

## Decision of the European Ombudsman closing the inquiry into complaint 1651/2012/(ER)PMC against the European Commission

Decision

**Case** 1651/2012/PMC - **Opened on** 11/09/2012 - **Decision on** 13/06/2014 - **Institutions concerned** European Commission ( No maladministration found ) | European Commission ( No further inquiries justified ) |

The complainant is an Italian association which carried out a project in Armenia, financed through a grant by the EU Delegation to that country. In late 2009, after the project had been completed, the complainant requested the EU Delegation in Armenia to make the final payment. However, the Delegation requested some clarifications from the complainant and subsequently, due to the complexity of the project and suspected irregularities, asked for an audit. The complainant turned to the European Ombudsman in August 2012, complaining that it took the Delegation nearly two years to make the final payment after the complainant submitted its payment request. The complainant claimed that the Delegation should reimburse it the costs it had incurred while awaiting the outstanding payment.

The Ombudsman was not convinced that the Delegation's decision to ask for further information and, subsequently, to commission an audit, was unreasonable. While it is true that the audit report concluded that the eligible costs incurred amounted to 99.77% of the declared costs, the report also identified some shortcomings in the implementation of the project. Since there was nothing to suggest an excessive delay on the Delegation's part, she considered the complainant's allegation to be unfounded. Consequently, the Ombudsman closed the case with a finding of no maladministration. As regards certain procedural issues raised by the complainant, the Ombudsman found no grounds for further inquiries.

## The background to the complaint

1. The complainant is an Italian association which was the leading partner and contractor in a project concluded within the framework of the TACIS [1] programme (hereinafter 'the Project'). The Project aimed at introducing innovative development strategies and supporting specific social and economic projects in two regions in Armenia. It was implemented from August 2007 to December 2009 and was managed by the EU Delegation to Armenia (the 'Delegation'). The Project was completed in late 2009. On 27 April 2010, the complainant submitted to the



Delegation the financial report and accompanying request for final payment, amounting to approximately EUR 200 000. On 2 June 2010 and 9 July 2010, the Delegation requested clarifications on the complainant's report and, on 11 August 2010, informed it of some doubts it had as regards the complainant's replies thereto. The Commission subsequently decided to have the Project audited by a private company. The audit was conducted between 4 November 2010 and 14 September 2011.

2. On 22 March 2011, the complainant informed the Delegation that the delay in making the final payment was causing it to incur extra expenditure. The complainant asked for information on the state of play and requested a reimbursement of the extra costs. On 22 November 2011, the final audit report was released. The report concluded that almost all of the expenditure incurred was in conformity with the Grant Agreement. On 8 December 2011, the Delegation therefore released the final payment.

3. On 13 January 2012, the complainant requested the Delegation to reimburse the bank costs it claimed to have incurred due to the delay in making the final payment. It provided a bank statement certifying overall costs of EUR 39 850.51 [2] consisting of interest and administrative fees for the years 2010 and 2011. On 1 February 2012, the Delegation rejected the complainant's request. By letters of 27 and 28 February 2012, the complainant asked the Delegation whether it had been contacted by its Armenian sub-contractors as regards certain audit findings and what measures to take in relation thereto. On 28 February 2012, the complainant informed the Delegation that the delay in effecting the final payment resulted in further extra costs amounting to EUR 55 930 [3]. These costs arose during the complainant's engagement with the audit process. On 22 March 2012, the complainant requested some clarifications from the Delegation concerning the inspections which it had carried out at the offices of the complainant's Armenian partners and about the state of play of the Project. On 23 March 2012, the Delegation rejected the complainant's request of 28 February 2012. On 9 August 2012, the complainant turned to the European Ombudsman.

