

Draft recommendations of the European Ombudsman in own-initiative inquiry OI/8/2013/OV concerning the Executive Agency for Small and Medium-sized Enterprises (EASME) Made in accordance with Article 3(6) of the Statute of the European Ombudsman

Recommendation

Case OI/8/2013/OV - **Opened on** 16/12/2013 - **Recommendation on** 14/04/2016 - **Decision on** 25/03/2015 - **Institution concerned** Executive Agency for Competitiveness and Innovation
(Draft recommendation accepted by the institution) |

The background to the own-initiative inquiry

1. When dealing with a complaint against the Executive Agency for Competitiveness and Innovation (EACI) concerning a request for review of a proposal submitted in response to Call for proposals 'CIP-EIP-Eco-Innovation-2012', the Ombudsman became aware that the EACI does not have in place a review procedure to which applicants whose projects have been rejected could have recourse. Such procedures exist in some other EU agencies, such as the Research Executive Agency (REA) and the European Research Council Executive Agency (ERCEA). Like the EACI, these latter agencies also deal with the assessment of scientific proposals submitted to them in response to calls for proposals, in particular under the Horizon 2020 Programme [1] .

2. In the absence of a review procedure, dissatisfied applicants have no other choice than to initiate court proceedings or submit a complaint directly to the European Ombudsman. In the Ombudsman's view, each EU institution which is in frequent contact with persons who may have reason to complain should put in place a procedure that allows for grievances to be addressed and resolved rapidly by the institution itself, if possible. This provides a more efficient and effective solution for applicants than that furnished by the courts or the Ombudsman as the first and only avenue of redress.

3. For a complaints (or 'redress') procedure to be effective and credible, it ought to ensure an impartial examination of the issues raised by a complainant. In the case of the EACI, the Ombudsman is of the view that the most appropriate way to achieve this would be to establish an independent Review or Redress Committee.



The inquiry

4. On 16 December 2013, the Ombudsman opened an own-initiative inquiry and invited the EACI to consider establishing a procedure allowing a dissatisfied applicant to turn to an independent Review or Redress Committee.

5. The Ombudsman pointed out that the EACI could draw inspiration from the review procedures that are in place at the REA and the ERCEA. The Ombudsman also referred to a special report that she submitted to the European Parliament concerning a similar issue raised in relation to Frontex [2] .

6. With effect from 1 January 2014, the EACI was replaced and succeeded by the EASME (see footnote 1 above). It was thus the EASME which sent an opinion on the issue raised by the Ombudsman in her own-initiative inquiry. The Ombudsman's draft recommendations below take into account the facts and arguments put forward by the EASME.

Establishing a review procedure within the EASME

Arguments presented to the Ombudsman

7. In its opinion, the EASME acknowledged the importance of having in place a procedure allowing applicants to request the review of adverse decisions taken by it. However, as an Executive Agency of the Commission, the EASME has to comply with the applicable rules and regulations which establish the framework for the implementation of EU programmes. The EASME described the three currently available review procedures, namely i) the general review procedure by the Commission in respect of all acts of the EASME, ii) the procedure for the review of EASME decisions taken in the context of the Horizon 2020 Programme, and iii) the procedure for the review of EASME decisions taken in the context of other EU programmes.

8. With regard to point i), the EASME explained that the executive agencies are governed by Council Regulation 58/2003/EC of 19 December 2002 on Executive Agencies [3] (the 'Regulation on Executive Agencies'). In accordance with Article 22 of that Regulation, "*any act of an executive agency which injures a third party may be referred to the Commission by any person directly or individually concerned or by a Member State for a review of its legality*". It also provides that "*the Commission may suspend implementation of the act at issue or prescribe interim measures. In its final decision the Commission may uphold the executive agency's act or decide that the agency must modify it either in whole or in part*". Thus, the Regulation on Executive Agencies already provides for a procedure to address and solve complaints from any third party, including applicants who respond to all calls for proposals issued by the EASME under an EU programme.

9. The EASME stated that, in accordance with Article 97 (Means of Redress) of the revised



Financial Regulation applicable since 1 January 2013 [4] , it provides information on the above-mentioned review procedure in the letters sent to unsuccessful applicants and tenderers. The model letter to unsuccessful applicants which the EASME enclosed with its opinion also provides details on the possibility of having recourse to the European Ombudsman and the General Court of the EU.

10. With regard to point ii), the EASME explained that it is an executive agency entrusted by the European Commission with the implementation of parts of different EU programmes. By virtue of the Commission's Act of Delegation of 23 December 2013 [5] , the Agency was entrusted with the implementation of parts of the Horizon 2020, COSME [6] , LIFE [7] and EMFF programmes. Each programme has its own legal basis and a different responsible parent Directorate-General (DG).

11. The only programme managed by the EASME, the legal basis of which envisages a specific review procedure, is the Horizon 2020 Programme. Article 16 of the relevant regulation [8] provides for an " *evaluation review procedure* " for applicants who " *consider that the evaluation of their proposal has not been carried out in accordance with the procedures set out in this Regulation, the relevant work programme, work plan or the call for proposals* " . However, the examination of the request for review covers only the procedural aspects of the evaluation and not the merits of the proposal. An evaluation review committee provides an opinion on the procedural aspects of the evaluation process and may recommend either (a) re-evaluation of the proposal primarily by evaluators not involved in the previous evaluation, or (b) confirmation of the initial evaluation.

