

## **Decision in case 1877/2019/LM on the European Commission's decision to offset against a previous outstanding debt a payment due to an association participating in a project under the EU's Horizon 2020 programme**

Decision

**Case 1877/2019/LM - Opened on 10/12/2019 - Decision on 23/11/2020 - Institution concerned** European Commission ( No maladministration found ) |

The complainant, a non-profit association, is a partner in an EU-funded project under the EU's Horizon 2020 programme, which is managed by the Research Executive Agency (REA). It had an outstanding debt to the European Commission, which it was paying back in instalments. The Commission decided to offset the 'pre-financing' payment, which should have been made to the complainant at the start of the project, against the complainant's outstanding debt with the Commission. The complainant agreed to continue its tasks under the project, but turned to the Ombudsman to seek an alternative solution.

The Ombudsman found that the Commission was legally obliged to offset the pre-financing payment, and that it informed the complainant and the project coordinator about this in good time. The complainant had willingly chosen to participate in the project under these terms. The Ombudsman therefore closed the case with a finding of no maladministration. However, she made a suggestion for improvement to the Commission and the REA on the need to improve communication with project partners in future cases.

## **Background to the complaint**

1. The complainant is a non-profit association. In 2004, the Commission terminated the complainant's participation in two EU-funded projects due to irregularities, and sought to recover part of the grants paid to the complainant. After the complainant challenged this decision, an EU court ruling found that it should pay back EUR 143 402.49 to the Commission.

2. The complainant did not have the financial resources to pay this amount. Due to the complainant's lack of seizable assets and sufficient cash flow, the Commission could not recover the funds nor agree on a fixed payment plan. In agreement with a bailiff, the complainant started to repay its debt in instalments of EUR 1 000 per month and continues to



do so [1] , to the knowledge of the Ombudsman's inquiry team.

3. In April 2019, the complainant signed a grant agreement, as part of a consortium, for the project *iProcureSecurity* [2] under the EU's Horizon 2020 programme [3] , which is managed by the Research Executive Agency (REA). The project aims to increase the cooperation of European Emergency Medical Service Systems (EMSS), with a view to creating a European System of Medical Services. According to the grant agreement [4] , the coordinator of the project would receive a 'pre-financing payment', one or more interim payments and payment of the balance, which it would then distribute to the other partners of the consortium.

4. In May 2019, the Commission, which is responsible for the financial aspects of the project, informed the project coordinator that there were outstanding recovery orders against the complainant. As a result, it would partly offset the complainant's share in the pre-financing payment against its outstanding debt. The Commission made clear that there was no scope for negotiation. It asked the coordinator to assess if the complainant's participation in the project was still possible under these circumstances. The coordinator replied that it had not been aware of the situation.

5. On 16 May 2019, the Commission informed the complainant that it would offset its part of the pre-financing payment (EUR 73 125). The coordinator discussed with the complainant and informed the REA that the complainant could still participate in the project, under careful supervision by the coordinator. The coordinator informed the complainant that it expected the complainant to be able to make all payments upfront even though it would not receive the pre-financing payment.

6. In the summer of 2019, the complainant contacted the REA to get clarification about the eligibility of certain costs it would have to incur under the project.

7. The complainant did not find the REA's replies sufficiently clear and turned to the Ombudsman in October 2019.

## The inquiry

8. The Ombudsman opened an inquiry into the complainant's claim that the Commission should propose a financial solution that would allow the complainant to complete the project. For example, the complainant would like the Commission to reimburse certain expenses that the association will incur for the project or allow him to suspend the payment of its debt by instalments.

9. The Ombudsman's inquiry team inspected the Commission's and the REA's files on this case and met with representatives from both. The representatives from the Commission provided information on the financial matters, while the representatives from the REA gave information on the project and the selection of the complainant as a project partner.



## Arguments presented to the Ombudsman

**10.** The complainant stated that it would not be able to carry out the project and could become insolvent if, besides the pre-financing, additional future payments under the project would be offset. Additional offsetting would also make it difficult to comply with the existing repayment plan. Therefore, the complainant wanted the Commission to reimburse certain expenses that it will incur for the project or suspend its obligation to pay back its debt in instalments.

**11.** The Commission said that, according to the EU's Financial Regulation it is legally obliged to recover the outstanding funds by offsetting the pre-financing payment, when the deadline for payment has expired. [5] The Commission emphasised that this is done in order to protect the EU's financial interests and to guarantee equal treatment of all prospective partners in EU funded projects. As a result, the Commission offsets payments against existing claims, even when it has agreed on an instalment plan with a debtor, and where the debtor complies with this plan. The Commission also confirmed that other payments due to the complainant would also be offset until the debt is settled.

**12.** The Commission said that it had not agreed on the payment plan that the complainant is currently following. The current payment arrangement does not meet the legal requirements laid down in the Financial Regulation. [6] Based on the current repayment plan being followed by the complainant, the debt would not be repaid for more than 12 years. However, the maximum additional time that the Commission can grant to repay a debt is two years. Since September 2017, the Commission has attempted several times to reach an agreement about a possible payment plan with instalments of at least EUR 5 000 per month, plus interest. However, the complainant did not agree to this, as it has insufficient cash flow. No agreement was reached and the complainant continues to pay the debt in instalments of EUR 1 000 per month.