## The inquiry

4. The Ombudsman opened an inquiry into the following allegations and related claims.

a) The Delegation failed to reimburse the sum of EUR 41 629.69 incurred by the complainant between 1 January 2010 and 30 June 2012 in order to service a loan required to make advance payments to the Project partners pending the final payment. The Commission should reimburse the complainant the said sum.

b) The Delegation failed to reimburse the sum of EUR 55 930, representing the extra costs incurred by the complainant in order to ensure the continuation of the Project after its end date, pending the final payment. The Commission should reimburse the complainant the said sum.

c) The Delegation failed to reply to the complainant's letters dated 27 and 28 February 2012. The Commission should reply to the said letters.



d) The Delegation failed to reply to the complainant's request for clarifications of 22 March 2011. The Commission should provide the clarifications which the complainant requested.

5. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Alleged failure to reimburse the costs incurred by the complainant in order to service a bank loan and related claim**

### **Arguments presented to the Ombudsman**

6. In support of its first allegation, the complainant made the following points: (i) Article 15(2) of the General Conditions of the Grant Contract cannot be interpreted as allowing an open-ended or a repeated suspension of the payment deadline; (ii) the requests for clarifications of 2 June 2010 and 9 July 2010 resulted from the Delegation's inaccurate examination of the final report submitted by the complainant, as demonstrated by the final outcome of the external audit. Consequently, the duration of the overall financial checks on the project was not reasonable and the delay in effecting the final payment was unjustified; (iii) the requests for clarifications resulted in the duplication of checks and further delay in launching the external audit. Consequently, the duration of the overall financial checks on the Project was not reasonable and the delay in effecting the final payment was unjustified; and (iv) it was the Delegation that suggested making advance payments to the Armenian partners, who had no access to a credit line.

7. As regards argument (i), the Commission referred in its opinion to Article 14.6 of the General Conditions of the Grant Contract, which explicitly stipulates that interest owed shall not be considered eligible for Union funding. The Commission also submitted that the complainant had given the Delegation insufficient and unsatisfactory replies to its requests for clarifications. In the Commission's view, these requests formed part of the process of assessing the compliance of the Project with the EU financial and procedural framework, and, in particular, its compliance with the Grant Contract. In addition, these requests were based on a number of concerns, such as the complainant's shortcomings in managing the partnerships with the partners in the Project, the Delegation's doubts as regards the eligibility of certain costs incurred by the complainant and the complex nature of the Project and of related smaller projects, as well as the numerous procurement procedures that needed to be launched. The Delegation thus considered that the financial risk of the Project was high and, consequently, that it would require substantial financial checks. In accordance with Article 15(2) and (3) of the General Conditions of the Grant Contract, the Delegation suspended the payment of the balance in respect of the Project from 2 June 2010, the date of its first request for information and clarifications, until it



received a satisfactory and complete reply to its previous requests. The complainant replied on 1 July and 4 August 2010. However, the Delegation considered the information and clarifications provided to be insufficient and unsatisfactory. Consequently, on 11 August 2010, pursuant to Article 15(2) and (3) of the Grant Contract, the Delegation decided to conduct a financial audit of the Project. In the Commission's view, the notification of this decision to the complainant suspended the time limit for paying the balance in respect of the Project as from 11 August 2010 until the audit's conclusion.

8. As regards arguments (ii) and (iii), the Commission again argued that the information provided by the complainant was unsatisfactory and that the audit of the Project lasted from 4 November 2010 to 14 September 2011. In its view, this length of time was neither disproportionate nor excessive. Indeed, it considered that the duration of the audit was justified by the complexity of the Project and the complainant's inability to ensure its partners' full cooperation. The Commission also observed that the Delegation's decision to launch a financial audit of the Project was in conformity with the time limits set by Article 15(2) and (3). These provisions provide that the Delegation can ask for a financial audit up to a maximum of 90 days from receipt of the complainant's payment request, excluding the time necessary to reply to the Delegation's requests for clarifications.

