Neutral Citation Number: [2021] EWHC 1355 (Admin)

Case No: CO/3110/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 21/05/2021

Before :

MR JUSTICE ANDREW BAKER

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Between :

THE QUEEN (on the application of TRINITY COLLEGE (CSP) LIMITED)	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**

- -
- -

Fenella Morris QC (instructed by **Mills & Reeve LLP**) for the **Claimant**
Galina Ward (instructed by **The Government Legal Department** (for the Ministry of Housing, Communities and Local Government)) for the **Defendant**

Hearing dates: 11, 12 May 2021

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. This is my judgment following a 'rolled-up' hearing directed by Morris J by Order dated 21 October 2020. His Observations in that Order indicated that he was concerned there might be a lack of promptness in the claim and a need to amend the judicial review grounds, but for which he would have been minded to grant permission. The judicial review grounds were subsequently amended, with permission granted by Order of John Howell QC, sitting as a Deputy High Court Judge, dated 2 March 2021; and having heard Ms Morris QC open the case for the claimant and Ms Ward's submissions in response for the defendant, I concluded that there was a properly arguable case and that it would not be right to say that the claimant had not acted promptly.

2. Prior to Ms Morris QC's reply, therefore, I granted the claimant permission to seek judicial review on the grounds pleaded in the Re-Amended Details of Claim for which Mr Howell QC's Order had granted pleading permission, so that she need only reply on the final merits.

3. A worthy project that, given the aims of the European Regional Development Fund ('the ERDF'), may have warranted support from that Fund, all things being equal, has had to be funded by the claimant without any such support. All things were not equal, however, because of the way in which the main project contract was awarded by the claimant, prior to any grant of ERDF support. It is not the function of these judicial review proceedings to consider where responsibility for that may lie as between the claimant and those acting for it or advising it in relation to the project, and that was rightly not explored. The question is whether there is reviewable error, as proposed by the claimant, in the defendant's refusal to grant ERDF support, given the circumstances as they were found to be when the claimant's application was rejected. My conclusion is that there is not, and this claim must be dismissed.

Background

4. One of the many and varied responsibilities of the defendant Secretary of State, discharged through the Ministry of Housing, Communities and Local Government ('the Ministry'), has been that of managing authority for the United Kingdom under Regulation (EU) No 1303/2013 of the European Parliament and of the Council dated 17 December 2013 ('the Regulation'). The Regulation laid down common provisions on the ERDF and other European Structural Investment Funds ('ESIF').

5. Since 2016, Mr John Osborne, as Head of the Ministry's Greater South East Growth Delivery Team ('the GDT'), managed a team responsible for ERDF funding of projects in the East and South-East of England.

6. The claimant is a commercial arm of Trinity College, Cambridge. It has refurbished and fitted out an existing, 9,000 sq ft building, within the world-renowned Cambridge Science Park, to create a research hub of affordable laboratories for biomedical research. In a project description that was in the evidence before me (I did not have evidence as to whether the final works matched this exactly, but that does not matter), the plan was to create a large, shared laboratory with benches and desks available for hire (a research 'incubator'), plus small, self-contained laboratories intended to be let

out on an annual basis (a research 'accelerator'). The GDT regarded this planned 'Biohub' project as an exciting prospect that was in principle a good candidate for ERDF support.

7. After preliminary dialogue between May and July 2017, the claimant was invited to submit a full application for a grant of ERDF support. It eventually did so on 25 June 2018, although further iterations of its application would follow, arising out of the GDT's appraisals and dialogue with the claimant in respect of the application, submitted on 31 July 2018, 14 November 2018, 4 December 2018, 20 December 2018, 8 January 2019, 24 January 2019, 6 February 2019 and, finally, 11 February 2019. That final iteration sought 50% ERDF support in respect of projected costs of c.£3.5 million (the exact figures do not matter), i.e. for an ERDF grant of c.£1.75 million. In every iteration, the grant application sought funding for contracts yet to be awarded, the opportunity to bid for which the application form said would be advertised on the project website. Nearly 90% by value of those future contracts would be the contract to refurbish and fit out the building, the rest being for the purchase of scientific equipment and office furniture for the new facility.

8. In fact, however, unknown to the GDT, the claimant awarded that primary contract, to refurbish and fit out the building, on 8 January 2019, and work started under it on 21 January 2019. The contract opportunity had not been advertised anywhere for any period of time. The GDT learned that the contract had already been placed during a telephone call on 8 February 2019 between Ms Vicki Bidwell from the GDT and Mr George Bennett of Hewdon Consulting, who had been contracted to assist the claimant by (coincidentally) Bidwells, the consultant surveyors acting for the claimant on the project. This revelation triggered a procurement review led by Mr Grahame Johnson, a GDT Quality Assurance and Compliance Officer.

9. For her part, Ms Bidwell initially expected this would be a formality. She had no reason to suppose the contract opportunity had not been advertised as indicated in the application form. A month or so later, after the claimant, via Bidwells, had been asked various questions by an email dated 6 March 2019, including about the advertising of the contract opportunity, for the purpose of the procurement review, Ms Bidwell spoke again to Mr Bennett. He asked what the claimant's options would be if the conclusion was that the contract had not been compliantly procured. Ms Bidwell told him it would need to be re-procured as ERDF projects could only include compliant costs. Mr Bennett told her the claimant would be unable or unwilling to do that.

10. The upshot of the procurement review was a letter dated 11 June 2019 from Mr Osborne to the claimant, stating "*with great disappointment … that based on the outcome of the procurement review, the Managing Authority is unlikely to proceed with the award of ERDF grant*", and enclosing a schedule setting out the procurement review findings. Several procurement inadequacies had been found, including the failure to advertise the contract opportunity. The letter concluded as follows:

> "*I appreciate that this is not the news you were expecting, and you will be disappointed with the outcome. We are equally disappointed, as the project meets national and local strategic objectives and would provide much needed laboratory space in Cambridge for SMEs to invest and grow.*

> *Our process now requires us to make a final decision on the application. As it stands, the project will be rejected based on the conclusion of the procurement review. If you have additional evidence (other than that already reviewed) to satisfy all the procurement issues then please provide this to us by no later than the 26 June. Alternatively if [you] would prefer to withdraw the project, please let us know.*"

11. Following a meeting triggered by that letter, the claimant replied by letter dated 25 June 2019. It contended that the failure to advertise the contract opportunity had been "*a technical breach of the national guidelines*" and refused to accept that, as it was put, "*the loss of 100% grant funding is an appropriate sanction*". Reasons for the claimant's position were set out, the thrust of which was that the national procurement rules in force when the contract was awarded, being the ESIF National Procurement Requirements (ESIF-GN-1-001), Version 5, published on 20 February 2017 ('NPR5'), provided a penalty for failure to advertise as required by those rules of a 10% grant 'correction'. The claimant said it should have been made the subject of that penalty, not a grant refusal.

12. The claimant's letter also appeared to suggest a possible complaint, for which there was never any basis, that there had been representations by the GDT to the effect that ERDF support would be granted, on which reliance had been placed. There was never any basis for such a complaint because (a) though there had been indications of enthusiasm, possible approval or approval in principle, they were for a project under which contracts had not been awarded prior to the grant of ERDF support, and (b) it was stated to the claimant explicitly in writing, more than once, that incurring or committing to expense prior to the grant of support was at the claimant's risk and could render the project ineligible.

13. Hints at least of a complaint of frustrating legitimate expectations created by representations persisted thereafter, up to and including in Ms Morris QC's skeleton argument for the rolled-up hearing before me. She confirmed in oral argument, however, that no such case was pursued.

14. Mr Osborne replied to the claimant by letter dated 25 October 2019. It would have been better no doubt if that reply could have come more promptly, but that delay had no consequence except to be part of the reason why, ultimately, the issues arising have taken until now to come before the court. That letter focused on the claimant's assertion that the matter should be viewed through the prism of 'corrections' (a feature of the ESIF system, as I explain below). The view taken, on that basis, was that following an EU Commission Decision, C(2019) 9527, dated 14 May 2019 ('the 2019 Decision') and/or Version 6 of the ESIF National Procurement Requirements ('NPR6'), published on 16 August 2019 taking account of the 2019 Decision, any ERDF grant for the claimant's Biohub project would be subject to a correction of 100%, not 10%.

15. By letter dated 5 November 2019, Mills & Reeve LLP replied on behalf of the claimant taking issue with aspects of the factual basis of the October letter, and suggesting that the appropriate way forward should be to apply NPR5 and treat the claimant's project as subject to a 10% correction for the procurement failing. This was followed by a judicial review pre-action protocol letter from Mills & Reeve to the defendant dated 27 November 2019 asserting that there had been a "*decision made on or around 23*

October 2019 to apply a 100% penalty to an application for grant funding", and setting out proposed grounds of challenge.

16. By letter dated 4 December 2019, from the Government Legal Department on behalf of the defendant, the October letter was withdrawn so that the matters raised by Mills & Reeve and "*the wider factual and legal context*" could be considered further.

17. That further consideration resulted in a 'minded to' letter, from Mr Osborne to the claimant, dated 23 March 2020. The 'minded to' notification was in these terms:

> "*5. The Department has carefully considered all the factual circumstances against the applicable legal framework. For the reasons set out below we are minded to reject the application for ERDF funding. However before we make a final decision we would invite you to make any further representations in response to matters set out below. Please do so within 28 days, or confirm that you do not wish to do so if that is the case.*"

18. The reasoning given in the letter for the 'minded to' decision thus notified was that (subject to considering further representations from the claimant, if any):

    (1) (at [12]-[14]), Article 122(2) of the Regulation required Member States to "*prevent, detect and correct irregularities*". Prevention and correction were separate matters. The defendant was therefore bound to refuse the grant application since it had established, prior to the making of any grant of ERDF support, that there had been what would be a procurement irregularity;

    (2) (at [15]-[21]) there was no relevant representation capable of creating a legitimate expectation of funding in the circumstances as they had turned out to be;

    (3) (at [22]) the October letter had been incorrect to proceed on the basis that any question of correction arose prior to the grant of ERDF support, but (at [23]-[30]) if it were a question of correction then the applicable regime would be that of the 2019 Decision and NPR6, under which this would be a case for 100% correction, not 10%. This was on the basis that no financial correction procedure could be said to have been launched, and the procurement breach had not been identified, until after 14 May 2019 (in each case, if meaningful to use those terms prior to grant).

