

Recommendation of the European Ombudsman in case 1016/2016/CEC on the European Commission's refusal to make a payment under a grant agreement concerning university associations in Latin-America

Recommendation

Case 1016/2016/CEC - **Opened on** 17/11/2016 - **Recommendation on** 15/10/2018 - **Decision on** 18/03/2019 - **Institution concerned** European Commission (Recommendation agreed by the institution) |

The complainant, the European University Association, representing over 800 universities in Europe, brought this case about the Commission's refusal to pay certain of the costs it had incurred under the ALFA-PUENTES project. The unpaid amount is 83,289.89 EUR.

The Ombudsman finds that the Commission has not provided sufficient justifications for its refusal and that its decision to refuse to pay the disputed amount constitutes maladministration.

Therefore, the Ombudsman recommends that the Commission pay the unpaid amount to the complainant.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The complaint was brought by the European University Association (EUA), a non-governmental organisation representing over 800 universities in Europe [2] .
2. The EUA was the coordinator of a consortium of 22 Latin-American and European university associations for the project ' ALFA-PUENTES : *Building Capacity of University Associations in fostering Latin-American regional integration* (ALFA III)'. The ALFA-PUENTES project received funding from the EU under grant agreement DCI-ALA/19.09.01/10/21526/245-593/ALFA III (2010)87 and was implemented from 28 March 2011 to 27 March 2014.
3. During the period June-July 2014, after the project had concluded, the complainant submitted the Final Report on the project. This included an audit report, a final narrative report, an explanatory note, and a table of the costs incurred in Latin America. The complainant asked the



Commission to make the final payment which it calculated as amounting to 162,645.72 EUR.

4. The Commission refused to make this payment. The exchanges between the Commission and the complainant that followed failed to resolve the matter. However, on 9 February 2015 the Commission informed the complainant that it would make a final payment of 63,713.49 EUR.

5. On 27 February 2015, the Commission requested **an audit** of several ALFA projects, including the one in question here. Following the audit, [3] the Final Financial Audit Report of 3 November 2015 (hereinafter: 'Audit Report') found that:

“• The Financial Report presents fairly, in all material respects, the actual expenditure incurred and revenue received for the Project for the period from 28 March 2011 to 27 March 2014 in conformity with the applicable Contractual Conditions; and

• The Project funds provided by the European Commission have, in all material respects, been used in conformity with the applicable Contractual Conditions.”

6. As the Audit Report concluded that the “ *balance of funding payable by the Commission* ” was 84.472,43 EUR, the complainant asked the Commission on 1 December 2015 to pay the balance.

7. In its reply of 17 February 2016, the Commission refused to pay the outstanding amount [4] .

8. Dissatisfied with the Commission's reply, the complainant turned to the European Ombudsman.

The inquiry

9. The Ombudsman opened an inquiry into the Commission's refusal to make a payment of 83,289.89 EUR to the complainant.

10. While the complainant raises a number of other issues, its key claim is that the Commission **failed to act in accordance with the conclusions of the Audit Report** which proposed payment of the amount in question. The complainant points out that project expenditure did not exceed either the overall project budget or the specific budget headings. In fact, the complainant contends that the Commission misinterpreted the findings of the Audit Report in particular by stating that it had identified serious financial and internal control issues in the running of the project.

11. The Ombudsman received the Commission's reply on the issues raised in this inquiry and, subsequently, the comments of the complainant. The Ombudsman also sent the Commission a letter with her preliminary findings (see paragraphs 20-23). The Ombudsman **notes** that several delays **are taking place in the conduct of this inquiry and acknowledges** that some of these delays **have been caused by the Ombudsman's office** . For these delays, the



Ombudsman's Office has apologised to the complainant.

Relevant Provisions of the Grant Agreement

12. In the course of the inquiry, the Commission clarified that the legal basis for its decision to declare the contested costs ineligible was Article 14.1(c) and (e) of the General Conditions:

"Eligible costs are actual costs incurred by the Beneficiary(ies) which meet all the following criteria:

(...) c) [they] must be necessary for the implementation of the action which is the subject of the grant and (...)

e) they must be reasonable, justified and comply with the requirements of sound financial management, in particular regarding economy and efficiency."

13. Thus, the Commission stated that the reason for declaring the costs ineligible was that it had decided that these costs were incurred on activities which were neither necessary, reasonable, nor justified in order to implement the project successfully.

Arguments presented to the Ombudsman

14. The complainant argues that the Commission has misinterpreted the findings of the Audit Report. It claims that the Commission was wrong to state that the Audit Report outlined "*a number of serious financial and internal control issues, which justified the qualified opinion of the auditor*". The complainant notes that, on the contrary, the audit concluded that the Commission should pay it an amount of 84.472,43 EUR.

