

Decision on European Commission's decision to recover funds from an organisation in the context of an EU-funded project in the Horn of Africa relating to conservation and biodiversity (case 1842/2021/LM)

Decision

Case 1842/2021/LM - Opened on 07/12/2021 - Decision on 06/12/2022 - Institution concerned European Commission (No maladministration found) |

The case concerned the European Commission's decision to recover funds from an organisation that carried out an EU-funded project relating to environmental protection and biodiversity in the Horn of Africa. The Commission sought to recover the funds following the findings of an audit report. The complainant contested this decision.

In the course of the inquiry, the Commission waived its decision to recover the funds granted for one of the costs. The Commission further explained why it had considered the other costs concerned as ineligible. The Ombudsman considered that the Commission's explanations were reasonable and closed the case with a finding of no maladministration.

Background to the complaint

1. The complainant is an international conservation organisation, which carried out an EU-funded project [1] concerning environmental protection and biodiversity in the Horn of Africa. The European Commission, through the EU Delegation to Djibouti, was responsible for overseeing the project.
2. In order to implement the project, the complainant signed a grant agreement with a local contracting authority, the Intergovernmental Authority on Development (IGAD) in Djibouti. The 'grant agreement' laid down that an external audit firm could audit the project on behalf of the Commission. [2]
3. In December 2018, the project was audited, following which the auditors sent to the complainant the 'draft audit report'. This report identified problems with different costs claimed under the grant, amounting to EUR 243 662.94, which it deemed ineligible. The complainant was given the opportunity to provide comments on this report, which it did, contesting the findings.



4. In March 2019, the auditors then sent the 'pre-final report', which took into account the complainant's comments, and reduced the amount of one of the costs deemed ineligible. Following this, the auditor sent the 'final audit report' to the Commission in June 2019, identifying costs amounting to EUR 174 976.19 overall as being ineligible.

5. The Commission (the EU Delegation to Djibouti) endorsed the findings of the audit and, on 19 August 2019, sent the complainant a 'pre-information notice' informing it of the results of the audit. The Commission asked the complainant to provide comments or supporting documents within 30 days of the receipt of the letter.

6. In October 2019, the complainant contested the findings in the audit report and provided further supporting documents to prove that the contested expenses were eligible. In particular, the complainant contested the finding related to EUR 161 755.96 of costs, which were deemed ineligible because of "missing or inadequate documentation". This included the findings that:

a) EUR 12 000 of the costs for one staff member were ineligible as there were no timesheets to prove the time worked.

b) EUR 21 200 paid by the complainant to one of its implementing partner was ineligible because the implementing partner failed to provide sufficient evidence that it had paid this amount to the consultants, for which the expenses were claimed.

c) EUR 128 556 of costs in relation to the time contributed by the complainant's technical staff were ineligible under the budget heading under which the complainant had claimed the costs. According to the 'Special Conditions to the grant agreement', this time worked by the complainant's staff was to be considered as a 'contribution in-kind', which was a component of the complainant's 'co-financing' of total *accepted costs* of the budget for the project. This working time should not have been considered as a cost eligible for reimbursement under the grant.

7. In November 2019, the Commission confirmed the findings of the audit report and issued a debit note for the recovery of EUR 157 478.91.

8. In December 2019, the complainant paid the amount sought by the Commission in the debit note, but contested the conclusion of the Commission. In October and November 2020, the Commission confirmed its assessment on the eligibility of the costs and, given that the complainant had paid the debit note, closed the file. The complainant informed the Commission of its intention to contest the decision.

9. The complainant turned to the European Ombudsman in October 2021.

The inquiry



10. The Ombudsman opened an inquiry on the complaint.

11. During the inquiry, the Ombudsman inquiry team received the reply of the Commission on the Ombudsman's request for a written reply in April 2022. Subsequently, the Ombudsman inquiry team received comments from the complainant in response to the Commission's reply in June 2022, after which the Ombudsman inquiry team sought additional clarifications from the Commission.

Arguments presented to the Ombudsman

Absence of timesheets for one staff member

12. The Commission said that a grant recipient should be able to provide documentary evidence of staff costs. This is done by providing salary slips and employment contracts, but also timesheets are normally necessary in order to prove that a staff member's work was related to the implementation of a project. [3] The 'General Conditions' to the grant agreement [4] set the obligation of record keeping for grant recipients. They require the grant recipient to keep staff and payroll records such as contracts, salary statements and timesheets.

13. The complainant argued that it was not necessary to provide timesheets as proof of the salary costs at issue because it had employed the staff member full time to work for the project, which was clear from the staff member's employment contract.

14. In its reply to the Ombudsman, the Commission accepted that, in this specific case, the complainant did not need to provide timesheets as documentary evidence of the salary costs of the staff member in question. The employment contract and the proof of payment provided sufficient assurance that the staff member effectively worked full time on the project. It thus refunded the corresponding amount to the complainant.

Missing evidence of payment to the implementing partner's consultant

15. The Commission said that the complainant did not provide adequate evidence to show that the complainant's partner paid EUR 21 200 EUR to its consultants. The complainant did not explain the nature of the evidence submitted [5] , therefore the auditors could not establish a link between the invoices and payments to consultants.