19. Mills & Reeve responded on behalf of the claimant by letter dated 9 April 2020. That letter did not engage at all with the primary basis for the 'minded to' decision (paragraph 18(1) above), did not challenge the conclusion on legitimate expectations (paragraph 18(2) above), and did not contest the alternative analysis in the 'minded to' letter (paragraph 18(3) above). Rather, it complained that (a) the Department (meaning, in practice, the GDT) was aware prior to 14 May 2019 that the refurbishment contract opportunity had not been advertised, (b) a financial correction procedure therefore *should have been commenced* prior to 14 May 2019, in which case (c) the conclusion could and should have been that there would be a 10% correction as the only consequence of the failure to advertise. As will be seen, although the points argued before me mean that some lengthy analysis is required before I can come back to this, that was, in substance, the correct complaint to make, in the sense that the claimant

would have to show that the defendant erred by failing to make a final grant decision until after 14 May 2019, if there was to be a successful challenge to the grant refusal.

20. That letter generated, in response, the final decision by letter from Mr Osborne to the claimant dated 2 June 2020 that the claimant's grant application for ERDF support for its Biohub project was rejected. That is the decision now subject to judicial review with the permission I granted at the hearing. The decision letter noted that Mills & Reeve had not challenged the primary ground for the 'minded to' decision or disputed that no financial correction procedure had been launched on or before 14 May 2019. It responded to, and did not accept, the complaint that the GDT should have launched such a procedure prior to that date. On that basis, the conclusion was that Mills & Reeve's further representations did not provide reason to alter the 'minded to' decision, and thus:

> "*… the Department does not consider that [it] is able to approve the application for a grant. My final decision therefore is that your application is rejected.*"

The Grounds

21. The Claim Form stated that the decision to be challenged was a decision "*to apply a 100% penalty to the Claimant's application for grant funding from the [ERDF]*". It was common ground before me that the decision was in fact a decision to refuse a grant of ERDF support for the claimant's Biohub project, and the argument proceeded on that basis.

22. Four judicial review grounds were pleaded. For no apparent reason, the order of Grounds 1 and 2 was reversed by Ms Morris QC in her skeleton argument for the hearing, but I shall use the pleaded order, as did Ms Ward. Thus, the pleaded grounds originally were:

    (1) Ground 1, that the defendant had misdirected himself as to the meaning of the words "*financial correction procedure*" in the 2019 Decision.

    (2) Ground 2, that the defendant had misdirected himself as to the meaning of the word "*detected*" in the predecessor to the 2019 Decision, EU Commission Decision C(9527) 2013 dated 19 December 2013 ('the 2013 Decision').

    (3) Ground 3, that the defendant acted procedurally unlawfully in failing to fulfil his obligation to detect irregularities within a reasonable time, causing (it was said) the claimant to be subjected unfairly to the more punitive correction regime of the 2019 Decision when it was neither necessary nor proportionate to do so.

    (4) Ground 4, that there had been a breach of A1P1 and Article 6, ECHR, on the basis that:

        (a) the claimant's "*interest in the grant is a property right within the meaning of A1P1 (JT v First Tier Tribunal [2018] EWCA Civ 1735)*";

        (b) the defendant "*told the Claimant that it had been awarded the grant, and that the funds were being released to it, and the Claimant relied upon those representations to commence works: it had a legitimate*

expectation that it would receive the grant monies. Moreover, the Defendant [sic., Claimant] is, as a matter of law, entitled to the grant, less the 10% correction";

(c) the defendant's failings, as alleged under Grounds 1 to 3, meant that he had interfered unlawfully with that property right, in breach of Article 6 without proportionate justification;

(d) the claimant could only secure just satisfaction for those breaches by the defendant paying compensation "*to put [the claimant] in the position it would have been had the grant been paid as the Defendant said it would be at the start of 2019.*"

23. Although the claimant accepted at the hearing that there was no basis for a claim of frustrated legitimate expectation, Ground 4 was not abandoned. It is unsustainable, however. The defendant never told the claimant it had been awarded any grant. The claimant was told that the application was acceptable, or approved in principle, and indeed that a grant was expected, but that was for a Biohub project in which no contract had yet been awarded, not for a Biohub project where the central and expensive project contract had been placed prior to grant, using a procurement method that did not meet the requirements that would be imposed on a grant recipient.

24. If in the factual circumstances as they turned out to be, and on a proper view of the applicable legal rules, the defendant's decision to refuse the ERDF grant was flawed, it will stand to be quashed. If it was not flawed, Ground 4 does not provide any basis for a claim. On what I shall call Ground A (see below), Ms Morris QC's argument was that the Regulation, the 2013 and 2019 Decisions, and NPR5/NPR6 ('the NPRs') between them, properly construed, entitled the defendant to grant the claimant ERDF support, subject to a 10% correction, and so did not oblige the defendant to reject the grant application. Even if, as at some points in her argument Ms Morris QC suggested, this were elevated to a right in the claimant to be granted ERDF support subject to 10% correction, that would not be the right alleged by Ground 4 based on representations, reliance and legitimate expectations frustrated.

25. I did not complicate matters by refusing permission on Ground 4, but in truth it was not reasonably arguable.

26. In keeping with the approach adopted by Mills & Reeve in April 2020, the grounds originally pleaded did not challenge the primary basis of the 'minded to' letter, which was therefore equally the primary basis of the decision letter. The defendant it seems drew attention to that in his Summary Grounds of Resistance, and, cutting a longer procedural story short, the claimant's Re-Amended Details of Claim by reference to which I granted permission finally took as the prior point (and logically so) that the defendant erred in law in considering that Article 122(2) of the Regulation meant he was duty bound to reject the grant application, having identified prior to grant that the central project contract had been placed in a way that would mean there would be an irregularity if a grant were made.

27. Though couched as the claimant's response to a preliminary point raised by the defendant, that is indeed the logically prior ground of challenge, on which the claimant

needs to be correct, and it was argued as such at the hearing. So as not to disturb the numbering previously used, I shall refer to this argument as 'Ground A'.

28. Finally for this initial analysis of the pleaded grounds, the oral argument made it clear that Ground 2 is academic. The 2013 Decision could in theory give rise to an issue whether an irregularity was "*detected*" after the date of adoption of that Decision, i.e. after 19 December 2013. On any view, if these are meaningful notions prior to grant, the irregularity here occurred, and thereafter was detected, only years later than December 2013.

29. The question that arises, if the claimant is first correct on Ground A, is whether a "*financial correction procedure*" was "*launched*" on or before 14 May 2019, within the meaning of the 2019 Decision, applied by analogy to consideration of financial corrections by the defendant, so that the 2013 Decision (and therefore NPR5) should have been treated as still applicable to the claimant's circumstances. That is the question raised by Ground 1, or part of it. As with Ground 4, I did not on this basis refuse permission on Ground 2, but it will not be necessary to consider it further.

30. That leaves Grounds A, 1 and 3 to be considered. First, it is convenient to set out and explain, so far as material, the applicable law.

The Law

31. There are three sources of law relevant to this case: the Regulation; the 2013 and 2019 Decisions; NPR5 and NPR6.

32. The last of these are slightly curious documents. Much of their content is a mix of guidance about funding under the ESIF and explanations of the EU legal regime governing it. In keeping with that content, they open with this disclaimer:

> "*This document is guidance on the subject of how to select suppliers of goods, works and services in projects part funded through ESIF. It does not constitute legal advice, nor does it imply waiver of the legal obligations of recipients of ESIF grants. … The Department does not accept any liability relating to the use of this document. Users seeking information on public procurement should refer to the relevant Public Contracts Regulations, the guidance on the Europa website and seek their own specialist advice from professional advisers.*"

33. It was common ground that at the same time, some of the content of NPR5 and NPR6 creates legal rules applicable for some grant recipients to procurement of goods, works or services for their ESIF part-funded projects. That is because part of Chapter 6 sets out rules of national law applicable to procurement by *inter alia* grant recipients who are outside the scope of the Public Contracts Regulations, for example because they are not a 'contracting authority' as defined in those Regulations, and there is no source for those rules other than the NPRs themselves. In that respect, despite the disclaimer, the content is by nature not merely guidance about or explanation of the system or rules of law created elsewhere relating to it. It *is* the applicable law.

34. That is relevant here because the claimant is not a contracting authority. To the extent that the NPRs in that way created rules of national law, and leaving aside at this point

which of NPR5 or NPR6 is relevant, those rules would in principle apply to the claimant if granted ERDF support.

The Regulation

35. It is necessary to refer to quite a few provisions of the Regulation.

36. Article 1 of the Regulation, defining its subject matter, provides that it "*lays down common rules applicable to the … ERDF …, the European Social Fund …, the Cohesion Fund, the European Agricultural Fund for Rural Development … and the European Maritime and Fisheries Fund …, which operate under a common framework (the 'European Structural and Investment' – 'ESI Funds'). It also lays down the provisions necessary to ensure the effectiveness of the ESI Funds and their coordination with one another and with other Union instruments. …*"

37. Article 2 contains definitions, including:

    (1) at Article 2(9), a definition of 'operation' to mean "*a project, contract, action or group of projects selected by the managing authorities of the programmes concerned, or under their responsibility, that contributes to the objectives of a priority or priorities; …*". If the claimant's Biohub project had been granted ERDF support by the defendant, it would have been an operation within that definition;

    (2) at Article 2(36), a definition of 'irregularity' to mean "*any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the ESI Funds, which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union.*" It was common ground that if the claimant had been an ERDF grant recipient, then a breach by it of the national law procurement rules applicable to it under NPR5 or NPR6 (as the case might be) would have been a breach of national law by an economic operator involved in the implementation of an ESIF, as referred to in that definition. It would thus be an irregularity as defined by the Regulation if, but only if, it had or would have the effect of charging an unjustified item of expenditure to the EU budget. What that means needs to be considered to determine this case.

