MARIANNE THYSSEN
MEMBER OF THE EUROPEAN COMMISSION

Brussels, 16 JAN. 2017

Dear Ms O'Reilly,

Subject: **Complaint by ANDEFOREM, ref. 1689/2015/PHP**

Thank you for the letter of 6 September 2016 addressed to President JUNCKER about the above-mentioned case.

I am pleased to enclose the comments of the Commission regarding this complaint. A translation into the language of the complainant (Spanish) will be transmitted shortly.

I draw your attention to the fact that this file has been treated confidentially.

Naturally, the Commission remains at your disposal for any further information you may require.

Yours sincerely,

Enclosure

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FINAL

Comments of the Commission on a proposal for a solution by the European Ombudsman
- Complaint by ANDEFOREM, ref. 1689/2015/PHP

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1. THE ALLEGATION AND CLAIM

On 6 September 2016, the Ombudsman informed the Commission that she had opened an inquiry into a complaint concerning subsidies supposedly co-financed by the European Social Fund, and proposed the Commission a friendly solution, whereby the latter:

(i) Should take all the steps open to it to ensure that the complainant is paid the remaining subsidies due;

(ii) Should make use of the means at its disposal in order to ensure the effective functioning of the management and control systems; and

(iii) Should take all the necessary actions to further investigate why the relevant local administration failed to certify the expenses incurred by the complainant.

The complainant in her initial request 1689/2015/PHP alleged to the Ombudsman that:

> *The Commission failed to give a proper follow-up to the complainant's complaint concerning the payment of a number of subsidies co-financed by the European Social Fund.*

The complainant claims that:

> *The Commission should adopt the necessary measures to ensure that the national authorities pay the complainant the remaining amount of subsidies.*

2. THE COMMISSION'S REPLY TO THE OMBUDSMAN'S PROPOSAL

Preliminary observations

The Commission would like to refer to the full content of its previous exchanges with the Ombudsman and, especially its reply from 28 June 2016 (Ares(2016) 3061901), where the Commission already provided the Ombudsman with its opinion on this case detailing the actions taken and its powers within the shared management of the EU funds. The Ombudsman's preliminary assessment seems to be based on a misinterpretation of the ESF legal framework and functioning, as developed below. In particular, the following statements of the preliminary assessment are not accurate: that the subsidies received by the complainant were co-financed by the ESF (paragraph 1 of the proposal), that there is sufficient evidence to doubt that the management and control systems function effectively (paragraph 14 of the proposal), and that the local authorities have the obligation to certify the expenses that have been incurred (paragraph 16 of the proposal), including those of the complainant (paragraph 17 of the proposal).

The Commission would like therefore to start its comments on the proposal for a solution with the following general observations on the ESF legal framework and functioning.

For the part of the budget of the European Union implemented within the framework of shared management between the Member States (MS) and the Commission (like the ESF), implementation tasks are delegated to MSs, which have a primary role in the management.[1]

During the 2007-2013 programming period[2], the activity of the ESF in the MS takes the form of operational programmes which cover the programming period and are drawn up by the MS, which manages and implements them.[3]

It is the MS, through its managing authority[4], which chooses the projects that it wants to finance and the beneficiaries of the funds.

It is also the MS, through its certifying authority, which decides in the last instance whether it will ask the expenses corresponding to the projects to be co-financed.[5] Indeed, the MS decides freely whether it finances itself the projects or asks for ESF co-financing.[6] As explained by the Advocate General in his Opinion concerning case C-417/04 P,

"*82. (…) the very substance of the structural funds shows that they are complementary, which emphasises the predominant role played by the State and the broad discretion it enjoys not only in selecting the beneficiaries, but also in drawing up the programmes which it wishes to subsidise (…).*

84. It is therefore for the Government concerned to determine the future of what is really its own project. It has several options: it can, for example, abandon the project, suspend it or transfer it; on the other hand, it can defray the financial cost out of its own budgets in order to ensure that the project is completed (…)"

