above, the Ombudsman concludes that the Commission accepted the essential part of his draft recommendation.

B. Alleged defects in the online reporting system SESAM

Arguments presented to the Ombudsman

94. The complainant argued that the SESAM system does not allow an official in charge of a project to introduce any minor changes to reports he/she receives. He took the view that such (good) practice was circumvented by a named Commission official who introduced a change in the "*Funding distribution report*" outside of the SESAM system (in the Excel calculation sheet) in order to show the payment of EUR 66 940.14 as the "*third pre-financing*". The official did not ask the complainant (as Project Coordinator) to introduce such changes through SESAM. The complainant also argued that, one year after he had submitted Report P3, another official in charge sent him templates to use which did not exist in SESAM. This showed, in his view, that there were no fixed standards in SESAM. The functioning of the system depended on the will of the officials who happened to deal with the grant (there were nine officials who dealt with the Project). He also referred to a number of technical problems he encountered when using SESAM (the password was not functioning when he wanted to send Report P1, the official then in charge was not able to reset the system and he had problems submitting Report P3 as well).

95. In its opinion, the Commission stated that the reporting rules and online reporting system were established at the beginning of the 6th Framework Programme and the Commission informed all the coordinators, through direct contacts by e-mails and during meetings, how they should report on the project. These rules were also explained in the reporting guidelines available online (the Commission provided the relevant link). The Commission argued that the system was improved during the Framework Programme to make it more user friendly and to



eliminate as many defects as possible.

96. The fact that the SESAM system does not allow Project Officers to introduce minor changes is justified because it constitutes a safeguard measure for the beneficiaries. All changes must be made by the coordinators in order to avoid Commission officials making changes on their own initiative, or to avoid discussion of what could be considered a minor change. The Commission considers this to be a good practice.

97. The complainant's argument on the assessment of reports by the Project Officers themselves is not grounded because there are standard assessment forms in SESAM and Project Officers are trained on how to evaluate the performance and implementation of projects in accordance with internally approved rules and procedures.

The Ombudsman's assessment

98. As regards the complainant's argument that the named official introduced a relevant change outside of SESAM, the Ombudsman regretted that the Commission did not take a position on this alleged fact in either its letters to the complainant or in its opinion. However, taking into account that the alleged fact concerns the Commission's behaviour in relation to which the second instance of maladministration was found, the Ombudsman did not consider it useful to deal with this argument separately.

99. As regards the complainant's remaining arguments, the Ombudsman did not consider that the complainant has demonstrated a serious flaw in the system. For instance, the complainant informed the Commission on 10 July 2007 about his problems when trying to submit Report P3. He was subsequently able to submit this report two days later, on 12 July 2007.

100. The Ombudsman concluded that no further inquiries are justified into the second allegation.

C. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman takes the view that, as regards the complainant's first allegation, the Commission accepted the essential part of the Ombudsman's draft recommendation and thus satisfied the complainant's first claim. For the reasons put forward in paragraphs 77 and 78 above, the complainant's second claim cannot be sustained. As regards the complainant's second allegation, no further inquiries are justified.

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



P. Nikiforos Diamandouros

Done in Strasbourg on 23 November 2011

[1] MTKD-CT-2004-509834 Transfer of Knowledge.

[2] Article 6.1.b. ii, last sentence of the Contract provided: "*Where less than 70% of a pre-financing has been used at the end of a reporting period and notwithstanding the approval by the Commission of the related reports, subsequent intermediate pre-financing may be paid only if (i) an audit certificate is provided for that reporting period or (ii) on the basis of a complementary periodic management report referred to in Article II.7.2.b) that shall be submitted to the Commission once the above -mentioned spending rate has been achieved.*"

[3] Pursuant to Article II.7.3 and II.22 of the General Conditions of the Contract.

[4] In the opinion, the Commission stated that it had first informed the complainant of the recovery order on 9 June 2009. In his observations, the complainant stated that this was not the case. There is no copy of such a letter in the file.

[5] Quotation from the Commission's letter dated 28 July 2009.

[6] The Ombudsman understands that the costs of the audit were included in this sum. In the Final Report, the University claimed EUR 68 793.77.

[7] In this respect, it should be noted that Article 11 of the Contract provides: "*The Court of First Instance or the Court of Justice of the European Communities, as is appropriate in the specific case, shall have sole jurisdiction to hear any disputes between the Community and the contractor as regards the validity, the application or any interpretation of this contract.*"

[8] The contents of these letters are summarised in paragraphs 23, 25, 26, 28 and 29 above.