9. As regards argument (iv), the Commission stated that there was no evidence that the Delegation was officially consulted prior to the complainant's decision to make advance payments to its partners or that it approved any such decision. The Commission also referred to the complainant's letter of 22 March 2012, in which the latter wrote that "[it] *would like to underline that [it was] not obliged to anticipate the resources necessary to close the project activities for all the project partnership*". Moreover, the Commission stated that the Delegation had never committed itself to reimburse any of the associated costs resulting from the loans. It added that, in any case, it could not have done so, as these costs were clearly ineligible pursuant to Article 14(1) and (6) of the General Conditions and were never included in the Project budget. Indeed, it considered that the proper implementation of the action was the complainant's sole responsibility.

10. In its observations, the complainant stated, as regards argument (i), that the audit showed that the eligible costs incurred amounted to 99.77% of the declared costs, thus clearly demonstrating that the subsequent checks were aimed at delaying the final payment.

11. Concerning arguments (ii) and (iii), the complainant contended that the Delegation's requests for clarifications were the consequence of its staff's incompetence and prejudices against the complainant. It also argued that the requests for clarifications were technically unreasonable and contained some inaccuracies. The complainant submitted that the requests made subsequent to that of 2 June 2010 did not aim at clarifying the same issues in more depth, but related to entirely different matters. For example, in its letter of 11 August 2010, the Delegation highlighted a possible double payment as regards one of the complainant's employees, and asked the auditor to verify this matter. However, the complainant stated that it was not possible to link this alleged irregularity to information it had previously provided to the Delegation. Therefore, it was of the view that the audit process had been carried out efficiently



as far as it was concerned and added that it was its Armenian partners who, despite the complainant's efforts, were unwilling to cooperate and did not send the requested documents. The complainant also clarified that it did not state that the audit in itself took too long, but rather complained that the Delegation launched the audit a very long time after the Project's end date. In fact, while the audit lasted almost one year, the final payment was made *nearly two years* after the complainant's request for payment. In this respect, the complainant submitted that it was informed of the audit only *six months* after it had sent the final financial report to the Delegation.

**12.** In relation to argument (iv), the complainant maintained its view that it had followed the Delegation's suggestion to make advance payments to its Armenian partners, but also acknowledged that it was not "coerced" by the Delegation in this respect. Furthermore, it referred to the difficulties faced by local partners in receiving bank loans, as shown in a report on the Project Steering Committee's meetings.

## The Ombudsman's assessment

**13.** The Ombudsman notes that the Commission referred to Article 15(2) and (3) of the Grant Contract [4] . While Article 15(2) allows the Commission to suspend the time limit for approving a report if additional clarifications are needed, Article 15(3) entitles the Commission to suspend the time limit for dealing with a request for payment if further checks are considered necessary. The Ombudsman agrees with the complainant's view that these provisions cannot be interpreted as authorising the Contracting Authority to delay payments unless there is a good reason for doing so. It is therefore necessary carefully to assess the grounds which the Commission put forward in order to justify the relevant suspensions.

**14.** The final audit report concluded that the eligible costs incurred amounted to 99.77% of the declared costs. This fact would appear, at first sight, to support the complainant's view that the checks carried out were unnecessary.

**15.** However, it should also be noted that the Delegation had identified certain points which, in its opinion, required further clarification, such as (i) the Project's compliance with the relevant contractual obligations, (ii) the complainant's management of the partnerships with the Project partners, (iii) the eligibility of certain costs incurred by the complainant, (iv) the complex nature of the Project, and (v) the considerable number of procurement procedures which needed to be organised. Moreover, the final audit report confirmed certain shortcomings in the complainant's handling of the Project and concluded that the reporting of expenses by local partners for the purpose of the preparation of the overall Financial Report had not been systematic and resulted in certain deficiencies. The audit also found that (i) the approaches to maintaining accounting records had been different and stated by way of example that the use of spread sheet applications instead of the double-entry bookkeeping system with applicable controls and audit trails was unreliable, prone to a high risk of errors, inadvertent modification, loss of data and inconsistency; (ii) some of the bank accounts related to the Project were not opened in the name of the local partners as legal entities, but in the name of directors of these organisations,