By including expenditure in statements of expenditures underlying applications for payment submitted to the Commission, the MS certifies that the expenditure declared complies with applicable EU and national rules, including eligibility rules,[7] and declares its will that such expenditure should be co-financed by the ESF. Eligibility is a pre-condition for a MS to declare expenditure for co-financing under the ESF, yet, the MS remains free to decide that even eligible expenditure is not to be declared to the Commission and thus not to be co-financed by the ESF. Consequently, while co-financing by the ESF of an item of expenditure requires eligibility of that expenditure, eligibility of an item of expenditure does not entail its co-financing by the ESF.

Among the rules for eligibility is the requirement that the MS addresses information to European Union citizens and beneficiaries with the aim of highlighting the role and source of the ESF financing.[8] Accordingly, when a project is publicised by the national

[1] Article 14(1) of Council Regulation (EC) No 1083/2006.

[2] For the 2007-2013 programming period, Council Regulation (EC) No 1083/2006 of 11 July 2006 lays down general provisions on the funds and Council Regulation (EC) No 1081/2006 establishes the ESF. The legal framework of structural funds, like the ESF, is specific to each programming period.

[3] Article 32 of Council Regulation (EC) No 1083/2006.

[4] Article 60(a) of Council Regulation (EC) No 1083/2006.

[5] Articles 61(a) and 78 of Council Regulation (EC) No 1083/2006.

[6] This conclusion is not put into question by the judgment of 25 January 2001 of case C-413/98, which is mentioned in paragraph 15 and footnote 4 of the preliminary assessment and which in any event refers to the 1984-89 programming period.

[7] Article 61(b)(ii) of Council Regulation (EC) No 1083/2006.

[8] Article 69 of Council Regulation (EC) No 1083/2006.

authorities as "co-financed" by the ESF, this does not mean that it is effectively co-financed by the ESF but just that some publicity has been put in place in order for the project to be eligible for financing, which the MS can then decide so.

In addition, the MS has primary responsibility for setting up a management and control system which complies with the requirements of the Regulations, ensuring that this system functions effectively and also preventing, detecting, and correcting irregularities.[9] The Commission plays a supervisory role by satisfying itself that the arrangements governing the management and control system are compliant.[10] It does so by verifying the effective functioning of this system and suspending interim payments and making financial corrections, where necessary.[11]

In view of this background, the following should be clarified:

(a) <u>The European Social Fund (ESF) has not co-financed the projects of the complainant</u>

The Commission would like to reiterate that, already in March 2015, the Commission made an initial enquiry to the Managing Authority responsible for the ESF in Spain (UAFSE-Unidad Administradora del Fundo Social Europeo, located within the Ministry of Employment), about the possible co-financing from the ESF to the courses that are the object of this complaint and the possible implications for the fund management. The UAFSE informed the Commission in its communication from 28 April 2015 that there was no expenditure certified by the national authorities related to the training courses in question. In addition, it was clarified in the discussions maintained that, although the call for proposals included a reference to the possible co-funding by the ESF, after various verifications and change in the strategy of the Operational Programme "Andalucia", this operation would no longer be subject to ESF co-funding and no certification from the related actions would be certified to the Commission. As a consequence, the activities related to the two calls for projects to which the grants of the complainant belong were eventually funded by the regional administration.

As a result of this information, in general terms the ESF regulatory framework does not apply to the courses managed by the complainant and therefore the powers of the Commission to carry further investigations are limited.

(b) Since the Spanish authorities decided not to request co-financing by the ESF of the complainant's training courses, they <u>are under no obligation to certify the expenses that have been incurred</u>. As explained above, the MS decides freely whether it finances itself the projects or asks for ESF co-financing.