[9] It should be noted that, pursuant to Article 6.1(e) of the Contract, the Commission should have paid the third pre-financing 90 days after the approval of the corrected Report P3. Article 6.1(e) of the Contract: "*Where no comments, changes or substantial corrections to any of the project activity reports or financial statements are required or where the Commission approves the reports more than 45 days after the reception, the Commisison shall make the appropriate payment within 90 days of receipt of the project activity reports and associated financial statements. Where substantial comments, changes, further information or adjustments are requested by the Commission within this period, the delay is suspended upon notification by the Commission. The remainder of the 90 days payment period begins again only after submission by the contractor of the required information.*"

[10] This quotation is from the FP6 Guide to Financial Issues (page 82). The Guide may be found at

http://ec.europa.eu/research/fp6/model-contract/pdf/fp6-guide-financial-issues-feb05_en.pdf



[Nasc]

[11] See footnote 8.

[12] Article II.1.16 of the General Conditions of the Contract reads as follows: "*Pre-financing: means any part of the Community financial contribution which is paid in advance of submission of proof of work having been carried out for a specific period of the project either in order to provide advance funds to permit the work on the project to begin or to continue with the next phase.*"

[13] See footnote 8.

[14] The Commission sent an email to the complainant dated 5 September 2008 (attached to the complaint under annex 8) in which the Commission's Financial Officer asked the complainant for some additional information concerning the Audit Certificate : "*I. Audit Certificate. According to the type of contract ... the two references articles [of the General Conditions of the Contract] used are not correct ... we would like to receive a signed statement from the auditor "D.P" in which they just confirm to comply with the above mentioned (correct) article with reference to the Audit Certificate already provided.*"

[15] The only minimal difference concerned the fourth period: the Audit certified costs of EUR 68 932.22 and the Final report showed for that period the amount of EUR 68 793.77 (annex 12.1 to the observations). Footnote 18 below (last sentence) could also be compared with the Commission's statement described in paragraph 46 of the present draft recommendation.

[16] On page 12 of the Audit Certificate, the auditor (Ms DP) confirmed in point (I) that the Project ended on 31 May 2008 and all actions foreseen in the contract had been carried out. On page 11, in points V.1, 4 and 5 respectively, she certified that, between 1 June 2004 and 31 May 2008 (i) the University received EUR 202 401, 46 of "the Project means"; (ii) the University spent EUR 201 898.18 of the "Project means" (excluding the cost of the audit); and (iii) the University had to return EUR 999.24 to the Commission (excluding the cost of the audit). Moreover, in point V.7 on page 11, she certified that the University spent EUR 9217.63 of its own funds on the Project. Finally, on page 10, she presented the accounts of the Project costs from 1 June 2004 to 31 May 2008. The costs were outlined in a table showing the costs for each reporting period P1-P4 separately ("Rozliczenie kosztów projektu za okres od 01.06.2004 do 31.05.2008 r.") The costs of the Project "borne" by the University and certified by the auditor for Period 1 amounted to EUR 47 110; for Period 2: EUR 51 967.27; for Period 3: EUR 32 450.87 and for Period P4: EUR 68 932.22.

[17] Article 6.1 (e) of the Contract: "*Where no comments, changes or substantial corrections to any of the project activity reports or financial statements are required or where the Commission approves the reports more than 45 days after the reception, the Commisison shall make the appropriate payment within 90 days of receipt of the project activity reports and associated financial statements. Where substantial comments, changes, further information or adjustments are requested by the Commission within this period, the delay is suspended upon notification by*



the Commission. The remainder of the 90 days payment period begins again only after submission by the contractor of the required information. "

[18] See the Commission's letter to Coordinators of the Marie Curie Host Fellowships grants, dated 3 December 2007.

[19] See footnote 2.

[20] Article II.5.5 of the General Conditions to the Contract and Article 8 of the Contract.

[21] In his observations, the complainant stated that, in 2005, the Polish Ministry of Finance awarded the University funds for the same research covered by the Project (PLN 585 000).

[22] See paragraph 40 above.

[23] The Ombudsman notes with concern that the Commission failed to inform him in its opinion that the University had already paid back the recovery order. According to the complainant's observations, on 9 December 2009, the University complied with the recovery order and paid back the Commission the amount due in two lump sums: EUR 55 307.33 and then EUR 9 025.49.

[24] In accordance with the Ombudsman's practice, only the Polish version of the opinion was sent to the complainant.

[25] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[26] The Commission attached to its reply a copy of its draft letter to the Rector of the University.