15. In addition, the complainant argues that the Commission's reasons for refusing to make the payment are purely procedural and based on an arbitrary decision on whether the expenses were necessary. The complainant states that it cannot understand how, and under which criteria, the Commission could judge that the expenditure in question was not necessary to deliver the project results. The complainant considers that all expenditure was clearly project related. It refers, for example, to a cost overrun to organise project team management meetings which was fully in line with the purpose of the grant, namely, capacity-building in Latin-American university associations.

16. The Commission agrees that the overall objectives of the project have been met. Nonetheless, it states that it was concerned about the overruns on several of the budget lines, and particularly in terms of administrative support staff, which constituted the largest part of the contested costs. In its view, the complainant has failed to properly justify the large increase in costs incurred towards the very end of the project.

17. The Commission states that the Audit Report is just one source used to verify project expenditure. It does not automatically entitle the complainant to receive a payment. In this case,



the Commission based its assessment on the expenditure verification reports, on the independent operational and financial desk checks of the Commission's Directorate-General for International Cooperation and Development (DG DEVCO), and on the independent external audit. In the case of the Audit Report, the Commission points out that it found that 18,715.75 EUR of the costs claimed were ineligible. While this amount was below the "materiality threshold" [5] of 2%, the audit revealed internal control shortages such as missing or inadequate supporting documentation and inconsistency between payroll expenses and corresponding timesheets. Nevertheless, since the project had ended, the Commission did not consider it necessary to require remedial action from the complainant.

18. The Commission states that, in accordance with the terms of reference of the audit, external audits focus on the internal control, financial and accounting requirements of the project and do not examine the necessity and reasonableness of the declared costs.

19. The Commission considers that the complainant has failed to justify properly why there had been cost overruns under different budget subheadings. In particular, it has not provided sound explanations which would satisfy the requirements of necessity, reasonableness, justification and compliance with the requirements of sound financial management, in particular regarding economy and efficiency. The Commission refers to cost overruns in budget headings regarding administrative support staff, events, international travel, meetings and research, which it has declared ineligible on the grounds mentioned above.

The Ombudsman's preliminary finding

20. Taking into account the arguments and views put forward by the parties, the Ombudsman made the **preliminary finding** that the Commission has not provided a sufficient basis for its decision to disregard the Audit Report and to refuse to make a payment of 83,289.89 EUR to the complainant.

21. In particular, although the Ombudsman acknowledged that the Commission was not bound to act on the Audit Report, she considered that a decision which departs from audit findings must be properly and convincingly supported by relevant facts and arguments. The Ombudsman noted that in the context of grants, terms such as "necessity" and "reasonableness" are very much open to interpretation and that the issue of "sound financial management" was specifically within the domain of the external auditor. The Ombudsman's position, at that point, was that the Commission had not provided a sufficient basis for its decision to disregard the auditor's report and to refuse the final payment.

22. The Ombudsman further considered the possible negative implications for the reputation of the complainant, which represents European universities, flowing from the Commission's decision to refuse to pay the disputed amount. That possible negative impact made it all the more necessary that the Commission should have a particularly convincing basis for the decision to refuse the payment.

23. In addition, the Ombudsman noted that the project in question, which was complex and



involved many partners across several Latin-American countries, was delivered successfully and within budget. More generally, she considered that the ALFA-PUENTES programme was of significant importance to the EU [6] .

24. Based on this preliminary finding, on 12 July 2018 the Ombudsman invited the Commission to provide a fuller justification for its decision to refuse the payment in question. The Commission was invited to provide this fuller justification by 31 August 2018 . The Ombudsman noted that, in the absence of good reasons being provided for the decision, she might be led to the conclusion that the Commission should pay the disputed amount to the complainant. At the Commission's request the Ombudsman subsequently extended the deadline to 30 September 2018 .

25. In the absence of a response from the Commission by the extended deadline, and up to the date of this Recommendation, the Ombudsman has proceeded with her inquiry on the basis of the information already available.

The Ombudsman's assessment leading to a recommendation

26. It is clear that the project in question was a particularly complex one involving, as it did, a diversity of partners (22 partners and four associate partners) across Europe and Latin America. The complainant has itself acknowledged difficulties it encountered in ensuring it operated within the General Conditions of the funding agreement. The external auditor identified ineligible expenditure of 18,715.75 EUR, across a range of headings. The complainant accepted that this expenditure, amounting to 0.55% of total reported expenditure, should not be reimbursed. The Ombudsman notes that the amount remaining in dispute (83,289.89 EUR) constitutes just 3% of the maximum grant payable.