Moreover and as mentioned, by including some expenditure in its statements of expenditures, the MS certifies that the expenditure complies with applicable EU and national rules. Therefore, expenditure can only be certified by the MS to the Commission after all required verifications have been carried out. In the case at hand and as developed below, the national authorities have informed the Commission in April and May 2016

9 Article 70(1) of Council Regulation (EC) No 1083/2006.
10 Article 72 of Council Regulation (EC) No 1083/2006.
11 Articles 92 and 99 of Council Regulation (EC) No 1083/2006.

that the projects of the complainant had been subject to verifications as a result of which recovery procedures were initiated.

Therefore the failure to certify the complainant's projects is no evidence that the management and control systems of the operational programme do not function effectively.

(c) The Commission has diligently acted further to the complaint

The Commission takes note of the Ombudsman's acknowledgement that: (a) the Commission tried to contact the local authorities on several occasions, including through the Spanish Permanent Representation in Brussels and (b) the Commission has kept the complainant informed in that respect (paragraph 12).

Indeed, although the projects of the complainant are not co-financed by the ESF, the Commission, taking into account the reputational impact of the initial announcement of ESF co-financing, and with the aim to support the complainant in its demand, wrote several times to the national and regional authorities asking for complementary information on the state of play of the payment procedure, and informed the complainant of this exchange. In addition, the Commission has required feedback on the state of play of this complaint during numerous meetings related to the ESF implementation in Spain. After numerous exchanges that can be found in chronological order below, it turned out that, as a result of the administrative verifications carried out by the regional competent authorities, the complainant is requested to reimburse part of both grants due to multiple irregularities detected in the course of the verifications.

Please find below in chronological order our exchanges with the complainant, the Spanish Managing Authority and the regional authorities:

On 23 and 24 February 2015 and 4 June 2015, the complainant writes to Commissioner Navracsics, President Junker and Commissioner Georgieva, regarding the lack of payments, allegedly granted under the European Social Fund (Ares(2015) 868496), (Ares(2015) 779724) and (Ares(2015) 2337131).

On 19 March 2015, the Commission writes to the complainant confirming reception of correspondence and informing that the complaint has been sent to UAFSE (Ares(2015)1217051).

On 19 March 2015, the Commission writes to UAFSE, asking to follow-up on the complaint and to duly inform on the results of the verifications and implications that these could have on the ESF (Ares(2015)1214065).

On 17 June 2015, the Commission writes to the complainant, informing that, following the verifications carried out by UAFSE, there is no certified expenditure under the complainant's name in the framework of the European Social Fund (Ares(2015)1811754).

On 19 and 20 of June 2015, the complainant renews her complaint to the European Commission and forwards on this occasion a letter by the Andalusian Ombudsman advocating in the complainant's favour (Ares(2016) 2886478).

On 10 July 2015, the Commission contacts directly the regional Department for Education of the Regional Government of Andalusia, responsible at the time for the management of the professional training activities, in relation to the complaint (Ares(2015)2911401). This request from the Commission already went beyond the established procedures and legal prerogatives related to the implementation of the ESF, as it was already known that the activities in question were not finally co-financed by the ESF.

In the absence of an answer from regional authorities, the Commission writes again to UAFSE on 1 December 2015, asking to intervene as national authority, even if the subject matter is not related with any ESF activity (Ares(2015) 5500386).

On 11 December 2015, the Commission writes to the Secretary General of Education and Professional Training of the Regional Government of Andalusia (Ares (2015)5761770) renewing its request for information on the subject and in view of the lack of reply on previous correspondence.

On 21 December 2015 the Commission informs the complainant about the correspondence addressed to the Spanish Authorities, of 1 and 11 December 2015 (see exchanges under ref. Ares(2016) 6031734).

On 27 January 2016 the Commission receives a letter from the Department of Education of the Regional Government of Andalusia informing that the competences on professional training currently belong to the Department for Employment, Enterprise and Trade of Andalusia regional government, without indicating any more details on the subject of the complaint (Ares(2016)528195).