38. Article 6 of the Regulation provides that "*Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application ('applicable law').*" It was common ground that the part of the NPRs that creates rules of national law relating to procurement by grant recipients is applicable law, as thus defined. That is why breaches thereof by a grant recipient could be irregularities, subject to considering their effect, as just stated.

39. Article 65 of the Regulation, on '**Eligibility**', provides *inter alia* as follows:

> "*1. The eligibility of expenditure shall be determined on the basis of national rules, except where specific rules are laid down in, or on the basis of, this Regulation or the Fund-specific rules.*

> *2. Expenditure shall be eligible for a contribution from the ESI Funds if it has been incurred by a beneficiary and paid between the date of submission of the programme to the Commission or from 1 January 2014, whichever is earlier, and 31 December 2023. …*
>
> *…*
>
> *6. Operations shall not be selected for support by the ESI Funds where they have been physically completed or fully implemented before the application for funding under the programme is submitted by the beneficiary to the managing authority, irrespective of whether all related payments have been made by the beneficiary.*"

40. The effect of Article 65(6) is that had the claimant not only placed the main Biohub refurbishment contract, but completed the project, prior to making its grant application, it would have been ineligible for a grant of ERDF support, even if the project fitted the objectives of an ERDF programme managed by the defendant and even if all procurement was done in a way that would have complied fully with the applicable NPR had the claimant been a grant recipient.

41. Ms Ward advanced a particular submission, as part of the defendant's case on Ground A, that the national procurement rules created by the NPRs were rules as to eligibility of expenditure. The conclusion was said to be that all expenditure incurred under a contract in the placement of which those rules were not respected was, from the perspective of the Regulation, ineligible.

42. Article 122(2) of the Regulation, the source, on the defendant's case in respect of Ground A, of a duty to reject the claimant's application on the facts as found by the procurement review, provides that "*Member States shall prevent, detect and correct irregularities and shall recover amounts unduly paid, together with any interest on late payments. They shall notify the Commission of irregularities that exceed EUR 10 000 in contribution from the Funds and shall keep it informed of significant progress in related administrative and legal proceedings.*" It immediately qualifies that obligation, stating that Member States "*shall not notify the Commission of irregularities*" in certain cases, including "*(c) cases which are detected and corrected by the managing authority or certifying authority before inclusion of the expenditure in a statement of expenditure submitted to the Commission.*"

43. Article 122(2) then repeats and reinforces the general reporting obligation, and creates a reimbursement liability on Members States, as follows:

> "*In all other cases, in particular those preceding a bankruptcy or in cases of suspected fraud, the detected irregularities and the associated preventive and corrective measures shall be reported to the Commission.*
>
> *When amounts unduly paid to a beneficiary cannot be recovered and this is as a result of fault or negligence on the part of a Member State, the Member State shall be responsible for reimbursing the amounts concerned to the budget of the Union. Member States may decide not to recover an amount unduly paid if the amount to be recovered from the beneficiary, not including interest, does not exceed EUR 250 in contribution from the Funds to an operation in an accounting year.*"

44. Article 125 of the Regulation sets out the functions of a managing authority, here the defendant. By Article 125(1), a managing authority is responsible "*for managing the operational programme in accordance with the principle of sound financial management*". In that regard, *inter alia*:

(1) by Article 125(3), "*As regards the selection of operations, the managing authority shall:*

(a) draw up and, once approved, apply appropriate selection procedures and criteria that:

…

(ii) are non-discriminatory and transparent;

…

(e) satisfy itself that, where the operation has started before the submission of an application for funding to the managing authority, applicable law relevant for the operation has been complied with.

…", and the case proceeded on the basis that Article 125(3)(e) did not apply, i.e. the claimant was treated as having submitted its application for a grant of ERDF support before project work started on 21 January 2019 although the final form of the application ultimately pursued and rejected was only submitted on 11 February 2019;

(2) by Article 125(4), "*As regards the financial management and control of the operational programme, the managing authority shall:*

(a) verify that the co-financed products and services have been delivered and that expenditure declared by the beneficiaries has been paid and that it complies with applicable law, the operational programme and the conditions for support of the operation;

…";

(3) Article 125(5) requires verifications pursuant to Article 125(4)(a) to include administrative verification of each reimbursement application by a grant recipient and on-the-spot verifications of operations, the frequency and scope of which are to be proportionate to the level of funding support and risk involved.

45. Mr Osborne said in his witness statement that penalties were imposed on the defendant by the Commission during the 2007-2013 ESIF programme governed by the predecessor to the Regulation, because of weaknesses during the life of that programme in the UK's approach to verifying procurement compliance by grant recipients. The UK's participation in the 2007-2013 ERDF programme was interrupted between June 2013 and March 2014, and a more rigorous procurement testing regime was approved by the Commission and implemented for the 2014-2020 programme governed by the Regulation.

46. This was interesting background, from a time before Mr Osborne's involvement, to explain a certain heightened sensitivity to procurement issues at the Ministry after 2013, in the context of the defendant's managing authority function under the Regulation, but nothing more than that. In particular, there was no suggestion or evidence that the selection procedures and criteria drawn up and approved under Article 125(3)(a), which (if they were in evidence at all) I was not shown, provided that where a contract had been placed prior to grant and it was found that there had been a failure to comply fully with what would be applicable procurement requirements if ERDF support were granted, the grant application had to be rejected.

47. The defendant, through the Ministry, is also the certifying authority under the Regulation for the UK's participation in the ERDF. That is not part of Mr Osborne's responsibilities, since there has to be, and is, a separation within the Ministry between the two sets of officials discharging the independent responsibilities of managing authority and certifying authority. Article 126 of the Regulation sets out the functions of a certifying authority, *viz.* to be responsible in particular for:

> "*(a) drawing up and submitting payment applications to the Commission and certifying that they result from reliable accounting systems, are based on verifiable supporting documents and have been subject to verifications by the managing authority;*
>
> *…*
>
> *(c) certifying the completeness, accuracy and veracity of the accounts and that the expenditure entered in the accounts [(i)] complies with applicable law and [(ii)] has been incurred in respect of operations selected for funding in accordance with the criteria applicable to the operational programme and complying with applicable law;*
>
> *…*"
>
> (my emphasis, sub-paragraph numbering (i)/(ii) added for convenience).

48. Another particular submission advanced by Ms Ward, as part of the case for the defendant in response to Ground A, was that in the circumstances obtaining here, if ERDF support had been granted and if (as the claimant contends) there would then have been an applicable correction for its procurement breach of 10% under NPR5, then the Ministry could not have certified the 90% (after applying that correction) under Article 126(c). If that be correct, it would follow (and this was the conclusion of Ms Ward's submission) that there could be no grant to the claimant. A 'grant' of ERDF support to an applicant the circumstances of whose project at the time of the decision to 'grant' mean that reimbursement from the Commission could not be sought under the Regulation, is not in truth a grant of ERDF support at all, but a grant of Ministry funding outside the ERDF programme. If that was the legal position, I do not think the decision letter could be faulted for articulating that as a 'duty' on the part of the defendant to refuse the claimant's application, which was for funding support within the ERDF programme.

49. Article 131(1) requires that applications to the Commission for payment, i.e. for reimbursement from (here) the ERDF, must include "*(a) the total amount of eligible*

expenditure incurred by beneficiaries and paid in implementing operations, as entered in the accounting system of the certifying authority", as well as "*(b) the total amount of public expenditure incurred in implementing operations, as [so] entered.*" If Ms Ward's submission about Article 65 be correct (see paragraph 41 above), then it might be said on that basis that no part of any expenditure under a contract in the placement of which applicable procurement rules had been broken could be included in a payment application to the Commission, leading again to a conclusion that if it were seen in advance of grant that that would be the consequence of accepting a grant application, then there would in substance be a duty to reject.

50. The critical Regulation concept for the purpose of this judgment is that of a 'financial correction'. Article 85(1) of the Regulation provides that, "*The Commission shall make financial corrections by cancelling all or part of the Union contribution to a programme and effecting recovery from the Member State, in order to exclude from Union financing expenditure which is in breach of applicable law.*"; and then by Articles 85(2)/(3):

> "*2. A breach of applicable law shall lead to a financial correction only in relation to expenditure that has been declared to the Commission and where one of the following conditions is met:*
>
> *(a) the breach has affected the selection of an operation by the body responsible for support from the ESI Funds or in cases where, due to the nature of the breach, it is not possible to establish that impact but there is a substantial risk that the breach has had such an effect;*
>
> *(b) the breach has affected the amount of expenditure declared for reimbursement by the budget of the Union or in cases where, due to the nature of the breach, it is not possible to quantify its impact but there is a substantial risk that the breach has had such an effect.*
>
> *3. When deciding on a financial correction under paragraph 1, the Commission shall respect the principle of proportionality, by taking account of the nature and gravity of the breach of applicable law and its financial implications for the budget of the Union. …*"

51. Article 144 of the Regulation, on '**Criteria for financial corrections**' by the Commission, requires the Commission (Article 144(1)) to make financial corrections "*by cancelling all or part of the Union contribution to an operational programme in accordance with Article 85, where, after carrying out the necessary examination, it concludes that:*

> *(a) there is a serious deficiency in the effective functioning of the management and control system of the operational programme which has put at risk the Union contribution already paid to the operational programme;*
>
> *(b) the Member State has not complied with its obligations under Article 143 prior to the opening of the correction procedure under this paragraph;*

> *(c) expenditure contained in payment application is irregular and has not been corrected by the Member State prior to the opening of the correction procedure under this paragraph*" [my emphasis].