27. The Ombudsman does not accept the Commission's position that it was not the external auditor's role to examine the necessity and reasonableness of the complainant's declared project costs. The Ombudsman notes that the external auditor's task was to check that the project funding provided by the Commission had been used in conformity with the contractual conditions. The Audit Report itself states that it had been prepared "*in order to gain assurance that the Project funding provided has, in all material respects, been used in conformity with the applicable Contractual Conditions ... and to facilitate determination with the [complainant] of any balance of funding which is payable or recoverable.*" Those contractual conditions include Article 14 of the General Conditions to the grant agreement. The Ombudsman notes that the external auditor assessed the eligibility of the project costs when making financial findings regarding them. The requirements of necessity, reasonableness, justification and sound financial management, mentioned in Article 14.1 (c) and (e), are integral components of such an eligibility assessment. Therefore, the external auditor, when assessing the complainant's declared project costs, must, by definition, have checked these costs against these criteria. There is nothing in the audit report to suggest otherwise.



28. The Ombudsman takes the view that when an EU institution or body departs from the findings of an Audit Report, as the Commission did in this case, it should provide sufficient and convincing explanations for doing so.

29. The costs in dispute in this case concern, primarily, costs of administrative support staff and other research staff and were incurred, mostly, in the final months of the life of the project. The Commission's position, in brief, is that these particular costs should have been anticipated and notified to the Commission while the project was still under way. The Commission also takes the view that these costs did not relate to activities covered by the project. The complainant's position, again in brief, is that these costs, for the most part, were not extra costs, but a reallocation of staff costs from other staff categories. The complainant also argues that, in a project with a total budget of more than 3 million EUR, and with more than 20 partner organisations operating in Europe and Latin America, it was inevitable that there would be issues about staff costs given that staff were employed under different types of contracts and at different salary levels. The complainant insists that the disputed costs were incurred in activities covered by the project.

30. The Ombudsman remains unconvinced by the explanations provided by the Commission as to why it considers that the cost overruns involved spending which was not necessary, reasonable, justified or in accordance with the principle of sound financial management. The Ombudsman notes in this respect that the Commission has confirmed that the complainant met the overall project objectives and carried out the main activities. The Ombudsman further takes into account that, although the complainant has overspent on certain budget headings, it has kept the expenditure within the overall budget of the project.

31. The Commission characterises the Audit Report as having identified certain financial and internal control issues in the management of the project. This seems to infer that there were matters of significant concern affecting the complainant's overall management of the project. Arising from these issues, the external auditor declared certain costs ineligible. The Ombudsman notes that the auditor deducted these ineligible costs from the balance it considered payable by the Commission. However, these ineligible costs (amounting to 18,715.75 EUR, or 0.55% of total reported expenditure) can hardly be seen as suggesting significant mismanagement of the project by the complainant. Moreover, despite these financial and internal control findings, the auditor nevertheless proposed that the Commission pay the complainant an amount of 84,472.43 EUR (adjusted subsequently to 83,289.89 EUR). The Ombudsman therefore understands that the project has been largely implemented in a satisfactory manner and in line with the principles of sound financial management.

32. The Ombudsman concludes that the Commission has not justified its decision to depart from the external auditor's finding that the complainant should receive a final payment of 84,472.43 EUR (adjusted subsequently to 83,289.89 EUR). The Ombudsman therefore confirms her preliminary finding of 12 July 2018.

33. In light of the above, the Ombudsman finds that the Commission's refusal to make a payment of 83,289.89 EUR to the complainant constitutes maladministration. She therefore



makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the Commission:

The European Commission should make a payment of 83,289.89 EUR to the complainant.

The European Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 15 January 2019.

Emily O'Reilly

European Ombudsman

Strasbourg, 15/10/2018

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

[2] www.eua.be [Link]

[3] The final meeting for that audit took place on 30 April 2015.

[4] The Commission made an additional payment of 1.182,54 EUR to correct an error under subheading 1.3.3 of the Final Report. Thus, the disputed amount now was 83,289.89 EUR.

[5] This is an audit term. One definition of “materiality threshold” is that “[it] is the maximum amount by which the **auditors** believe the statements could be misstated, by known or unknown error or fraud, and still not affect the decisions of reasonable financial statement users.”

[6] For example, the 2017 San Salvador Declaration of the European Union, Latin America and the Caribbean (EULAC) Academic and Knowledge Summit states: “EUA, as a representative institution of European universities, alongside the main Latin American and Caribbean rector and University associations, must constitute a permanent platform for collaboration, taking as



precedent and utilising structural projects, such as ALFA-PUENTES.”

https://ec.europa.eu/research/iscp/pdf/declaracion_de_san-salvador_en.pdf [Link]