On 4 February 2016, the Commission sends a letter to the Department of Employment, Enterprise and Trade of the Regional Government of Andalusia, renewing its request for information about this case (Ares(2016)619473).

On 26 April 2016, the Commission informs the Spanish Permanent Representation about this complaint and asks that measures are taken to solve this case within the competences of the relevant regional and/or national authorities. The Permanent Representation forwards the Commission request on 27 April 2016 to UAFSE, asking them to reply about the issue. UAFSE replies on the same day, indicating that the case was already investigated and explaining that they were waiting for the reply of the Directorate General for Professional Training from the Regional Government of Andalusia and that they had contacted them again on this (Ares(2016) 6112903).

On 4 May 2016, the Commission sends an e-mail to the complainant informing the complainant about the exchange with the Spanish Authorities (Ares(2016)2134695) and that, as the expenditure was not certified to the Commission within the FSE, the issue was out of Commission competence and it could stop continue replying to her.

On 12 May 2016, UAFSE informs the complainant that the expenditure claimed has never been certified in the framework of ESF. In addition, UAFSE forwards to the complainant the report signed by the Director General for Professional Training for Employment of the Regional Government of Andalusia, in which it is stated that indeed the complainant had been offered two grants – one to give courses to young unemployed people (file ref. 98/2001/V/1630) and one for people over 50 years old (file ref. 98/2011/L/1636). The regional authorities informed the complainant that the first file was under revision based on the justifying documents presented by the complainant. Regarding the second file, the regional authorities informed that the procedure to issue a recovery order of EUR 133,500 had been launched and that the complainant had 15 days to bring proofs against the recovery order. The proof would need to be then studied by the authorities during maximum one year before deciding whether or not to finally go ahead and issue the recovery order (Ares(2016) 5300155).

On 28 June 2016, the Commission sends an e-mail to the Ombudsman informing about the steps it took and the information it requested in order to support the complainant, even acknowledging that the Commission has no legal ground to intervene between the regional authorities grating the aid and the beneficiary's company (Ares(2016) 3061901).

On 13 September 2016, UAFSE forwards the above mentioned letter to the Commission (Ares(2016)5300155).

On 13 September 2016, the Commission replies to UAFSE asking to contact again the regional authorities to request an update of the state of play of the two files (Ares(2016)5300155).

On 7 and 20 October 2016, the Commission enquires again with UAFSE about this update (Ares(2016)6031734).

On 21 October 2016, the UAFSE replies to the Commission, enclosing a final detailed report from the Director General for Professional Training for Employment of the Regional Government of Andalusia detailing the revision of the two files carried out and the conclusions of those Ares(2016) 6049340).

On the file 98/2011//V/1636, after examination of the support documentation provided by the beneficiary on 23 February 2016, several irregularities were detected that led to the initiation of a refund procedure, which included several hearings with the beneficiary. The final resolution of this procedure was adopted on 30 September 2016 and the beneficiary was required to reimburse EUR 85,509.34 and due interest.

On the file 98/2011//V/1630, after examination of the support documentation provided by the beneficiary, several irregularities were detected that led to the initiation of a refund procedure, which included several hearings with the beneficiary. The sum requested to be reimbursed amounts to EUR 42,504.66 and was notified on 22 September 2016, but the procedure is still on-going and the beneficiary can still contest the allegations.

Apart from the official correspondence detailed above, the Commission had numerous direct calls with the complainant in an attempt to assist her at its best, within the remit of its competences.

In view of the above, the Commission considers that no instance of maladministration can be established.

As regards the proposals made by the Ombudsman, the Commission has the following comments.

(i) Requirement to take all the steps open to it to ensure that the complainant is paid the remaining subsidies due

As developed above, the decision to certify and to request the complainant's projects to be co-financed by the ESF belongs to the MS. The Spanish authorities have legitimately decided that the complainant's projects will be subsidised solely with national funds and not with EU funds like the ESF. Moreover, certain expenditure of the complainant's projects appears to have been found irregular under national law.