52. Article 144(1) further requires that the Commission "*base its financial corrections on individual cases of identified irregularity and shall take account of whether an irregularity is systemic. Where it is not possible to quantify precisely the amount of irregular expenditure charged to the Funds …, the Commission shall apply a flat rate or extrapolated financial correction.*" Article 144(2) requires the Commission, when deciding on a correction, "*[to] respect the principle of proportionality by taking account of the nature and gravity of the irregularity and the extent and financial implications of the deficiencies in management and control systems found in the operational programme.*"

53. By Article 145(1), before taking a financial correction decision, the Commission must "*launch the procedure by informing the Member State of the provisional conclusion of its examination and requesting the Member State to submit its comments within two months.*" Article 145(2) makes a specific provision that if the Commission is proposing to apply an extrapolated or a flat rate correction, the Member State must be given the opportunity to demonstrate "*that the actual extent of the irregularity is less than the Commission's assessment.*" Article 145(6) empowers the Commission to adopt delegated acts laying down detailed rules concerning *inter alia*, "*the criteria for establishing the level of financial correction to be applied and the criteria for applying flat rates or extrapolated financial corrections.*"

54. Article 146 provides that a financial correction by the Commission is not to prejudice the Member State's obligation to pursue recoveries under Article 143(2), which is the final provision of the Regulation it is necessary to consider.

55. Article 143(1) of the Regulation provides that Member States are responsible in the first instance "*for investigating irregularities and making the financial corrections required and pursuing recoveries*". By Article 143(2), they are to "*make the financial corrections required in connection with individual or systemic irregularities detected in operations or operational programmes. Financial corrections shall consist of cancelling all or part of the public contribution to an operation or operational programme. The Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Funds … and shall apply a proportionate correction.*"

The Decisions

56. The 2013 and 2019 Decisions are delegated acts under Article 145(6) of the Regulation (see paragraph 53 above) setting out guidelines the Commission will apply for determining financial corrections made by it for non-compliance with public procurement rules.

57. Article 1 of each Decision provides that its Annex sets out the guidelines the Commission will follow for determining financial corrections. Article 2 in each case is a commencement provision:

(1) In the 2013 Decision, Article 2 states that its Annex will be applied by the Commission when making financial corrections related to irregularities "*detected after the date of adoption of this Decision*", i.e. after 19 December 2013; but that is effectively qualified by section 1.1 of the Annex, providing that where "*the contradictory procedure with the Member State is on-going*" at the date of adoption of the 2013 Decision, the prior guidelines will be applied if they would give a rate of correction more favourable to the Member State.

(2) In the 2019 Decision, a somewhat similar commencement concept is used, but it is defined more neatly, by reference to the terminology of Article 145 of the Regulation, and with different effect. Thus, Article 2 provides that the Commission will apply the guidelines in the Annex to the 2019 Decision "*to financial correction procedures launched after the date of adoption of this Decision*", i.e. after 14 May 2019.

58. Recital (6) of the 2013 Decision states the Commission's understanding that the purpose of financial corrections "*is to restore a situation where all of the expenditure declared for financing by the Union is legal and regular, in line with applicable national and Union rules.*" To materially similar effect, Recital (2) of the 2019 Decision states the understanding that Article 144 of the Regulation requires the Commission to make financial corrections "*in order to exclude from Union financing expenditure incurred in breach of applicable law, taking account of a proportionate use of administrative resources. The financial corrections have to be based on the identification of amounts unduly spent, and the financial implications for the budget. Where such amounts cannot be identified precisely, the Commission may apply extrapolated or flat-rate corrections … .*"

59. Provisions in Section 1.1 of each Annex repeat and elaborate on that notion. Thus, in the 2013 Decision, "*The amount of the financial correction is calculated in view of the expenditure amount declared to the Commission and related to the contract (or part of it) affected by the irregularity. The percentage of the suitable scale applies to the amount of the affected expenditure declared to the Commission …*"; in the 2019 Decision, perhaps rather more clearly, "*The Commission will make* ***financial corrections*** *in order to exclude from Union financing expenditure that is in breach of applicable law … . The irregularity may be quantifiable with precision or not. The financial impact of an irregularity is quantified with precision if it is possible, based on an examination of the individual cases, to calculate the exact amount of expenditure wrongly declared to the Commission for reimbursement; in such cases, the financial correction must be calculated precisely. However, it is considered that in the case of irregularities in public procurement, it is not possible to quantify precisely the financial impact due to the nature of the irregularity. Therefore, in such cases, a flat rate correction is to be applied to the affected expenditure taking account the nature and gravity of the irregularities, … .*"

60. In the 2019 Decision, section 1.1 goes on to spell out that financial corrections are only involved "*if the irregularity at stake has or could have a financial impact on the Union budget.*" That harks back, slightly inaccurately, to the definition of irregularity. To be more accurate, under that definition, there is no irregularity (and so of course no question of financial correction) absent potential impact on the EU budget. Thus, non-compliance with applicable procurement rules for which a flat rate for financial corrections is given by the Annex "*are those considered to have a financial impact. For*

cases where a breach of public procurement rules is only of a formal nature without any actual or potential financial impact, no financial correction is warranted." That view, with respect, is plainly correct. A finding that procurement rules have not been followed is *not* a finding that there has been irregularity, because (potential) financial impact has to be assessed.

61. Section 1.1 of each Decision also notes Member States' responsibility for making financial corrections for irregularities and recommends that they apply the same criteria and rates as set out in the Decision Annex when doing so.

62. Each Decision Annex includes flat rate corrections of 5%, 10%, 25% or 100%, for a range of cases. Section 1.3 of the 2013 Annex states that they "*take into account the seriousness of the irregularity and the principle of proportionality*" and they are to be applied "*when it is not possible to quantify precisely the financial implications for the contract in question*". It provides also *inter alia* that if a number of irregularities are detected in a single tender procedure, the flat rate corrections are not aggregated, rather the highest individual flat rate indicated is to be used; but also that a financial correction of 100% may be applied, though not otherwise indicated, "*in the most serious cases when the irregularity favours certain tenderer(s)/candidate(s) or where the irregularity relates to fraud, as established by a competent judicial or administrative body.*" There are provisions in sections 1.4 and 1.5 of the 2019 Annex similar to those quoted in this paragraph, except that the reservation of a possible 100% correction for an irregularity favouring certain tenderers or candidates (but where no fraud is involved) is not retained.

63. The 2013 Annex did not provide a guideline flat rate financial correction rate for failing to advertise a contract opportunity in breach of a national law procurement rule applicable to a grant recipient. At all events, that was the view taken by the defendant, on the basis of which in material part NPR5 was drafted, and I was not asked to question that view. Line item 1 in Table 2.1 of the 2013 Annex provided a flat rate correction rate of 100% for failure to publish a contract notice where required "*in accordance with the relevant rules*", which the defendant's interpretation took to refer only to the rules referred to in that line item, *viz.* Articles 35 and 58 of Directive 2004/18/EC, Article 42 of Directive 2004/17/EC and Section 2.1 of the Commission interpretative communication No.2006/C 179/02. That 100% rate was reduced to 25% where (to paraphrase) there was publication of a contract notice by means sufficient for the purpose of ensuring a fair opportunity to tender even if the specific publication method stipulated by applicable procurement requirements was not used.

64. Line item 1 in Table 2.1 of the 2019 Annex is, for my purposes, materially identical. However, the view that it is irrelevant to breaches only of national law procurement requirements for advertising contract opportunities, even if correct for the 2013 Annex, cannot stand, it was common ground, for the 2019 Annex. That is because though the relevant part of Table 2.1 has not been materially amended, a new section 1.2.2 in the Annex provides as follows:

> "*In so far as the Directives do not apply, but the procurement falls within the scope of the Treaty and under national procurement law, these guidelines apply provided that at least one of the following conditions is met:*
>
> …

> *(ii) there is a clear breach of the national public procurement law for the contracts at stake.*
>
> *In addition, these guidelines are applicable also if the national rules … explicitly require the beneficiaries of EU funds to comply with national public procurement rules or similar rules, even if those beneficiaries are not themselves a contracting authority as defined in the Directives. In that case, the irregularity is a breach to [sic.] the national rules … .*
>
> *In all such cases, the required level of financial corrections should be determined by analogy with the types of irregularity identified in Section 2.*"

The NPRs

65. That brings me finally to NPR5 and NPR6. Where I quote or describe particular provisions, they were the same in both Versions unless I note otherwise.

66. The first and general point to note is that the public procurement requirements explained or created (as the case may be) by the NPRs apply to grant recipients. The NPRs warn the reader that no organisation should apply for ESIF support "*unless it has fully considered and planned how it will be able to demonstrate compliance with Public Procurement Law, the Treaty Principles or National Rules as appropriate in selecting the suppliers of goods, works or services part funded through ESIF*." That is a salutary warning, but it does not mean or imply that the public procurement rules explained or created by the NPRs apply to an applicant when it is still an applicant. They will apply (including as regards anything already done to get the project started, at risk as to whether a grant will be made) only if the application is successful.

67. Ch.2, para 11, provides that the national rules set out in the relevant section of Ch.6 will apply to non-contracting authorities and to contracting authorities not subject to the Commission Communicative Interpretation. Ch.6, para 2 then provides, so far as material, that ESIF grant recipients who are not contracting authorities "*must demonstrate that the selection process used to determine the suppliers of goods, services and works part funded through ESIF, is consistent with … the National Rules*".

68. Ch.6, para 22, states that the national rules "*are designed to achieve sound financial management of public funds and to open opportunities up to competition*", and by a footnote adds that they are also designed to ensure that the financial framework of the ESIF is not prejudiced by the charging of excessive sums to its budget. Bizarrely, in NPR6 the sub-heading above Ch.6, para 22, is '**National Guidance**' not '**National Rules**' as it was in NPR5, and 'guidance' rather than 'rules' is used in that paragraph, but elsewhere in the document for the most part 'rules' remains unchanged, including in the footnote to para 22 itself.