**13.** The REA said that, when it accepted the complainant as a partner in the project, it was aware of the complainant's debt to the Commission. However, the complainant was eligible for EU funding in spite of this. [7] The REA said that, in order to participate in the project, the complainant had to declare that it has stable and sufficient sources of funding to maintain its activity throughout its participation. [8]

**14.** The REA contended that it had made a risk assessment before the grant agreement was signed. It had concluded that the complainant's financial situation did not represent a risk for the completion of the project. The funding due to the complainant was not a significant part of the overall maximum amount of the grant. Its tasks were to be performed in the final stages of the project [9] , and it would have been possible to replace the complainant in case of problems. When the Commission informed the project coordinator that the payment would be offset, it presented several options to the coordinator. The participation of the complainant in the project could continue (and eventually be reduced), after verifying that it could complete its tasks without receiving the pre-financing payment. The coordinator could replace the complainant with another partner or distribute the tasks of the complainant among the remaining partners. The coordinator informed the REA that the complainant would continue to participate in the project



(see paragraph 5 above).

**15.** The REA pointed out that the grant agreement [10], the debit notes and the recovery letters that the complainant received from the Commission clearly stated that any funds that it owed any EU institution or agency could be offset by the Commission against its debt, without its prior consent. Therefore, the complainant was aware of this possibility.

## The Ombudsman's assessment

**16.** The Financial Regulation states that, when an entity has an outstanding debt to any EU institution, agency or body, that is certain, of a fixed amount and due, the Commission has an obligation to offset any subsequent payment due to that entity, in order to protect the financial interests of the EU. The Commission does not have discretion to offset certain amounts and not others. [11] As such, the Ombudsman is satisfied that the Commission has no option other than to offset the pre-financing payment against the complainant's outstanding debt.

**17.** The question in this case is whether the complainant and the project coordinator were informed in good time that the pre-financing payment would be offset.

**18.** The documents available to the complainant (such as the grant agreement and the debit notes) sufficiently informed it that the Commission reserved the right, at any moment, to offset payments against existing claims, without its prior consent. However, the wording of these documents suggests that the Commission has some discretion over the amount that it chooses to offset. Therefore, it might initially not have been entirely clear to the complainant that the Commission was *obliged* to offset the entire pre-financing payment in the context of the *iProcureSecurity* project.

**19.** Furthermore, the project coordinator does not seem to have been aware of the complainant's outstanding debts when signing the grant agreement. As the REA could not assume that the project coordinator would be aware of the situation, it would have been appropriate for the REA to have shared this information with the coordinator before the signature of the grant agreement, so that the coordinator could make a fully informed decision regarding the project. The Ombudsman will make a suggestion for improvement to avoid similar communication issues in the future.

**20.** However, the REA informed the project coordinator about the situation before offsetting the pre-financing payment for the complainant. In this context, the REA gave the coordinator the option that the complainant could step down and be replaced as a project partner, or that its participation in the project could be reduced. The coordinator took the view that the complainant could still participate in the project (under strict supervision) and the complainant chose to continue with the project even without the pre-financing payment. Since the coordinator and the complainant agreed, in full knowledge of the situation, to proceed with the project, the initial failure by the REA to provide clarity on the situation before the signature of the grant agreement had no material effect.



**21.** The Ombudsman is thus satisfied that the Commission and the REA addressed and clarified the situation in good time before the complainant undertook any tasks under the project. In light of the above, the Ombudsman finds no maladministration by the Commission or the REA.

## Conclusion

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

**There was no maladministration by the European Commission or the Research Executive Agency (REA).**

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

## Suggestion for improvement

**In situations where one of the partners in an EU-funded project has a debt to the Commission, REA should make sure that the project coordinator is informed. When the Commission is entitled to offset payments against existing claims, it should clearly inform all the interested parties that this is the case. REA should clarify, with the project coordinator, the potential implications for the project before the grant agreement is signed.**

Emily O'Reilly European Ombudsman

Strasbourg, 23/11/2020

[1] On 2 February 2020, the complainant had an outstanding debt of EUR 44 938.33 euros (plus EUR 32 264.24 late payment interest that had accrued up to that date).

[2] Strategic Partnership of Emergency Medical Service Practitioners for Coordination of Innovation Procurement: <https://cordis.europa.eu/project/id/833291> [Link].

[3] Horizon 2020 is the EU's research and innovation funding programme: <https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020> [Link].

[4] Article 21.1 of the grant agreement.

[5] Article 102 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the



Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (Financial Regulation), available at:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32018R1046> [Link].

[6] Article 104 of the Financial Regulation provides that the debtor has to undertake to pay interest for the entire additional period agreed to repay the debt and has to lodge a financial guarantee covering the outstanding amount including the interest.

[7] Article 136 of the Financial Regulation lists exclusion situations, that is, circumstances under which a body cannot receive EU funding. The existence of an outstanding debt is not one of these.

[8] Article 198 of the Financial Regulation.

[9] The complainant's tasks concerned the organisation and promotion of the final event.

[10] Horizon 2020 Model Grant Agreement, Article 44, and FP6 Model Grant Agreement, Article II.31.3, of Annex II General conditions that states that: *"Sums owed to the Commission may be recovered by offsetting them against any sums owed to the contractor, after informing the latter accordingly, or by calling in any financial guarantee. The contractor's prior consent shall not be required"*.

[11] See Article 102 of the Financial Regulation.