

## Decision in case 2110/2018/DDJ on the European Commission's decision to recover money from a company in an EU-financed project

Decision

**Case 2110/2018/DDJ - Opened on 01/02/2019 - Decision on 17/05/2021 - Institution concerned** European Commission ( No further inquiries justified ) |

The complainant participated in an EU-funded project on cross-border e-health services and received money from the European Commission. An external audit found that almost all of the staff costs claimed by the complainant were ineligible. The Commission therefore decided to recover the money paid.

The Ombudsman opened an inquiry and found that the Commission was right concerning the major part of its claim. However, regarding a substantial part of the claim, the auditors had imposed a standard of proof in relation to the staff costs that was much more demanding than that provided for in the applicable rules.

The Ombudsman therefore proposed a solution that the Commission should consider waiving its reimbursement claim regarding those staff costs.

The Commission did not agree to the proposed solution. The Ombudsman closed the inquiry by concluding that further inquiries would not result in a more satisfactory outcome.

## Background to the complaint

1. The complainant is a Czech company that participated in an EU-funded project on cross-border e-health services (the 'project'). [1]
2. After an external audit at the end of the project, the European Commission concluded that almost all of the staff costs declared by the complainant during the project were ineligible.
3. The complainant contested the Commission's conclusions. The complainant took the view that it complied with the grant agreement. The auditor's criticism of the staff costs did not result from the grant agreement but resulted rather from the " *Guide to Financial Issues relating to ICT PSP Grant Agreements* " (the 'Financial Guide'), which had never been brought to the



complainant's attention, and which, therefore, should not have been used.

4. The Commission maintained its conclusion that, based on the audit, the complainant had failed to comply with the grant agreement. The Financial Guide merely helped the project partners and the auditor understand the provisions of the grant agreement better. The Commission therefore issued a debit note to the complainant amounting to EUR 861 263 covering the ineligible costs for which the complainant had received funding.

5. On 5 December 2018, the complainant turned to the Ombudsman.

## The Ombudsman's proposal for a solution

6. The Ombudsman opened an inquiry into the Commission's decision to recover nearly all the complainant's staff costs, which were deemed ineligible by the auditor. In the course of the inquiry, the Ombudsman received the Commission's reply on the complaint and the complainant's comments on that reply. Having carefully examined the information provided, the Ombudsman proposed a solution [2] to the Commission on 14 May 2020.

7. The Ombudsman found reasonable the Commission's position that the complainant's bonus payments were ineligible because they did not comply with the grant agreement. The Ombudsman further found that, although the Commission had failed to communicate the Financial Guide properly, a finding of maladministration was not warranted as the auditor acknowledged that timesheets were not the only acceptable means to justify costs. Yet, the Ombudsman made a suggestion for improvement that *"[t]he Commission should refer [...] the [Financial] Guide to the grant holders in the grant agreement itself, where it should also make clear that the Guide may be updated."*

8. Regarding the complainant's timekeeping system, the Ombudsman concluded the Commission imposed on the complainant a standard of proof in relation to its staff costs which was much more demanding than that provided for in the applicable rules. The Ombudsman therefore proposed [3] that **'[t]he Commission should consider waiving its reimbursement claim in respect of the firm's staff costs which was based on the finding that its timekeeping system did not comply with the grant agreement.'**

## The Commission's reply

9. In its reply to the Ombudsman's proposal, the Commission maintained that it had treated the complainant fairly and in full compliance with the rules. The Commission recalled that a functioning timekeeping system, or alternative evidence that constitutes a reliable basis for determining the actual hours worked, is essential for the eligibility of staff costs.

10. The Commission said that the recovery decision was not based on the Financial Guide but on the provisions of the grant agreement. [4] Timesheets were not mandatory as a means of



proof and the spreadsheets proposed by the auditors – and subsequently submitted by the complainant – could have sufficed if accompanied with evidence supporting the plausibility of the hours claimed. However, the complainant did not have an appropriate time recording system and had failed to provide sufficient and appropriate alternative evidence to support the costs claimed.

**11.** The Commission considered that the requirements in the Financial Regulation [5] for waiving the recovery are not met in this case. It also argued that the recovery would not be inconsistent with the principle of proportionality. The absence of an appropriate timekeeping system and the absence of other means of substantiating the claimed costs is a breach of contractual obligations indicating a lack of diligence. The Commission is thus required by law to recover the declared costs. [6]

**12.** In reply to the Ombudsman's suggestion for improvement, the Commission insisted that the Financial Guide in question was properly published on the website of the programme and that it was thus available to the complainant. The Commission further said that it is moving towards a single electronic system for the implementation of all grants, which means that communication with applicants will be done via a portal where all applicable guides will be available, visible and easily accessible. In the Commission's view, this meets the Ombudsman's objective of improving transparency about the Commission's interpretation of provisions in grant agreements.