16. The complainant did not agree with the Commission's view that the supporting documents it had provided to the auditors were not adequate. However, it accepted that it could have explained in a clearer way the link between the documents and the expenses. In the course of the inquiry, it sent the Commission further supporting documents that it had not previously sent.



17. The Commission replied that the complainant had many opportunities to submit adequate supporting documents: when it received the draft audit report (December 2018), during the so called ‘audit adversarial procedure’ [6] (in March 2019) and when it received the pre-information notice (in August 2019). The complainant sent comments during the audit adversarial procedure and after it received the pre-information letter but failed to provide sufficient supporting documents.

18. The Commission stated that the additional supporting documentation provided by the complainant in the course of the inquiry might demonstrate the link between the invoices and payments to the consultant. However, the fact that certain invoices were only submitted almost five years after the contract was concluded, could raise doubts as to the validity of these documents. The Commission concluded that it could not retroactively accept the additional supporting documents. It contended that the complainant had failed to cooperate fully with the audit by failing to ensure that sufficient supporting documentation was available during the audit.

19. Finally, the Commission noted that, according to the ‘General Conditions of the grant agreement’, the payment obligations under the contract end 18 months after the implementation period. It stated that this 18-month period has since long expired in this case and cannot be reinstated. [7]

Costs relating to the time worked by the complainant’s technical staff

20. The complainant disputed that the costs of the time worked by its technical staff should be considered as an ‘in-kind contribution’ and part of its co-financing of the project because the cost was included in the budget of the project as a paid cost. Furthermore, the cost does not match the definition of in-kind contribution given in the General Conditions to the grant agreement, according to which “in-kind contributions are not actual expenditure” [8] . The complainant argued that the Special Conditions to the grant agreement attributed the same values to total estimated eligible costs [9] and total estimated accepted costs [10] : EUR 1 555 372. In the complainant’s view, it is therefore contradictory that the Commission considered the costs of the time worked by its technical staff as acceptable costs but not eligible costs because, by reading these two provisions jointly, it appears that all the accepted costs should be considered eligible for reimbursement under the grant.

21. The Commission said that, according to the grant agreement, the grant recipient was required to finance 10% of the total accepted costs of the project, as part of what is known as a ‘co-financing requirement’. The notion of accepted costs is used to allow grant recipients to satisfy the requirement of co-financing by attributing to a project costs that are not eligible but can still be taken into account in order to satisfy the co-financing requirement. Such costs include in-kind contributions, such as working time of staff.

22. The Commission contended that the grant agreement makes it clear that the total accepted



costs are estimated at EUR 1 555 372 and that the grant was limited to EUR 1 399 835 (90% of the estimated total eligible costs of the action). The grant agreement [11] specified that in-kind contributions of EUR 128 556, covering the working time contributed by the complainant's technical staff, were costs that were not eligible for funding under the grant but that could be considered part of the total accepted costs of the action for the purpose of co-financing. The fact that the complainant included these costs in the budget for the project, and not in a separate annex as required by the General Conditions to the grant agreement [12], does not make them eligible.

23. It was a choice of the complainant to propose that the time contribution of its staff would qualify as its component of the co-financing and should therefore not be eligible to receive funding under the contract. Accordingly, in the document "Expected sources of funding & summary of estimated costs" attached to its project proposal, the complainant referred to the technical staff time contribution as its contribution to the action. Had the time worked by the complainant's technical staff not have been considered as its in-kind contribution to the co-financing of the project, it would have needed to contribute in another way, because it had an obligation to co-finance the project under the grant agreement.

Fair hearing

24. The complainant considered that the Commission had failed to give it a fair hearing, and failed to properly assess the supporting documents it sent and reply to its arguments.

25. The Commission said that the complainant had been given the opportunity to submit comments to the audit findings on various occasions and that the audit findings had taken into account all the supporting documents and arguments provided by the complainant during this process.

The Ombudsman's assessment

26. The EU budget must be implemented in accordance with the principle of sound financial management. Recipients of EU grants have to provide evidence for costs incurred in the way described in the grant agreements, so that checks can be made whether EU funds were used properly. EU courts consistently held that the grant recipient has to prove, in accordance with the conditions laid down in the grant agreement, that the costs have been incurred. The grant recipient must show that the costs it declares are genuine, as the provision of reliable information guarantees the successful operation of the system of control. If a grant recipient fails to provide such evidence, it may have to repay the grant or parts of it. The grant recipient does not have any definitive right to full payment of the grant if it does not satisfy the applicable conditions. Their obligation to satisfy the financial conditions of the grant agreement is one of their essential commitments and accordingly determines whether the recipient can keep or should repay grant money [13].



27. In relation to the absence of timesheets for one staff member, the Ombudsman notes that the grant agreement does not explicitly say that the grant recipient should prove every staff cost with timesheets but says in general that the grant recipient should keep staff and payroll records, including timesheets [14] . This means that such costs can be proven by documents other than timesheets, where appropriate. The Ombudsman welcomes that the Commission showed flexibility in accepting alternative evidence and thus decided to reimburse the complainant for the funds it had recovered in relation to this cost.

