

Decision in case 325/2016/DR on how the European Commission dealt with a feasibility study on European research grants for cross-border investigative journalism

Decision

Case 325/2016/DR - Opened on 17/06/2016 - Decision on 19/02/2019 - Institution concerned European Commission (No maladministration found) |

The European Commission asked an external contractor to do a feasibility study to examine the possibility of setting up a grant scheme for cross-border investigative journalism. The aim of the study was to determine whether there was a need for EU financial support for investigative journalism, and to define possible models of funding. The study did not establish a clear need for EU funding, and the Commission decided not to take any further steps on this matter.

The complainant claimed that the Commission had altered the conclusions of the study initially submitted by the contractor.

The Ombudsman found that the contractor had indeed modified the initial findings of the study. However, this was because the Commission considered that it did not comply with the terms of reference of the contract, and in particular the principle of subsidiarity. There was no evidence to suggest that the modifications were made in order to manipulate the findings of the study.

While the Ombudsman found that the Commission took too long to publish the study and understood the dissatisfaction expressed by the team of journalism experts involved in the study, overall she found the Commission's explanations to be adequate.

Background to the complaint

1. The European Commission was tasked with looking into the possibility of setting up a grant scheme for funding cross-border investigative journalism. The Commission asked a consortium of independent consultants ('the contractor') to do a feasibility study. The purpose of the feasibility study was to determine whether there was a need for EU financial support for cross-border investigative journalism in Europe and to define possible funding models that would be compatible with the EU 'Financial Regulation' [1] , whilst guaranteeing the necessary independence of investigative journalists who might benefit from such grants. The contract



required the contractor to consult with a team of experts in the field of journalism ('the expert team').

2. In December 2013, the contractor submitted to the Commission the draft feasibility study. The Commission held that the draft study did not comply with the contract. The Commission eventually accepted the study on 31 October 2014. The study concluded that, while there may be a need for funding investigative journalism, there was no clear legal basis justifying possible EU involvement.

3. On 31 March 2015, the Commission published the feasibility study on its website [2] .

4. On 4 June 2015, the expert team issued a press release claiming that the Commission had altered the conclusions of the study [3] and that the study published by the Commission was different from the one which the contractor had submitted in December 2013.

5. The complainant, a Member of the European Parliament, took issue with the way the Commission had carried out the study and turned to the European Ombudsman.

The inquiry

6. The Ombudsman opened an inquiry into the complainant's concern that the Commission had modified the feasibility study to justify its decision not to implement the grant scheme.

7. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's reply. The Ombudsman's inquiry team also inspected the Commission's file on this case.

8. Several delays took place in the conduct of this inquiry, for which the Ombudsman's Office will apologise to the complainant.

Arguments presented to the Ombudsman

A) The conclusions of the feasibility study were fundamentally altered

9. **The complainant** stated that the conclusions of the 2013 version of the feasibility study were fundamentally altered in the final published study of October 2014. Whereas the 2013 version had been supportive of a grant scheme, the final study was not. The complainant took the view that the Commission imposed to the contractor the conclusions it wished to see adopted.

10. In that regard, the complainant relied on the press release issued by the expert team that the conclusions of the study had been altered. The complainant also noted that there are significant differences between the two versions of the study, in particular with regard to the conclusions reached on a number of issues.



11. The first issue concerned whether there was a need to provide additional funding, beyond the media's own resources, for cross-border investigative journalism. The 2013 version of the study referred to difficulties in most EU Member States due to changes undergone by the media sector. It claimed that there is a lack of training and of job opportunities in investigative journalism, partly due to a lack of funding. It also highlighted the positive impact that additional funding could have on Member States that had recently transitioned towards democracy and an independent media landscape. However, although the final study acknowledged that changes in the media sector had affected investigative journalism, it implied that additional funding was not necessary.

12. The second issue concerned the question whether EU involvement was justified, in line with the principles of 'subsidiarity' [4] and 'proportionality'. In the complainant's view, this is where the two versions diverge the most. While both versions of the study used essentially the same analysis, they came to opposite conclusions. The complainant considers that the final version of the study did not provide sufficient grounds to justify why, based on the subsidiarity principle, the proposed grant scheme should not go ahead.

13. The third issue concerned the administrative overhead costs. The 2013 version of the study concluded that these costs would be about 20% while the final study concluded that they would exceed 20%. For the complainant, that conclusion was not supported by the findings of the final study.