## The complainant's comments

**13.** The complainant welcomed the Ombudsman's solution proposal and maintained that it had a robust timekeeping system in place during the project, which meets the requirements of the grant agreement.

**14.** Regarding the bonus payments, the complainant disagreed with the Ombudsman's assessment. The complainant argued that a recovery of the bonus payments would be proportionate only in relation to the market level of remuneration to project managers. The complainant provided an expert opinion on what is a standard level remuneration for similar positions in large companies in the IT sector in the Czech Republic during the relevant time period. The complainant argued that the Commission should acknowledge the eligibility of the bonus payments up to that level.

## The Ombudsman's assessment after the proposal for a solution

**15.** The Ombudsman regrets that the Commission did not agree to her solution proposal.

**16.** The Ombudsman acknowledges that the Commission must ensure that EU funds are spent in accordance with the principles of sound financial management. The Commission is correct in



stating that it is the duty of those who receive EU funds to keep all relevant evidence demonstrating that they complied with the applicable conditions. This has consistently been confirmed by the EU Courts. [7] However, the Ombudsman considers that the Commission also should take into account a general principle of fairness.

**17.** In this case, it is the Ombudsman's view that the Commission failed to engage constructively with the complainant as regards the functioning of its timekeeping system, thereby taking an overly formalistic stance as regards how to substantiate the working time. The Ombudsman already explained in her solution proposal [8] how the circumstances in this case were particularly unfair.

**18.** In an effort to promote a fair solution, the Ombudsman asked the Commission to reconsider its recovery regarding this aspect of the staff costs. The Commission has not agreed to the proposed solution. The Ombudsman takes the view that further inquiries will not result in a different outcome and therefore closes the inquiry. [9]

**19.** The Ombudsman welcomes the Commission's commitment to improve transparency about its interpretation of provisions in grant agreements, through the described central platform for communicating with grant recipients.

**20.** The additional documentation provided by the complainant regarding the bonus payments does not alter the Ombudsman's finding as set out in the solution proposal. The amount of the bonuses in relation to the market level was only one of the reasons for the Commission rejecting the bonuses as ineligible costs. As the conditions in the grant agreement for accepting staff costs were not met for the bonus payments, the Ombudsman finds no reason to question the Commission's conclusion that the bonus payments are ineligible costs. The Ombudsman thus maintains her finding that there was no maladministration by the Commission regarding this aspect of the case.

## Conclusion

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

**Given the unlikely prospects of obtaining a more satisfactory outcome, the Ombudsman closes the inquiry with no further inquiries.**

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

Emily O'Reilly European Ombudsman

Strasbourg, 17/05/2021



[1] The ‘Smart Open Services - Open eHealth Initiative for a European Large Scale Pilot of Patient Summary and Electronic Prescription’ project (Grant Agreement 224991), co-funded under EU ICT Policy Support Programme, which was part of the Competitiveness and Innovation Framework Programme: <https://ec.europa.eu/cip/> [Link]. Cross-border e-health services are “ *an infrastructure ensuring the continuity of care for European citizens while they are travelling abroad in the EU. This gives EU countries the possibility to exchange health data in a secure, efficient and interoperable way*”:

[https://ec.europa.eu/health/ehealth/electronic\\_crossborder\\_healthservices\\_en](https://ec.europa.eu/health/ehealth/electronic_crossborder_healthservices_en) [Link]

[2] The full text of the solution proposal is available at:

<https://www.ombudsman.europa.eu/en/solution/en/141884> [Link].

[3] Making reference to the financial rules applied by the EU institutions, cf. Article 101 of the Financial Regulation (Regulation 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:

**<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1581944455684&uri=CELEX:32018R1046>**  
)

[4] Cf. Article II.20(1), articles II.20(1) and (2a), and article II.23 of the Grant Agreement.

[5] Article 101(2)-(4) of the Financial Regulation.

[6] Judgment of the Court of First Instance of 22 May 2007, *Commission of the European Communities v IIC Informations-Industrie Consulting GmbH*, case T-500/04, para 94. Judgment of the General Court of 27 April 2016, *ANKO AE Antiprosopion, Emporiou kai Viomichanias v European Commission*, case T-154/14, para 140. Judgement of the Court of Justice of 28 February 2019, *Alfamicro v European Commission*, C-14/18 P, paras 66 et seq.

[7] Cases C-14/18 P *Alfamicro v. Commission*, Judgment of the Court of Justice of 28 February 2019, paras. 64-71, and C-584/17 P *ADR Center SpA v. Commission*, Judgment of the General Court of 16 July 2020, para. 99-109.

[8] Proposal for a solution of the European Ombudsman in case 2110/2018/DDJ, see above footnote 2, paras. 14-20.

[9] See also decision of the European Ombudsman in cases 646/2017/JAP, 306/2018/JAS.