69. The requirement material to this case, then, and to which the claimant would have been subject if granted ERDF support for its Biohub project, was created, by Ch.6, para 23, with:

    (1) primary language stating that, "*To meet the national rules an ESIF grant recipient's process must be in line with the requirements below:*" above a table;

(2) the following entry in that table:

Value of contract	**Minimum Procedure**	**Advertising Required**
£25,000 - £200,000 (services) and £4.5m (works) [NPR6 upper limits were marginally different]	The advert needs to incorporate or direct any interested party to the following information: • Details of the opportunity • What is required from all interested parties • How successful candidates will be chosen • Deadline and details of how to apply Justification will also be required to demonstrate that the contract award is in line with the advert	Advertise the opportunity on the grant recipients/or other appropriate website for 10 days.

70. There was therefore no absolute requirement for exact compliance with what was set out in the table. The rule was that the claimant, if it became a grant recipient, would have to have (or to have had, in relation to action taken prior to grant, if relevant) a procurement process "*in line with the requirements*" there indicated.

71. Ch.6, para 24, stated that although the national rules "*are more relaxed than both the requirements under the PCR and the Treaty Principles*", certain practices "*will not be acceptable under any circumstances*". That is to say, given the nature of the requirement I have just described, a grant recipient's process if it included any of those practices could never be regarded as 'in line with' the requirements in the table so as to be regarded as meeting the national rules. Two such practices were identified in NPR5. The list was expanded in NPR6.

72. Ch.6, para 27, identified the financial corrections the defendant would apply. NPR5 and NPR6 were very different in that respect.

73. In NPR5, Ch.6, para 27, said that breaches of the national rules would be treated as a breach of contract and an irregularity, and that the following corrections would apply:

Breach	**Correction**[46]
Direct awards to linked organisations	10%

Non compliance with the thresholds above	5%
A lack of audit trail to demonstrate the process followed and decisions taken	5%
Failure to advertise the opportunity on the grant recipients website for 10 days	10%
Failure to adhere to the Guidance on Identifying, Managing and Monitoring Conflicts of Interest within ERDF and ESF, and submit a declaration to MHCLG or DWP	5%
Failure to impartially assess each bid against the same criteria and demonstrate this through use of a score sheet	5%
Failure to provide evidence to demonstrate that the winning bidder has been selected on merit	5%

46 The MA reserves the right to apply higher corrections where repeat breaches occur

74. The question might arise whether the corrections in that table could be applied cumulatively. It might be said there is no reason in concept why not, and NPR5 did not say they would never be aggregated. On the other hand, NPR5 did not say in terms that they might be applied cumulatively, though it did warn (in the footnote) of the possible impact of repeat (not multiple) breaches, and it might be said therefore that there was no warning that these national rules corrections applied differently in that respect to those of the 2013 Decision, with its specific non-cumulation provision. On the other hand again, Ch.1, para 3, of NPR5 in terms described the national rules penalties as separate, meaning in context separate from those that would arise if the procurement requirements were set by EU law rather than national law. This was not a point the parties had prepared to argue, and it seems to me it would deserve fuller consideration if it mattered. As it is, it will not be necessary to resolve it on this occasion.

75. By contrast, Ch.6, para 27, of NPR6, stated that for breaches of the national "*guidance*", and in order to protect the ESIF budget:

> "*the department shall apply the correction rates based on upon [sic.] analogous breaches as set out in the Commission Guidelines, which is explained in Chapter 3 of this guidance.*
>
> ***Therefore if a Non Contracting Authority does not advertise a contract opportunity with a value over £25,000 in any form a 100% correction will be applied in accordance with the Commission's corrections note.***"
>
> (larger font and emboldening in the original).

76. A footnote to Ch.1 in NPR6 stated that it would apply to procurement processes commenced on or after the date of publication, i.e. 16 August 2019, unless otherwise stated. As regards the above change in the financial corrections scheme, however, contrary provision was made, in that by a new Ch.6, para 28, NPR6 stated that:

> "*… All breaches, including those related to contracts let prior to 14th May 2019, will be subject to the Commission Guidelines for procurement correction rates for breaches identified after 14th May 2019. The corrections listed for procurement breaches listed in the previous guidance will no longer apply, except for any breaches that were identified prior to 14th May 2019.*"

77. Thankfully, there is no suggestion in this case that a procurement breach was identified *on* 14 May 2019 so as to fall into the drafting crack between those two sentences. More seriously, the decision letter not only took a view, giving rise to Ground 1, on when it could be said that a financial correction procedure was launched in respect of the claimant, applying the Regulation and 2019 Decision concept by analogy and if it be meaningful to ask that question at all prior to grant, but also took a view that it could not be said, for the purpose of Ch.6, para 28, of NPR6, that a procurement breach had been identified any earlier. The latter view is not separately challenged, i.e. there is no claim for a judicial review of the grant refusal on the basis that a procurement breach had been identified prior to 14 May 2019 even if no financial correction procedure was launched in relation to it until after that date. For that reason, I do not need to take a final view on this point, but I can see how the evident intent for NPR6 to be in harmony with the 2019 Decision might steer the construction of "*identified*" in Ch.6, para 28, towards meaning identified to the grant recipient, in the sense of being notified as a 'minded to' conclusion after an examination of the case, to fit by analogy with Article 145(1) of the Regulation by reference to which the 2019 Decision had taken over from the 2013 Decision.

Analysis

78. It has taken some little while to set out, with some explanatory comment, the provisions necessary to understand and determine the issues arising. Having done so, a coherent scheme is readily discerned.

79. Firstly, there can be no question of an (actual) irregularity, or of a financial correction or financial correction procedure, prior to grant. The way in which the claimant awarded the Biohub refurbishment contract was not a breach of the national law procurement rules created by NPR5, though they would have applied to the claimant when it placed the contract in early January 2019 had it then been a grant recipient, precisely because the claimant was not then a grant recipient, but only a company with a grant application awaiting decision.

80. Secondly, a proper understanding of irregularities and financial corrections, within the meaning of the Regulation, is nonetheless important. An issue of principle between the parties is whether the following logic is correct in law, namely '*if we grant, there will be corrections, therefore we cannot grant*'. The claimant says that logic is wrong in law, and it should be '*if we grant, there will be corrections, therefore we can grant and make what will then be applicable corrections*'. That, if correct, only becomes, in effect, '*we cannot grant*', where the applicable corrections will be at 100% of elements without which the whole project fails to be viable as a grant prospect.

81. The contentious logic was stated in the June 2019 procurement review letter (paragraph 10 above) in these terms:

> "*We cannot award public funds to a project that we know will incur financial corrections under ERDF rules. We must therefore omit the costs associated with the refurbishment contract …*"

The letter then explained that this would render the project as a whole not viable for ERDF support, a conclusion the claimant does not challenge if the premise be right that the refurbishment contract had to be stripped out.

82. That reasoning was reiterated as the primary ground for being minded to reject the claimant's application in the March 2020 letter and thus became the primary ground for rejecting the claimant's application by the June 2020 decision letter. It is the defendant's response to what is now Ground A.

83. That reasoning seems to have been adopted, at least for the June 2019 letter, by reference to guidance internal to the Ministry and the Department for Work and Pensions (as managing authority for the European Social Fund) contained in an unpublished Action Note 31 dated 14 June 2017, rather than because of any fresh review of or advice received as to the law. Action Note 31 provided, so far as material, that:

> "*There are circumstances where we cannot simply deal with a procurement failing by way of imposing a percentage correction. These are:*
>
> - *where the failing is identified pre signing of the funding agreement*
>
> - *where there is evidence that the failing was deliberate and/or known about and simply accepted by grant recipient …*
>
> *In these instances the full value of the non-compliant contract should be removed from the application/project.*"

84. To be clear, there is no judicial review ground by reference to the unpublished status of Action Note 31. So far as material (*viz.* its view that the first bullet point has the stated consequence), if it accurately stated the effect of the Regulation, Ground A will not be made out, whereas if it is an inaccurate statement of the law, Ground A may be made out and the question will be how far that gets the claimant. Either way, it is not relevant, at all events absent any case that the claimant was misled by someone acting on behalf of the defendant, or had legitimate expectations based on representations that have been frustrated, that the GDT had access to that document setting out that view of the law but the claimant did not.

85. Thirdly, I have made the point already that, at least where, as in this case, a procurement issue affects a central contract without which a project is not viable for ERDF support, there is no practical difference between a duty to reject the grant application and an entitlement to grant subject to correction, if the applicable correction rate would be 100%. To test whether the managing authority has a meaningful entitlement to grant although it becomes aware prior to grant of a procurement issue, the case to be considered should be one where the correction that would be required if the grant had

been made would not be 100%. To consider that case properly, one first has to understand the purpose and effect of the correction that would be applied if indeed the grant had been made before discovery of the procurement problem.

86. Where a grant recipient awards a contract following a procurement process that does not comply with a procurement rule for breach of which a flat-rate correction rate of 10% applies:

(1) that will be a breach by the grant recipient of Article 6 of the Regulation and also a breach of contract if (as is the practice in the UK) the grant is made by a grant funding agreement between the managing authority and the recipient;

(2) that breach will not without more be an irregularity (see paragraphs 37-38 above);

(3) it will be an irregularity if and only if it "*has, or would have, the effect of … charging an unjustified item of expenditure to the budget of the Union*" (to quote again the definition of irregularity in Article 2(36) of the Regulation).

87. So there is a concept, not separately defined, of unjustified expenditure, and an idea that a breach can be capable of causing unjustified expenditure to be charged to the EU (by a payment claim the Member State will make under the Regulation) unless something occurs to prevent that from happening.