which constituted a fundamental internal control deficiency; and (iii) there were certain deficiencies as regards the procurement process. Additionally, it identified various shortcomings in the overall process of signing, implementing and monitoring construction contracts and payments. Besides, the complainant itself acknowledged certain difficulties relating to the Project, such as the fact that its partners did not fully cooperate with it. That difficulty was also identified by the auditor. In view of these findings, the Ombudsman accepts that the Delegation's decision to ask for further information and, subsequently, to commission an audit, was reasonable.

**16.** As regards the issue of delay in making the final payment, the Ombudsman notes that three different stages were involved: (a) the time before the audit, (b) the duration of the audit, and (c) the time between the final audit's release and the final payment. As regards (a), the Ombudsman points out that the complainant requested the final payment on 27 April 2010, while the Delegation asked for further clarifications on 2 June and 9 July 2010, before informing the complainant, on 11 August 2010, of its doubts about the implementation of the Project and its intention to carry out an audit. The audit began on 4 November 2010. In other words, once the Delegation received the final payment request, it replied to the complainant and its subsequent clarifications within a timeframe of approximately one month on each occasion. Even if one considers the entire period that elapsed between the submission of the final payment request and the launch of the audit, there is nothing to suggest that there was an excessive delay. As regards (b), the Ombudsman notes that the complainant does not appear to criticise the time it took the auditors to prepare their report. As regards (c), the Ombudsman notes that while the final audit report was released on 22 November 2011, the Delegation made the final payment on 8 December 2011, that is approximately two weeks later. In view of the above, the Ombudsman concludes that the complainant's allegation that there were undue delays is unfounded.

**17.** Finally, the Ombudsman notes that the Commission and the complainant disagree as regards the issue of whether the Delegation suggested to the complainant to make advance payments to the latter's Armenian partners. In the absence of any written agreement as regards this matter, and considering in particular that the complainant itself acknowledged that it was not coerced by the Delegation in this respect, the Ombudsman sees no grounds to pursue this aspect further.

**18.** In view of the above, the Ombudsman concludes that no maladministration can be found as regards the complainant's first allegation. Therefore, the complainant's related claim cannot succeed either.

## **Alleged failure to reimburse the extra costs incurred by the complainant for ensuring the continuation of the Project after its end date and related claim**

### **Arguments presented to the Ombudsman**



**19.** In support of this allegation, the complainant stated that Article 16(2) of the General Conditions of the Grant Contract [5] applies only to checks that take place after the completion of the Project and therefore does not apply to the present case.

**20.** In its opinion, the Commission replied that, according to Article 14(1) [6] of the General Conditions of the Grant Contract, eligible costs are only those incurred during the implementation period of a project. In this case, that period ended on 31 December 2009. The Commission also stated that the costs at issue were incurred long after the end of the implementation period of the Project and the submission of the final report. Therefore, they could not be considered eligible costs. Furthermore, even if these costs had been eligible, the Commission stated that the audit was the consequence of the complainant's shortcomings in providing sufficient and satisfactory replies to the requests for information sent by the Delegation. In addition, the Commission observed that, in the present case, it was the Delegation which paid for the audit and the auditor, whereas the complainant only had to provide administrative assistance to the audit and, as such, incurred limited costs. Therefore, the Commission concluded that the costs indicated by the complainant were in any case excessive and disproportionate and further submitted that Article 16(2) of the Grant Contract applies to any check required by the Commission, including, therefore, the audit carried out in the present case before the final payment was made.

**21.** In its observations, the complainant contended that, in essence, the extra costs it had incurred were necessary to reply to the Delegation's requests for additional documentation, and that these required intensive work lasting for over two years after the implementation of the Project.

## The Ombudsman's assessment

**22.** The Ombudsman notes that any work performed by the complainant in order to ensure the proper auditing of the Project was carried out on the basis of its legal obligation to provide such assistance under the relevant contract.