Thus, the Commission has no powers to oblige the MS to pay to the complainant the remaining subsidies due.

In any event and despite not having these powers, the Commission has had numerous exchanges with the MS (described above) and the complainant in order to help having this conflict solved and allowing the complainant to be paid.

Therefore, the Commission understands that it has already complied with the above proposal under point (i) and no instance of maladministration can be established in this regard.

(ii) Requirement to make use of the means at its disposal in order to ensure the effective functioning of the management and control systems

As mentioned, the Commission would like to underline that the management of the implementation of the budget of the European Union allocated to the European Structural and Investment Funds (hereinafter ESIF) abide by the principle of shared management. Under shared management, the national and regional authorities have primary responsibility for establishing management and controls that comply with EU Regulations, and prevent, detect, and correct irregularities.

This implies that guidelines are designed at European level and the implementation on the ground through operational programmes is managed by the relevant and designated EU Member States' authorities. Such implementation is managed by the relevant authorities in full compliance with applicable EU and national legislation. Therefore, it is for the national and regional authorities in first instance to address this complaint.

The Commission follows up the implementation of the ESF regularly through different tools including the annual Monitoring Committees and Examination Meetings. As regards financial management, the Commission closely monitors the financial execution and carries out regular controls and audits. The Commission in all cases applies the procedures foreseen in the regulations whenever deficiencies in the management and control systems or irregularities have been detected.

In relation to the Ombudsman view that the Commission, faced with the lack of cooperation from local authorities, could have carried out on-the-spot audits or required the Member State to carry out such an audit, Art. 62 (1) (b) of the regulation 1083/2006 stipulates that the national audit authorities "ensure that audits are carried out on operations on the basis of an appropriate sample to verify <u>expenditure declared</u>". In this particular case, as the Commission was informed on several occasions that expenditure of the complainant had not been declared in the framework of ESF, the Commission has no legal basis to carry out on-the-spot audits, nor to require the Member State to do so for activities that do not fall within the ESF regulatory framework.

As to the Ombudsman assessment that the Commission had enough evidence to establish that the expenses claimed by the complainant should have been certified by the local authority, please note that, as explained above, it is the Member State's prerogative to decide what expenditure it certifies to the Commission and only after all the controls both at regional and national level are carried out. In view of information that was provided to the complainant by the national authorities and received on 21 October 2016 by the Commission, it can be seen that finally not all the presented expenditure was declared eligible in the framework of the regional grants and a considerable amount of the initial pre-financing must be reimbursed. Against the above background, the Commission considers that no instance of maladministration can be established as regards point (ii).

(iii) Requirement to take all the necessary actions to further investigate why the relevant local administration failed to certify the expenses incurred by the complainant

In general terms and as explained above, the decision to certify or not expenditure related to activities within the framework for the shared management relies only to the Member State and this in all cases must be done after all management verifications and controls are duly carried. In addition, according to the latest information provided by the Managing Authority of the European Social Fund in Spain, UAFSE, on 21 October 2016, ref. Ares(2016) 6049340, the complainant should repay part of initially received pre-financing as it was not able to correctly justify the incurred expenditure.

Against the above background, the Commission considers that no instance of maladministration can be established as regards point (iii).

3. CONCLUSION

- The Commission considers that no instance of maladministration can be established as regards point (i), as this case does not involve funds from the EU budget and the Commission took all the actions in competence to investigate the case and even supported the complainant in its requests related to the regional administration.

- Against the above background, the Commission considers that no instance of maladministration can be established as regards point (ii), as the Commission carries its monitoring as provided by in the Regulations and assesses the potential risks with the Annual Control Reports.

- The Commission considers that no instance of maladministration can be established as regards point (iii), as the national authorities are free not to certify expenditure to the ESF related projects of the complainant and are indeed precluded from certifying them until they are satisfied that the expenditure (which is subject to verifications) is regular.