88. Breaches in relation to procurement rules need not, and typically will not, have any impact on whether the goods, works or services supplied are of a type that enable a project to contribute to the objectives of an ESIF programme priority. In this case, for example, the deficiencies identified by the procurement review had no bearing on whether the Biohub project, or the refurbishment works in particular, were suitable for ERDF support. Indeed, it has been the GDT's position throughout on behalf of the defendant that in principle the Biohub project works *were* appropriate for ERDF support.

89. Marrying that thought to the definition of irregularity, an assessment has to be made of the extent to which, if at all, it is 'unjustified' to use ERDF money towards cost incurred for works that, though improperly procured from the perspective of applicable procurement rules, are part of or will contribute towards an ERDF-suitable project. The breach will only have the effect of charging unjustified expenditure to the EU budget, through an ERDF payment claim by the Member State, if (a) the procurement breach *does* mean that the use of ERDF money to cover or contribute towards that cost, to the full extent originally promised by the grant, would be unjustified, yet (b) the Member State nonetheless claims payment to that full extent, i.e. to the full extent promised to the grant recipient by the grant.

90. In that light, and given the language of the provisions concerning it (Articles 2(36), 85, and 143 to 145), the financial corrections mechanism under the Regulation performs precisely that function of assessing the extent, if any, of unjustified expenditure; and that is the basis upon which, as I read them, the 2013 and 2019 Decisions proceed.

91. I agree with a submission by Ms Ward that in this context the idea of unjustified expenditure is or may be wider than causation:

(1) If it can be shown that a procurement breach has caused an ERDF part-funded contract to be placed at some identifiably greater cost than if procurement rules had been fully respected, it would be unjustified to charge the EU budget via the ERDF for a contribution to the increase.

(2) It may not be possible to say if the procurement breach has increased cost. There is room for the view that it is unjustified to charge the ERDF with contributing to cost it cannot be shown was not caused by the procurement breach, or for the view that it is only unjustified to charge the ERDF with contributing to cost that has been shown to have been so caused.

(3) There may also be room, in the context of what is ultimately the use in the discretion of a public authority of public funds to promote socio-economic goals, for a view that it is unjustified ever to charge the ERDF with contributing to cost incurred under a contract improperly procured (from the perspective of applicable procurement rules), irrespective of whether the procurement breach had or may have had any impact on the size of that cost.

92. The provisions on financial corrections require that they be proportionate to the nature and gravity of the irregularity and the extent and financial implications of management and control deficiencies found. In the context of an irregularity founded upon a procurement breach, any proportionality assessment will of course have regard to whether the breach can be shown to have had a particular, quantifiable impact on project costs. But on the language of the Regulation, the assessment is not limited to that aspect.

93. What all that means is that the concept of financial corrections under the Regulation is a sophisticated one, and gives content to the notion of unjustified expenditure that is part of the definition of irregularity. The financial correction to be applied measures the extent to which the project costs, if included without that correction in the accounts by reference to which payment claims are made to the Commission under the Regulation, would seek to charge unjustified expenditure to the EU budget via the ERDF.

94. That is reflected in, and explains, the exclusion of corrected irregularities from Member States' notification obligation (Article 122(2)(c) of the Regulation), and the requirement, before the Commission can be entitled to apply a correction, that there has been expenditure included in a payment application that was irregular *and not corrected by the Member State* (Article 144(1)(c), the wording emphasised in paragraph 51 above).

95. It follows, and this was Ms Ward's submission for the defendant, that if the chronology is *grant – procurement breach – correction – payment claim*, and the payment claim is based on accounts which reflect the correction, those accounts will state eligible expenditure for the purpose of Article 131(1)(a) of the Regulation, and there will be no difficulty over certifying those accounts under Article 126. But then the Regulation nowhere distinguishes, for different treatment as between the two, procurement breaches that occur after grant and those that occur prior to grant (or, more accurately, cases in which facts that have already occurred, e.g. the awarding of a contract prior to grant without having advertised the opportunity, become, upon the grant being awarded, a procurement breach by the grant recipient).

96. The Regulation permits grants to be made although project work has commenced, indeed although project work has been completed, since the only expressed prohibition in that respect is on the selection of projects the putative grant recipient has completed before applying for a grant (Article 65(6)). The Regulation expressly obliges managing authorities to satisfy themselves that applicable law relevant for the operation has been complied with, where project work has commenced prior to any grant application being made (Article 125(3)(e)). However, contrary to Ms Ward's submission, that does not mean or imply that a grant must be refused if (what would be) a breach of applicable law is discovered. The language of Article 125(3)(e) is materially similar to that of Article 125(4)(a) on post-grant verification, where the consequence of finding that there has been a breach of applicable law, not mentioned in Article 125(4) but which can be appreciated by reading the Regulation as a whole, is the need to apply a correction.

97. Similarly, the Verifications Guidance promulgated by the Commission does not affect the analysis. Ms Ward relied on provisions including a provision reiterating Article 125(3)(e) of the Regulation and provisions emphasising Member States' responsibilities to seek to ensure that improper expenditure is not charged to the EU budget through the ESIF. They elaborate upon, but do not add to or change, the effect of the provisions of the Regulation.

98. It follows also that I do not accept Ms Ward's submission on Article 65(1) (paragraph 41 above). The extent to which, or manner in which, the NPRs determine eligibility of expenditure for the purpose of the ERDF, is that taking together the national procurement rules and the financial correction rates for breach thereof they define what percentage of cost incurred will be eligible expenditure where there has been a breach of those rules. The conclusion contended for by Ms Ward, *viz.* that all expenditure thus incurred is always ineligible, is not justified by a proper understanding of the Regulation and its concepts of irregularity and correction. It also proves too much, as it would mean that in the paradigm case (*grant – procurement breach – correction – payment claim*), the corrected expenditure would still have to be excluded from the certifying authority's accounts and would not generate an ERDF contribution as granted.

99. Similarly, therefore, I do not accept Ms Ward's submission on Article 126(c) (paragraph 48 above). Nothing in the Regulation draws the distinction which that submission sought to draw, in respect of expenditure charged to the ERDF funding account at (say) 90% of actual cost, to reflect a 10% correction, by reference to whether the managing authority (or certifying authority) knew or did not know at the time of grant of the facts that would give rise to the correction. Again, the argument proved too much, for it had no foundation unless it be that after a 10% correction, project expenditure at 90% stated in the accounts by reference to which ERDF payment claims would be made would still be uncertifiable under Article 126(c) because of the procurement breach leading to the correction. But that, in effect, would mean that every correction, even in the paradigm case referred to above, was a 100% correction, which is obviously not what the Regulation says or how it is intended to operate.

100. That brings me back to Article 122(2), the source, the defendant says, of an absolute obligation to refuse a grant if, prior to a final grant decision, a managing authority becomes aware of circumstances that, if a grant had been made, would require a financial correction. In my judgment, it does not have that effect. Once again, a breach of applicable law (e.g. a procurement failing) is not without more an irregularity. It is

or will be an irregularity only if it has the capacity to cause unjustified expenditure to be charged to the EU budget. A breach of applicable law identified by the managing authority during its grant approval procedures, in respect of which the managing authority can identify what correction it would call for, had the grant been awarded, does not have that capacity. The putative need to correct can be built into the grant, so that only what the Regulation would deem to be justified expenditure will ever form part of the accounts upon which payment claims will be based. The 'pre-correction', as it were, within the grant will prevent the material past facts that have been identified from becoming an irregularity if the grant is then awarded.

101. Ms Ward submitted, building on a (partial) analogy I posited between the financial corrections mechanism of the Regulation and liquidated damages provisions in ordinary private contracts, that just as the fact that a contract, if concluded, will contain a satisfactory liquidated damages regime for some category of breach does not mean the putative damages payee cannot refuse to proceed if she learns that facts already exist such that upon concluding the contract the relevant promise will be broken, and the liquidated damages clause will come into play, so here the financial corrections mechanism cannot be used to create some obligation on the defendant to proceed to grant after learning of facts that will put the grant recipient in breach of applicable procurement rules if the grant is made.

102. I agree with that submission, so far as it goes. Although of course this could not be determinative, I note that the grant application form the claimant was asked to use is consistent with it, requiring as it did that any contracts already awarded be identified separately from contracts expected to be awarded in the future and then warning as it did, concerning the former, that:

> "*The Managing Authority reserves the right not to take forward the Full Application if any aspects of procurement are identified as non-compliant at the Full Application stage.*" (my emphasis)

I agree with Ms Morris QC in her submission that reserving the right not to proceed is not the same thing as being obliged not to proceed; and it does seem unfortunate, even if no representations / legitimate expectations case could be made good in this instance, that the Ministry was communicating by its application form that pre-grant procurement that would be non-compliant for a grant recipient might – *but therefore, by definition, also might not* – be fatal to an application, while seemingly having a policy, or an understanding of the law, to the contrary, as set out in Action Note 31.

103. It is unnecessary in the circumstances to deal with a particular point taken by Ms Morris QC on the final part of section 1.1 of the 2019 Decision Annex (so I did not lengthen my summary of the 2019 Decision by mentioning it). The submission was that it showed the Commission to understand that it would be lawful under the Regulation to grant ERDF support subject to correction in a case such as the present (at all events if the relevant correction rate would not be 100%). Ms Ward submitted that the paragraph in question did not have to be read in that way and so was neutral. For completeness, I would say Ms Morris QC had the better of that particular point. The telling wording, to my mind, is this: "*If an irregularity is detected after the contract has been signed and the operation has been approved for funding (at any stage of the operation's cycle), the irregularity should be corrected by applying these guidelines.*" The position would be clearer with a comma after the word "*signed*". Reading the wording in its context,

however, on balance I think that is the sense of it (i.e. it has the sense it would have if it included that extra comma).