**23.** In this respect, the Ombudsman points out that Article 16(2) of the General Conditions of the Grant Contract states, among other things, that the complainant undertakes to allow the Commission and any external auditor carrying out verifications to verify, by examining the documents or by means of on-the-spot checks, the implementation of the Action and conduct a full audit, if necessary, on the basis of supporting documents for the accounts, accounting documents and any other document relevant to the financing of the action. There is nothing to suggest that this provision applies only to checks that take place *after* the completion of the Project, as the complainant stated.

**24.** The Ombudsman therefore considers that the Commission has provided her with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified.





**25.** In view of the above, the Ombudsman concludes that the complainant's second allegation cannot be sustained. Consequently, the complainant's related claim cannot succeed either.

## **Alleged failure to reply to the complainant's letters of 27 and 28 February 2012 and related claim**

### **Arguments presented to the Ombudsman**

**26.** In reply to the complainant's third allegation, the Commission stated in its opinion that, as the complainant's letter of 28 February 2012 included requests that had already been made in its letter of 27 February 2012, the Commission had intended to send a single reply to both letters. The Commission explained that in the end, probably due to an archiving error, the Delegation replied to a different letter that the complainant had sent. The Commission apologised for this oversight and provided the complainant with further clarifications. In this respect, it (i) pointed out that the Delegation had never been contacted by the complainant's Armenian partners in relation to audit findings 7 (relating to legal and tax aspects) and 9 (website design); (ii) said that it was the complainant's responsibility to consider and implement the recommendations of the audit; and (iii) reiterated, in relation to finding 7, that it was the complainant's responsibility to comply with Armenian legislation. Furthermore, it stated that certain findings of the audit had already been discussed in detail, in particular during the audit's closing meeting at the Delegation's premises on 14 September 2011.

**27.** In its observations, the complainant stated that the very succinct explanations given by the Commission were not satisfactory. The complainant pointed out that it had communicated the audit findings and recommendations to its Armenian partners and to the Delegation, but had never received any answer from either of them. Moreover, the complainant submitted that it had duly informed its Armenian partners of the legal and tax aspects. The fact that it had not received a reply was not its responsibility. In addition, the complainant argued that the explanations provided by the Commission in the framework of the Ombudsman's inquiry were not satisfactory, since the Commission failed to indicate what measures the complainant should have taken.

### **The Ombudsman's assessment**

**28.** As regards this allegation, the Ombudsman notes that the Commission provided the complainant with both a substantive reply and an apology. Moreover, the Ombudsman considers that the Commission's reply is appropriate. The complainant appears to suggest that the Commission's reply was insufficient since it was not responsible for its Armenian partners' shortcomings. However, the Ombudsman underlines in this regard that it was the complainant who had signed the Grant Contract and who was thus obliged to see to it that its obligations flowing from that contract were fulfilled. This means that the failures of its partners were indeed





attributable to the complainant. Moreover, the complainant did not challenge the Commission's statement that some issues had already been discussed at a meeting held on 14 September 2011.

**29.** In view of the above, the Ombudsman does not consider that there are sufficient grounds for further inquiries into the complainant's third allegation and the related claim.

## **Alleged failure to reply to the complainant's request for clarifications of 22 March 2011 and related claim**

### **Arguments presented to the Ombudsman**

**30.** As regards this allegation, the Commission acknowledged in its opinion that it had not replied to the complainant's request for clarifications. The Commission apologised for this omission and provided some clarifications to the complainant. It stated that (i) the complainant had been informed by its partners about the Delegation's visit of 23 April 2010, as well as of its outcome; (ii) the Delegation had authorised one of the complainant's previous Armenian partners (whose contract with the complainant expired on 31 December 2009) to proceed with the replacement of a vehicle bought in the framework of the Project; and (iii) the complainant had in the meantime been fully informed about the audit and its findings.