28. Regarding the costs relating to the implementing partner's consultant, the complainant accepted that it may not have explained in a sufficiently clear manner the link between documentation it had provided and the costs claimed. In the course of the Ombudsman's inquiry, it provided additional documentary evidence, which could be considered as more clear proof of these costs. However, the Commission stated that it could not accept this documentary evidence five years after the project had ended, and noted that the complainant had been given different opportunities to provide additional evidence previously.

29. EU case law has found that a grant recipient needs to send supporting documents within the time limits prescribed by the applicable rules and the grant agreement [15] . Delays in sending supporting documents may constitute a breach of contract [16] .

30. During its exchanges with the auditors and the Commission, the complainant had several opportunities to submit the additional supporting documentation and to request further clarifications relating to what evidence was required to establish the link between expenditure and documentation.

31. Against this background, the Ombudsman considers that the Commission was justified in refusing to accept the documents provided in the course of the Ombudsman's inquiry as proof of the expenses in question. Accepting documents submitted late could jeopardise the principle of legal certainty and equal treatment with other recipients of EU grants.

32. In relation to how the time worked by the complainant's technical staff was taken into account in the context of the project, the Ombudsman understands how there may have been confusion created by the fact that, under the grant agreement, the amount of the total eligible costs and the total accepted costs was the same. Article 3 of the Special Conditions to the grant agreement states that the total estimated eligible costs amount to EUR 1 555 372, which is the same as the amount of the total accepted costs. In addition, the General Conditions to the grant agreement define 'in-kind contributions' as "*not being actual expenditure*", which may add to this confusion. [17] The fact that the contracting authority initially paid to the complainant the amount of the grant corresponding to the time worked by the complainant's technical staff (before the audit was performed and the Commission asked the complainant to reimburse this amount) suggests that the contracting authority also misunderstood the provisions of the contract.

33. However, how the Commission interpreted the contract appears to be correct. Other parts of the Special Conditions to the grant agreement indicate that the total eligible costs may amount



to no more than 90% of the total accepted costs. In addition, according to Article 7 of the Special Conditions to the grant agreement, the time worked by the complainant's technical staff was to be considered as part of the accepted costs for the purposes of its co-financing component. The Commission also pointed out that, in its proposal, the complainant itself had committed to co-financing the project by providing working time of its staff to a value of EUR 128 556. The General Conditions to the grant agreement clearly say that in-kind contributions are not eligible costs, and may not be treated as co-financing by grant recipients *unless otherwise specified in the Special Conditions*, which is done in this case (in Article 7 of the Special Conditions). Furthermore, they should be listed in a separate annex, separate from eligible expenses. [18]

34. Against this background, while the grant agreement could have better explained the difference between the total eligible costs and the total accepted costs, by reading the contract as a whole, it appears that the Commission was correct to consider the time worked by the complainant's technical staff as ineligible. In addition, it appears that the complainant itself proposed that the time worked by its technical staff should be considered as its component of the co-financing under the grant agreement.

35. Regarding the complainant's claim that the Commission had failed to give it a fair hearing, the Ombudsman finds that the complainant had many possibilities to put forward its arguments and to send supporting documents.

36. Against this background, the Ombudsman concludes that there was no maladministration in this case.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [19] :

There was no maladministration by the European Commission.

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

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 06/12/2022

[1] The lower Awash-Lake Abbé Land and Seascape Enhancing Biodiversity Conservation in Transboundary Ecosystems and Seascapes project: https://www.eeas.europa.eu/node/8403_en (Reference FED/2013/330-243)



- [2] Article 5.2 of the “Special Conditions to the Grant Agreement”.
- [3] According to Article 16.9 of the “General Conditions to the Grant Agreement”.
- [4] Articles 16.7 to 16.9 of the General Conditions.
- [5] The complainant provided contracts between partner and the consultant, timesheets and copies of bank transactions.
- [6] Article 133 of the Financial Regulation.
- [7] Art.12.5 of the General Conditions.
- [8] Article 14.8 of the General Conditions.
- [9] Article 3.1 of the Special Conditions.
- [10] Article 7.1.1 of the Special Conditions.
- [11] Article 7.1.1 of the Special Conditions.
- [12] Article 14.8 of the General Conditions.
- [13] See in this respect judgement of the Court of first instance of 22 May 2007, case T-500/04, *Commission v. ICC* , point 94, available at the following [link \[Link\]](#).
- [14] See Article 16.9, letter k) of the General Conditions.
- [15] See case T-500/04, *Commission v. ICC* , point 95.
- [16] See, for example, judgement of the Court of 16 December 2010, *Commission v. Arci Nuova associazione comitato di Cagliari and Alberto Gessa* , case T-259/09, point 67, available at the following [link \[Link\]](#).
- [17] Article 14.8 of the General Conditions.
- [18] Article 14.8 of the General Conditions.
- [19] This complaint has been dealt with under delegated case handling, in accordance with [the Decision of the European Ombudsman adopting Implementing Provisions \[Link\]](#)