104. That brings me to the question of timing which, as a result, will determine this case.

105. The conclusion of the analysis so far gives me this proposition, namely that the defendant may lawfully grant ERDF support for a project to an applicant though aware, prior to grant, that the applicant has awarded a project contract without complying with what will be the procurement rules applicable to it as a grant recipient, at all events if the applicable correction rate would not be 100%. That flows, I have concluded, from a proper understanding of the financial correction mechanism under the Regulation. But that does not mean that there is an irregularity, or that there can be a correction or a correction procedure, prior to grant. There is not and cannot be, as I have already found. The proposition stated in this paragraph concerns the effect upon the lawfulness of making a grant of a correct understanding in prospect of how the irregularity and correction regime would apply if the grant were made without 'pre-correction'.

106. It follows that the corrections rates of the 2013 Decision and NPR5 are not those that fell to be considered, in prospect, when considering, after 14 May 2019, whether to grant ERDF support to a project. To ask what would be the impact of a procurement deficiency under such a grant, if made, is necessarily to posit a financial correction procedure launched after 14 May 2019, to which the 2019 Decision and NPR6 would apply (bearing in mind paragraph 77 above).

107. The 2019 Decision, and NPR6 based upon it, without doubt changed the law for ERDF grant recipients who were not contracting authorities (so that only national law procurement rules applied to them) if they did not comply with those rules. The possibility that the legal rules might change was inherent in the ESIF regime, particularly in relation to flat-rate correction levels, the effective entitlement to set which was with the Commission and the Ministry (if and to the extent the Commission had not acted).

108. Whether or not different considerations might have arisen if the Ministry had decided, without the Commission having departed from the 2013 Decision, to change the rules in the final stages of dealing with the claimant's grant application, here it did not do so. Similarly, I do not need to consider whether a grant recipient, under a grant awarded prior to 14 May 2019 who had, also prior to 14 May 2019, been guilty of a procurement breach, might be entitled to complain that the change was in effect retrospective in its application to it. The claimant, as it has accepted, cannot say it had a legitimate expectation that might found a basis for complaint against the defendant that the Commission would not change the rules of the game at a time before the claimant had been admitted as a player. The risk the Commission might do so, and that the claimant might then find itself committed to works but without a grant of ERDF support, was a risk it ran when it got the project underway prior to any final grant decision and failed when doing so to follow the procurement process it would be required to have followed as a grant recipient.

109. I turn now to consider Grounds A, 1 and 3 in turn. But it will be apparent that Ground 3 will be decisive. Upon analysis, it achieves nothing for the claimant to say, if it can, that the decision made (initially) in June 2019 was on a flawed basis. By then, the 2019 Decision had changed the law, any grant would be one under which, in substance, the

primary project contract had to be stripped out, rendering the project unviable as an ERDF operation, and there can be no criticism of the defendant on that basis for saying no then, or sticking to that decision in October 2019, March 2020, June 2020 or now.

110. It would be different only if it could be said that the defendant was wrong to conclude that the claimant had awarded the refurbishment contract in a way that would infringe the national law procurement rules that would apply to it as a grant recipient; but that has never been suggested. To the contrary – hence Ground 3 – the claimant says it was so obviously the case that what it had done did not meet those national rules that the defendant should have reached that conclusion rapidly, leading to a final decision that could lawfully have been a decision to grant (subject to 10% correction) by 14 May 2019.

Ground A

111. For the reasons given in the previous section of this judgment, Ground A is made out, in part. It was an error of law for the defendant to direct himself, which is the effect of the 'minded to' letter at [12]-[14], as summarised in paragraph 18(1) above, that the defendant could not lawfully grant ERDF support for a project to an applicant when aware, prior to grant, that the applicant had awarded a project contract without complying with what would be the procurement rules applicable to it as a grant recipient, even if the putative financial correction rate would not be 100%, e.g. only 10%.

112. The 'minded to' letter at [13] put it in this way: "*The consequence of … establishing the procurement irregularity in question before the grant funding agreement had been entered into (as was the case) is … that the Department is required to prevent the irregularity of unlawful funding by not entering into the funding agreement*" (original emphasis). The conclusion, at [14], was that: "*Accordingly, the Department is bound to refuse the funding application under the applicable Union and national law.*" To the contrary, however, as I have sought to explain, the defendant could prevent irregularity, in the case posited, by 'pre-correcting' the grant.

113. Action Note 31 and the initial statement of the defendant's position in the June 2019 letter founded upon it (see paragraphs 81-83 above) likewise in my judgment misstated the law.

114. However, by June 2019, when on a 'minded to' basis the decision was first made that the claimant's application for an ERDF grant would be refused, the view that the defendant was bound to refuse the application was in substance correct. By reason of the 2019 Decision, the putative correction rate for what would be the claimant's procurement breach if a grant were made had become 100%. The primary project contract would therefore have to be effectively stripped out of any grant, and it is not suggested that the defendant was wrong to conclude that without grant funding for that contract the Biohub project was not a viable candidate for ERDF support.

Ground 1

115. The claim here is that the defendant misconstrued the words "*financial correction procedure*" in the 2019 Decision. The claimant contends that a procurement review process, such as was triggered here by the revelation that the claimant had let the

primary Biohub project contract without waiting for a grant decision, is a financial correction procedure.

116. There is no question that there was a financial correction procedure under Article 145 of the Regulation, i.e. a procedure launched *by the Commission against the UK*. The issue is whether, within the UK's responsibility for detecting and correcting for irregularities (Article 143), applying Article 145 by analogy as between the defendant and the claimant, the procurement review was a financial correction procedure, so that correction rates under NPR5 should have been treated as still relevant to the claimant's flawed procurement procedure after 14 May 2019. I repeat that the claimant pleaded the claim, and therefore it proceeded, on the basis that it was not wrong to read the different commencement language used in NPR6 in harmony with the 2019 Decision.

117. The primary answer is that the procurement review process in this case cannot have been a financial correction procedure, because there was no grant. It was not wrong, as at June 2019 when in substance the grant decision was being made, to take the view that *ex hypothesi* any financial correction procedure could only be launched at the earliest then, and therefore after 14 May 2019.

118. Even if that is wrong, in my judgment Ground 1 is still not made out. I agree with Ms Ward that the procurement review was an examination of the case by the defendant to reach a provisional conclusion as to whether there had been a breach of applicable law requiring a financial correction under the Regulation (more strictly, whether what had happened would be a procurement breach requiring financial correction had there been a grant), and that is what Article 145(1) provides is to occur *before* a financial correction procedure is launched.

119. I unpack that conclusion on the facts below, but will complete the logic first. On that basis, by the June 2019 letter the defendant then informed the claimant of his provisional conclusion, which was to the effect that what had occurred *would* be a procurement breach requiring a financial correction had there been a grant, and provided the claimant with an opportunity to persuade him not to make that his final conclusion. If the concept be meaningful prior to grant, it was by the June 2019 letter, and not by any earlier step, that the defendant launched a financial correction procedure.

120. The essential chronology of the procurement review was as follows.

121. As mentioned above, Mr Bennett for the claimant informed Ms Bidwell for the defendant on 8 February 2019, over the telephone, that the claimant had already let the main refurbishment contract and work had begun under it. An email from Mr Bennett on 5 February 2019, in the context of what was then a continuing check of the putative ERDF grant for state aid compliance, could have been read as indicating that, but it became clear that it was indeed the position in that telephone call a few days later.

122. Ms Bidwell informed Mr Bennett by email on 11 February 2019 that a procurement review now had to be arranged.

123. The state aid check was completed on 13 February 2019, Ministry lawyers confirming that they were content on that score on the basis of the final iteration of the application form dated 11 February 2019. By email on 14 February 2019, Ms Bidwell informed Mr Bennett that Mr Johnson would probably be the compliance officer conducting the

procurement review and noted that he would need access to "*all the procurement process documents including the advert, assessment of the tenders, decision notes, contracts etc.*" In the same email she reported that the Ministry was now comfortable with the state aid position and said, "*I'm instructing the GFA [grant funding agreement] be released ASAP. Brilliant news!*" Ms Bidwell did not spell out, but it was obvious, that that would be subject to the outcome of the procurement review; it is apparent that she was assuming the review would be a formality, i.e. it did not occur to her that the claimant might have failed to follow what would be proper procurement procedure for a grant recipient.

124. On 6 March 2019, Mr Johnson emailed Mr Andrew Long of Bidwells with a list of requests for documents to inform his procurement review, saying that he would need to review "*the documentation set out below, or equivalent, in relation to the procurement of the contract*". In an email exchange the next day, 7 March 2019, between Mr Bennett and Ms Bidwell, Mr Bennett asked about progress on the funding agreement and Ms Bidwell replied that "*I've been advised that we need to test the procurement process before we can contract due to the size of the contract.*" (Under NPR5, small contracts of up to £25,000 by contract value attracted no particular national law procurement requirements at all.) Ms Bidwell asked Mr Bennett to urge Bidwells to get the documents Mr Johnson had requested to the GDT "*so we can conclude the checks asap*". The conversation I referred to in paragraph 9 above followed.

125. Mr Darren Lewins of Bidwells replied to Mr Johnson by email on 22 March 2019, stating that "*The project was procured on a single-stage selective tender in accordance with JCT Practice Note 2017*" in which five known contractors were invited to tender. Mr Lewins' email also annotated Mr Johnson's list of documentary requests with responses in red. Several of the responses, including the response on "*Evidence of all advertising*", were "*Not applicable to procurement route.*" Separately, Mr Lewins provided a link via which Mr Johnson could download documentation to review.

126. That 22 March response appears to indicate, taken at face value, that the contract opportunity had not been advertised. It said nothing as to what, if any, process had been adopted that might be treated as a satisfactory equivalent.

127. After reviewing Mr Lewin's answers and the documents to which he had given Mr Johnson access by the download link, Mr Johnson emailed Mr Lewin on 9 April 2019 with a list of "*questions and clarifications*", including this: "*I see … a single-stage selective tender process was used. Please can you confirm if the opportunity to tender was advertised anywhere and provide copies of any advertisements.*"

128. Bidwells did not respond in writing, and after some chasing messages in each direction, it was decided that a meeting should be arranged to go through matters. That meeting took place on Friday 10 May 2019. At the meeting, it was confirmed that the contract opportunity had indeed not been advertised at all. Reference however was made to the fact that the contractors whom the claimant had invited to tender for the work were all on the 'SafeContractor' supplier list. Mr Johnson sought to explore the significance of that, and how the SafeContractor list was compiled. Messrs Lewins and Bennett agreed to take those enquiries away with them and provide answers in writing. They did so, in an email from Mr Bennett, on 21 May 2019.