**31.** In its observations, the complainant submitted that the Commission's reply to its request for clarifications was insufficient. It complained that neither its Armenian partners nor the Delegation had considered it necessary to inform it of the on-spot-checks carried out on 23 April 2010 despite their importance to the complainant.

### **The Ombudsman's assessment**

**32.** The Ombudsman points out that, in the course of the present inquiry, the Commission replied to the complainant's request for clarifications and also apologised for its failure to do so beforehand. Moreover, the Ombudsman considers that the Commission's clarifications were appropriate and notes that the complainant did not put forward any valid argument challenging the Commission's position in this respect.

**33.** In view of the foregoing, the Ombudsman does not consider that there are sufficient grounds which would justify further pursuing the complainant's fourth allegation and the related claim.

## **Conclusions**

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following



conclusions:

**There was no maladministration in relation to the complainant's first and second allegations and related claims.**

**There are no grounds for further inquiries into the remainder of the complaint.**

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

Emily O'Reilly

Done in Strasbourg on 13 June 2014

[1] The TACIS programme's aim is to promote the transition to a market economy and to reinforce democracy and the rule of law in the partner states in Eastern Europe and Central Asia.

[2] The complainant observed that, in 2010, interest amounted to EUR 14 926.77 and that the banking fees amounted to EUR 2 744.99, that is, EUR 17 671.76 in total. In 2011, the relevant costs amounted to EUR 19 825.66 and EUR 2 353.09 respectively (EUR 22 178.75 in total). Subsequently, the complainant submitted that it incurred further costs amounting to an additional EUR 1 779.18 for the first semester of 2012, thus raising the total bank costs to EUR 41 629.69.

[3] According to the complainant, these extra costs consisted of: telephone expenses, stationery and other administrative costs amounting to EUR 9 540; personnel costs amounting to EUR 37 440; and mission costs amounting to EUR 8 950.

[4] Article 15(2) of the Grant Contract states that any financial report sent by the Beneficiary shall be considered approved if there is no written reply from the Contracting Authority within 45 days of its receipt accompanied by the required documents. However, the Contracting Authority is entitled to "suspend the time-limit for approval of the report by notifying the beneficiary that the report cannot be approved and that it finds it necessary to carry out additional checks. In such cases, the Contracting Authority may request clarification, alteration or additional information, which must be produced within 30 days of the request. The time-limit starts running again on the date the required information was received [...]". Moreover, the Ombudsman notes that Article 15(3) of the Grant Contract provides that the Contracting Authority may suspend the time limit by notifying the Beneficiary that the request for payment is inadmissible, for instance because the Contracting Authority "thinks it necessary to conduct further checks, including on-the-spot checks, to make sure that the expenditure is eligible. The time-limit for payment shall start running again on the date on which a correctly formulated



*request for payment is recorded ".*

[5] This article states that the Beneficiary will allow the Commission, the European Anti-Fraud Office, the European Court of Auditors and any external auditor to carry out verifications or audits up to seven years after the payment of the balance.

[6] This article provides that "[e] *ligible costs are costs actually incurred by the beneficiary of this grant which meet all the following criteria: a) they are incurred during the implementation of the action as specified in Article 2 of the Special Condition with the exception of costs relating to final reports and expenditure verification. Eventual contracts for goods/services/works used/provided/delivered during the implementation period may have been awarded but not executed by the Beneficiary or his partners before the implementation period of the Action started, provided the provisions of Annex IV were respected. Such costs must be paid for before the final report is finalised, b) have to be indicated in the estimated overall budget of the action, c) have to be necessary for the implementation of the action which is the subject of the grant, d) must be identifiable and verifiable, in particular being recorded in the accounting records of the beneficiary and determined according to the applicable accounting standards of the country where the beneficiary is established and according to the usual cost account practices of the beneficiary, e) have to be reasonable, justified and comply with the requirements of sound financial management, in particular regarding economy and efficiency*".