14. In its reply, **the Commission** presented an overview of the key stages in the completion and approval of the feasibility study [5] . It also stated that it did not accept the version submitted in December 2013 because it did not comply with the requirements set out in contract.

15. The Commission noted that a feasibility study must provide a "*clear rationale for intervention at Union level in accordance, inter alia, with the principle of subsidiarity*" [6] . It must also propose a rational and objective assessment of options, supported by facts and figures and presented in a logical way [7] . This was made clear to the contractor from the beginning. However, the draft submitted by the contractor in December 2013 did not meet these requirements. The reasons for EU involvement were almost inexistent and the need for EU financial support was not demonstrated. Thus, the final study did not "*reverse the conclusions from positive to negative*", but added "*a necessary dimension which was missing from the outset despite it being required in the terms of reference*". Much of the final feasibility study was the same as the 2013 version [8] .

16. In addition, the study lacked objectivity. The Commission claimed that the initial version was based on the assumption that funding was needed, without explaining why, and reflected the views of only one group of stakeholders (investigative journalists), as confirmed by the contractor itself. The changes in the final study were therefore made in order to present "*a complete analysis*".



17. Finally, the Commission had also identified, at an earlier stage in the process, problems raised by the relatively high overhead costs of the project. It also pointed to drafting problems that had not been addressed.

B) The Commission delayed releasing the study in order to alter its findings

18. **The complainant** contended that even though the feasibility study had been finalised by the expert team in December 2013, the Commission delayed releasing it by 15 months, in order to alter its conclusions.

19. In its reply, **the Commission** noted that the complainant referred to the version submitted to the Commission in December 2013. That version however was not accepted, as it did not comply with the terms of the contract. Therefore, more time was needed to finalise the study, including deciding on the best publication options [9] and dealing with data protection issues.

20. In his comments on the Commission's reply, **the complainant** pointed out that, up until December 2013, the consultation process between the Commission and the contractor was transparent and well-documented, while after that period the process became "*completely opaque*" [10]. He also stated that the Commission delayed the publication of the final study until it had ceased to be of interest to Parliament.

C) Failure to consult the expert team about the revision of the study

21. **The complainant** stated that the expert team, whose role was to prepare and validate the findings of the study, was not consulted on the final version prior to its publication.

22. **The Commission** explained that it was the contractor's role to carry out the research work and to draft the study, and that the study did not need to be validated by the expert team. Only the Commission could approve the study [11]. In addition, the Commission had played an active role in ensuring that the expert team was involved in preparing the study. It even organised, on its own initiative, an additional workshop with the expert team and the contractor, preceded by a bilateral meeting with the expert team, to give its members the opportunity to express their views.

23. In **the complainant's** view, the additional workshop with the expert team was irrelevant, as it took place before the Commission rejected the 2013 version of the feasibility study.

The Ombudsman's assessment

A) The conclusions of the feasibility study

24. Having analysed the two versions of the feasibility study, the Ombudsman finds that there are indeed differences regarding their length, structure and conclusions. The Commission explained that this was because the contractor had to revise the version of December 2013 to bring it in line with the requirements of the contract. The question thus arises whether and to what extent the Commission was allowed to intervene in the drafting process, and whether it provided convincing and reasonable explanations for doing so.

25. The Ombudsman notes that the Commission was entitled, based on the terms of the contract, to "*follow the activities undertaken by the contractor*", to review the documents



received, and to make suggestions or even redirect the work of the contractor “ *if necessary* ” [12] . The Commission had thus a certain margin of discretion to decide whether the draft study complied with the contractual terms and ultimately, to accept or reject it [13] .

26. The Ombudsman finds that the Commission provided convincing explanations as to why it could not accept the version of December 2013. In line with the principle of subsidiarity, the feasibility study had first to demonstrate whether EU, rather than national, funding was justified for cross-border investigative journalism projects [14] , and if yes, which model(s) of funding would be the most appropriate. The documents inspected by the Ombudsman show that this was a recurrent issue in the discussions between the Commission, the contractor and the expert team [15] , as the Commission considered that it was not properly addressed. The December 2013 version took for granted the fact that EU funding should be provided to encourage crossborder investigative journalism projects, and focused on the potential benefits of EU financial support, instead of explaining why it was for the EU rather than for the Member States to provide such financial support [16] . That version had also concluded that, “*while there [was] no compelling case for building (...) a support scheme at EU level (...) such a scheme would deliver a potentially positive impact even through low amounts of funding*” . The Commission was therefore entitled to insist that the study should include a more substantiated analysis of the need for EU financial support.