129. In the meantime, on 14 May 2019, the Commission promulgated the 2019 Decision.

130. The procurement review, taking account of all the information supplied by the claimant, was completed on 4 June 2019. Mr Johnson informed Ms Bidwell that day that the refurbishment contract was non-compliant and would have to be excluded, causing the project as a whole to be unviable as a candidate for ERDF support. The formal communication of that in what was effectively 'minded to' form came a week letter, by the letter of 11 June 2019.

131. Returning for a moment to the 10 May 2019 meeting, I have no reason not to accept, and do accept, Mr Johnson's evidence about it in a witness statement in these proceedings, including: (a) "*I had not formed the view at the meeting on whether or not the procurement would be established as compliant*"; (b) "*it had not been made clear to me by the end of the meeting how the SafeContractor list was compiled and how Bidwells had selected from it*"; (c) he was trying to establish at the meeting "*if SafeContractor was a list of contractors who would have had to satisfy objective selection criteria in a fairly advertised competition in order to get onto the list*".

132. Once the further information came in, Mr Johnson was able to and did form the view that there was no fair opportunity framework or advertised approved supplier process behind the SafeContractor list. As Mr Osborne explained in his witness statement, Mr Johnson's task had been "*to explore whether the procurement … had been compliant, even if not in accordance with the methodology stated in the application form. … If for example the successful contractor had been selected from an advertised framework agreement that might have led to the conclusion that the extent of open advertising to the market was sufficient to comply with the NPR.*" I agree with Mr Osborne's view that it was right "*that [Mr] Johnson should explore all possibilities that might support a conclusion that the contract had been let compliantly.*"

133. As it was, Mr Johnson was unable to reach that conclusion. There had been nothing that could be regarded as equivalent to (as the NPRs put it, "*in line with*") the advertising requirement referred to at Ch.6, para 23, of the NPRs, and there were significant deficiencies of substance and record-keeping. Not least among those, there was no indication of any objective award and selection criteria, no apparent reason why a sixth interested contractor had not been invited to tender, views on Bidwells' part for which Mr Johnson could not identify objective evidence that some of the losing bidders had underbid, and a winning bid that had not been the lowest bid and appeared to have been received after the tender deadline, Bidwells claiming but being unable in Mr Johnson's view to substantiate that though it had been submitted late electronically a hard copy had been delivered within time.

134. The claimant's factual case focused on the contention that it was made clear to Mr Johnson by Mr Lewins' email on 22 March 2019 that there had been no advertising of the contract opportunity as the grant application said there would be. The natural inference from Mr Johnson's email on 9 April 2019 is that he was not sure that really was what he was being told. But in any event, the national procurement rule against which Mr Johnson was testing the award of the refurbishment project was for a process in line with the specific method referred to in the NPRs (or, as Mr Johnson put it in his own terms in his email of 6 March 2019, a process equivalent thereto).

135. In the language of Article 145(1) of the Regulation, if (as Ground 1 proposes) it is to be applied by analogy to the facts of this case, in my judgment:

(1) the defendant was conducting by Mr Johnson's procurement review an examination of the subject procurement in order to reach a conclusion that would be provisional, in the sense that the claimant would be given an opportunity to respond before any final decision or action were taken on the basis of it, whether it had been compliant (or was a non-compliance that for a grant recipient would be an irregularity requiring a financial correction);

(2) the letter of 11 June 2019 informed the claimant of the conclusion, provisional in that sense, that there had not been compliance (and that the non-compliance would, for a grant recipient, be an irregularity that required a financial correction to be made).

136. For those reasons, I conclude that Ground 1 is not well founded.

Ground 3

137. On the view I have reached as to the import of the irregularity and financial correction regime for the grant award decision, if the compliance review had concluded prior to 14 May 2019 it could have been lawful for the defendant to make a 'pre-corrected' grant of ERDF support, applying a 10% correction in line with NPR5. That does not mean the claimant would have been entitled to such a grant, but the defendant would have been bound to make the decision upon the grant application on the basis that the Regulation did not create a legal duty on him to reject it. Whether on that basis he would have awarded the grant sought is not for me to consider on this claim.

138. I agree with Ms Morris QC that whether or not to grant ERDF support on that basis is a judgment call the defendant did not make, because instead the view was taken that he was bound to reject. For the reasons I have given above, that was a correct view to take, as of early June 2019 when the procurement review was concluded and the decision was being made.

139. That is where Ground 3 comes in. The claimant submits that in breach of an administrative law (procedural) duty to complete the procurement review within a reasonable time, the defendant without justification delayed the detection of (what would be) an irregularity under the 2013 Decision, in consequence of which the claimant was subjected to the effect of the more punitive correction rates that had to be set following the 2019 Decision when that was not necessary or proportionate.

140. The argument is that the claimant told the defendant on 22 March 2019 that it had not advertised, and then that: "*A matter as simple and obvious as concluding that the failure to advertise was an "irregularity" did not require more than two months of deliberation …*". I do not accept that argument:

(1) First, although I observed that Mr Lewins' 22 March 2019 email, taken at face value, appears to indicate there was no advertising, it could have been clearer – it is not obvious why it took Mr Lewins 16 days to say "*Not applicable to procurement route*" rather than replying promptly and saying "*There was no advertising*" – and it did not in fact convey to Mr Johnson that indeed there had been no advertising at all. His follow-up on 9 April 2019, asking whether that was what was being said, went unanswered until the 10 May 2019 meeting.

(2) Second, the absence of advertising as stipulated by the table at Ch.6, para 23, of the NPRs, or as the claimant had said in its application form would be used, did not without more constitute non-compliance with (what would be) applicable law. There was a need, in fairness to the claimant, to investigate the equivalence (or not), in substance, of the process in fact used, as was built into Ch.6, para 23, of the NPRs and as had been identified by the terms of Mr Johnson's initial list of requests on 6 March 2019. As Ms Ward submitted, had it not been for the intervention by the Commission on 14 May 2019, on these facts the claimant would have been complaining that the defendant had acted without fully examining the circumstances if a conclusion had been reached prior to the 10 May 2019 meeting and the provision thereafter (in fact on 21 May 2019) of the final information needed for a properly informed assessment of the position.

141. The timing of the Commission's intervention by the 2019 Decision was thus unhappy for the claimant, if (which for my purposes remains an unknown) the defendant would have been prepared to grant ERDF support to the Biohub project in the face of the findings of the procurement review, if it had been concluded prior to 14 May 2019 and Action Note 31 had stated the effect of the Regulation accurately in the material respect. But it was not through any actionable failure on the defendant's part that the procurement review was concluded in early June 2019. The erroneous view of the law stated in Action Note 31, as I have held it to have been, did not deprive the claimant of the possibility of being lawfully granted ERDF support for its Biohub project.

142. Rather, the defendant was entitled to make his decision whether to accept or refuse the claimant's grant application, as he did, following the conclusion of the procurement review in early June 2019. As things stood then, he was entitled and bound to conclude that the main refurbishment contract had been procured in a way that would attract a 100% correction if the claimant were a grant recipient, and on that basis, given the centrality of that contract to the project's viability as a candidate for ERDF support, to treat himself as effectively duty-bound to refuse the grant application.

Conclusions

143. For the reasons given when introducing and explaining the Grounds, Ground 2 is academic and Ground 4 fails. This claim must stand or fall upon Grounds A, 1 and 3.

144. Ground A, then, succeeds in part, in the sense that to the extent the defendant directed himself that if prior to grant he finds that the applicant has awarded a contract in a way that, if it were a grant recipient, would involve an irregularity requiring a financial correction pursuant to the Regulation, then as a matter of law the grant application must be rejected, that was a misdirection.

145. The true position in that circumstance was that the defendant could lawfully grant ERDF support, 'pre-corrected', although he would not be under a duty to do so, i.e. it would be a matter for decision by him whether to do so rather than a matter where he was bound in law to refuse. To the extent that Action Note 31 stated otherwise, it misstated the law.

146. Grounds 1 and 3 however fail, with the result that although the defendant misdirected himself to the extent just stated, because of Action Note 31 (at all events initially), the defendant was entitled and bound to consider whether to grant ERDF support to the

claimant on the facts as they stood in early June 2019, and therefore on the basis that the main refurbishment contract, procured by the claimant in what, if it were a grant recipient, would be a non-compliant fashion attracting a 100% correction, would have to be stripped out.

147. Since there has never been a challenge to the defendant's consequential conclusion that there was no viable basis for the grant of ERDF support if that main contract were stripped out, there is, overall, no operative error in the defendant's decision to reject the claimant's grant application.

148. Ironically perhaps, that means Mr Osborne's letter in October 2019 that the defendant was persuaded to withdraw, to be replaced some months later by the March 2020 'minded to' letter, was sufficient and legally accurate in substance (it talked of a financial correction procedure having actually been launched rather than of an assessment of the financial correction that would have to be applied if there had been a grant, but the impact for the claimant's application is the same). That letter summarised the chronology of the procurement review, implicitly rejecting any contention that the defendant was guilty of actionable delay, and concluded that with the advent of the 2019 Decision the Ministry was bound to consider this as a 100% correction case (more strictly, a putative 100% correction case) as regards the main refurbishment contract, and then explained how without that contract there could be no question of ERDF support for the claimant's project.

149. The claimant was warned in writing that, as regards ERDF grant funding, it acted at its own risk if it awarded the project works prior to a final grant decision. It took that risk. Its claim that it should not pay as a price the failure to secure that funding, by way of judicial review of the decision to refuse it in the circumstances as they were then found to be, fails and is dismissed.