27. The Commission also took issue with the lack of objectivity of the 2013 version of the study [17] . The inspection of the Commission’s file confirmed that the contractor, in reply to the Commission’s concerns, had explained to it that the expert team would not validate the study if it contained statements that were not supportive of the investigative journalism community. The Commission was thus right to ask the contractor to produce a version containing a more balanced and objective analysis.

28. Finally, the inspection also showed that the Commission had identified persistent drafting and structure-related problems in the version submitted in December 2013. This also led the contractor to make substantial changes to the wording, structure and length of the study [18] .

29. Although the changes made by the contractor [19] may appear, in the eyes of the complainant, to have been made in order to accommodate and comply with the wishes of the Commission, the Ombudsman’s inquiry confirmed that the differences between the two versions of the study were the result of the efforts made by the contractor to provide an analysis that would comply with the terms of the contract. The inspection did not uncover any evidence that could support the view that the Commission tried to manipulate the process or coerce the contractor to accept its views and change the conclusions of the study in a specific way.

B) Delay in releasing the feasibility study

30. The complainant took issue with the time it took the Commission to release the study. The Ombudsman notes that the 15-month period mentioned by the complainant covers two distinct periods, the first between December 2013 and October 2014, when the study was finally approved, and the second, from that date until its publication in March 2015.

31. Regarding the first period, the inquiry confirmed that, after it had submitted to the



Commission the December 2013 version of the study, the contractor had to produce several revised versions until the Commission gave its approval on 31 October 2014. As stated above, there was no evidence in the file inspected by the Ombudsman to support the view that the Commission delayed the approval process in order to manipulate the study's conclusions.

32. Regarding the time it took to publish the approved study, the Ombudsman agrees that five months is particularly long in this context. Moreover, it was only after the complainant inquired as to why the Commission had not published the study that the Commission did so.

33. That being said, the Ombudsman did not find any evidence in the inspected file to support the view that the Commission postponed the publication of the study until it was no longer of interest to Parliament.

34. The complainant is right in that there were differences in terms of the consultation process before December 2013 [20] and after that date [21]. In fact, after the change of the project manager, the contacts between the latter and the Commission (the responsible Head of Unit) were almost all bilateral. The Commission provided input on two out of four versions of the report, before it accepted the fifth (and final) one.

35. The contract provided, however, that it should last only one year (that is until December 2013). It did not provide for any meetings or workshops to take place after that period. It is therefore understandable that the consultation process that followed thereafter between the Commission and the contractor would be less formal. The Ombudsman's inspection revealed that that additional consultation, even if it was no longer reflected in formal minutes or notes shared with the experts, was nonetheless properly documented in the emails exchanged between the Commission and the contractor.

C) Involvement of the expert team

36. Under the terms of the contract, the responsibility for drafting and delivering the study lied with the contractor alone. The experts were expected to “*assist*” the contractor with regard to the methodology followed, and participate in workshops to discuss “*findings made*” and the “*next steps to be carried out*”. The inquiry confirmed that the expert team did so during the organised workshops.

37. As the complainant noted, **the expert team was not involved in the finalisation of the study after December 2013**. The modifications in the 2014 version were made mostly by the new project manager appointed in March 2014. As such, the additional workshop organised on the Commission's initiative was irrelevant, since it took place before the contractor submitted the December 2013 version.

38. The Ombudsman has already dealt with the fact that no further workshops (to discuss “*findings made*” and the “*next steps to be carried out*”) were organised after the one-year term of the contract had ended (see paragraph 35).

39. It is, however, understandable that the expert team expressed its dissatisfaction via a press release, given that the published version of the study departed significantly from the version in



which they had been involved. While it was for the contractor to ensure that the expert team was involved during the implementation of the contract, the Commission itself should have been aware of the inevitable frustration for the expert team who worked on a study that was subsequently altered without further input from them.

40. While the Ombudsman has, therefore, identified a number of shortcomings in this case, overall she finds the Commission's explanations to be adequate.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion :

While the Ombudsman finds that the Commission took too long to publish the study and understands the dissatisfaction expressed by the expert team involved in the study, she finds the Commission's explanations to be adequate and that there was no maladministration overall.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 19/02/2019

[1] Regulation 966/2012 on the financial rules applicable to the general budget of the Union: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0966&from=EN> [Link].

[2] <http://ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=13428665> [Link]

[3] The press release is available here: <http://www.aej-uk.org/investigative-pr.pdf> [Link]

[4] The subsidiarity principle is set out in the Treaty on European Union (TEU). In areas in which the EU does not have exclusive competence, the subsidiarity principle defines the circumstances in which it is preferable for action to be taken by at EU-level, rather than national level.

[5] The Commission noted that the contract provided for four meetings involving the contractor, the expert team and the Commission: a kick-off meeting, an interim report meeting and two



validating workshops. The last workshop, in which several issues requiring follow-up action were identified, took place in July 2013. The contractor submitted a revised version of the feasibility study in September 2013 that was discussed in an additional workshop organised by the Commission in October 2013. The contractor submitted another revised version in December 2013, which the Commission still rejected for non-compliance with the terms of the contract. In March 2014, the contractor replaced the project manager with another member of the consortium and submitted the final version of the study on 31 October 2014. The Commission accepted it on the same day.

[6] Article 38 e) of the Financial Regulation.

[7] Article 30 of the Financial Regulation.

[8] The Commission referred to the factual content, the chapters on the use of an intermediate organisation, the budgetary estimates, the country analyses and other annexes of the study.

[9] The choice was between publication by the Office for Publications or on the 'evaluation portal' managed by the Commission's Secretariat-General (<https://ec.europa.eu/research/participants/evaluation/> [Link]).

[10] The complainant noted that the Commission rejected the December 2013 version of the study after having held five meetings with the contractor and received three written reports. By contrast, no formal meetings took place between the Commission and the contractor after December 2013 and until the final report was approved.

[11] The Commission referred to the contract, which states that the experts were expected to assist the contractor with the methodology and discuss "*findings made*" and the "*next steps to be carried out*".

[12] The contract states that, after examining the documents it receives from the contractor, the Commission "*may ask for additional information or propose changes to redirect the work if necessary. Deliverables must be explicitly accepted by the Commission and acknowledged in writing*" (emphasis added). It also states that the Commission "*will follow the activities undertaken by the contractor, provide guidance on the execution of the tasks and give opinions on their results*" (emphasis added).

[13] The contract specifies that deliverables must be explicitly accepted by the Commission. In addition, payments could be made to the contractor only if the Commission accepted all the deliverables.

[14] Under the principle of subsidiarity (Article 5(3) TEU), the Union can act only if (a) the area concerned by its action falls within the competences shared between the Union and the Member States; (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States; and (c) the action can be implemented more successfully by the Union.



[15] In the course of the inquiry, the Ombudsman's inquiry team inspected the minutes of the meetings between the Commission, the contractor and the expert team, and the correspondence between the Commission and the contractor.

[16] The 2013 version stated that the field of (free) media was a matter that fell under shared competences. This was because it relates to the right to freedom and pluralism of the media, protected under Article 11 of the EU Charter of Fundamental Rights, and to human rights in general, which are a matter of freedom, security and justice area, which, in turn, is a shared competence (Article 4 of the Treaty on the Functioning of the EU). It also stated that there was a need to act in common, without however clearly demonstrating why this was so.

[17] In feedback provided to the contractor on the December 2013 version that it rejected, the Commission took the view that the study lacked a rational and objective assessment, expressed in a disproportionate way the point of view of the investigative journalism community, and therefore needed a balanced and objective analysis of whether EU support for the grant scheme was necessary.

[18] The version of December 2013 had in total 422 pages. It included 10 chapters and numerous annexes (three quarters of the study). By way of contrast, the version of October 2014 contained 92 pages and is organised in two parts, corresponding to the structure required by the contract.

[19] For instance, the version of December 2013 concludes that the field of (free) media is a matter falling under shared competence, while the final version of October 2014 concludes that it is uncertain whether actions to support cross-border investigative journalism fall within the shared and/or exclusive competences of the European Union. The conclusions concerning the overhead administrative costs are also slightly different.

[20] In that there were formal meetings/validating workshops between the Commission's Steering Committee, the contractor and the expert team to discuss and/or validate interim reports submitted by the contractor. Minutes were drawn up to reflect the views of the parties.

[21] None of the study versions submitted after December 2013 was discussed and/or validated during a formal workshop/meeting with the Steering Committee and/or the expert team.