12. The EASME stated that the REA and ERCEA manage only parts of the Horizon 2020 programme and have established the Horizon 2020 review procedure in accordance with the relevant legal provisions. Since the EASME has been entrusted with the management of other parts of the Horizon 2020 programme as from March 2014, a review procedure for Horizon 2020 calls for proposals has to be established in accordance with Regulation 1290/2013 and the guidelines of the EASME's parent DG, DG Research.

13. The EASME stated that this review procedure was currently being revised by DG Research. Once the revision is finalised, the EASME will establish a specific review procedure for the programme and an evaluation review committee. In the meantime, the general review procedure provided for in the Regulation on Executive Agencies (described in paragraph 8 above) applies and can be resorted to by third parties in order to contest any act of the EASME that could adversely affect them.

14. With regard to point iii), the EASME stated that there is no specific legal basis for the establishment of a review procedure in respect of the other programmes managed by the EASME as from 2014 (namely the COSME, LIFE and EMFF programmes). The EASME therefore applies the (general) review procedure provided for in the Regulation on Executive Agencies. Third parties can thus address their complaints to the relevant parent DG in charge of the programme and request a review of the EASME's act.



15. The EASME stated that it is currently analysing the possibility of establishing an evaluation review procedure similar to the one required by the Horizon 2020 programme that could apply to the other programmes. It pointed out, however, that, should this be feasible, the setting up of a specific review procedure for the purposes of such programmes would require consultation with and the prior approval of the relevant parent DGs (namely DG ENTR, DG ENER, DG CLIMA, DG ENV, DG CONNECT and DG MARE) and could also imply the amendment of the relevant legal bases so as to incorporate such a procedure in these programmes.

The Ombudsman's assessment leading to the draft recommendations

16. It has been the Ombudsman's consistent view that each EU institution which is in frequent contact with persons who may have reason to complain should put in place a procedure that makes provision for grievances to be addressed and resolved rapidly by the institution itself, before those persons have recourse to other redress mechanisms, such as the Ombudsman and courts, in the event that such attempt at resolution is unsuccessful.

17. Because of its mandate, the EASME is in frequent contact with applicants who respond to calls for proposals under several EU programmes. Indeed, Article 3(1) of the Commission Implementing Decision of 17 December 2013 establishing the EASME (the 'Decision') [9] provides that, with effect from 1 January 2014, the EASME is entrusted with the implementation of parts of the following four EU programmes: Horizon 2020, COSME, LIFE and EMFF. Article 3(2) of the Decision moreover provides that the EASME is entrusted with the implementation of the legacy of several actions under the Competitiveness and Innovation Framework Programme (CIP) 2007-2013.

18. The detailed list of tasks delegated under the above programmes is set out in Article 4 and in Annexes I to V to the Commission's Act of Delegation of 23 December 2013 [10]. For all the programmes, the EASME was given the task of "*award [ing] grants and manag [ing] the ensuing agreement or decision, including the operations required to launch and conclude grant award procedures*" [11]. However, with regard to the existence of a review procedure in the context of grant award procedures, the Ombudsman notes that a distinction should be made between 1) the Horizon 2020 Programme and 2) all the other programmes.

19. As regards, firstly, the award of grants under the **Horizon 2020 Programme**, Article 16 of Regulation 1290/2013 provides a clear legal basis for a review procedure. That provision lays down that the Commission (and thus, by delegation, the EASME) must provide a "*transparent evaluation review procedure*", and that an evaluation review committee must issue an opinion. Article 16 stipulates that applicants who consider that the evaluation of their proposal has not been carried out in accordance with the relevant procedure and work programme may ask for such a review. Article 16 also provides that the review by the evaluation review committee must cover "*only the procedural aspects of the evaluation*", and not the merits of the proposal itself. However, on the basis of its opinion, the evaluation review committee may make a recommendation for a *re-evaluation* of the proposal primarily by evaluators not involved in the



previous evaluation.

20. Moreover, Annex I to the Commission's Act of Delegation explicitly provides that one of the tasks of the EASME in the context of the Horizon 2020 Programme is to " *ensure that there is a procedure in place for participants to make enquiries or complaints about their involvement in the programmes and that information on how to register ... complaints is made available to all participants and published on-line* " and to " manage any request for an evaluation review procedure " (emphasis added).

21. As regards the **scope of the review** , the Ombudsman notes that this review procedure is similar to those established by the ERCEA and the REA which are also limited to "procedural aspects", and do not cover the assessment of the merits of proposals. The Ombudsman however notes that the fact that Article 16 of Regulation 1290/2013 limits the review by the evaluation review committee to " *procedural aspects* " should not mean that the review should be limited to purely formalistic elements. If that were the case, the possibility to make a request for review would obviously not have much value. In this context, the Ombudsman has already pointed out that there are three grounds that should give rise to a full re-evaluation of a proposal: (i) if an applicant puts forward evidence of procedural errors, for example, if it is clear that a step in the procedure has been overlooked; (ii) if an applicant puts forward evidence of factual errors, for example, if the experts refer to the wrong proposal; or (iii) if an applicant puts forward evidence of a *manifest* error of assessment [12] . The Ombudsman is therefore of the view that the review procedure to be established by the EASME in the context of the Horizon 2020 programme should cover those three eventualities.

22. The Ombudsman understands from the EASME's opinion that it has not yet established such a review procedure because it is waiting for the outcome of DG Research's revision of the procedure.

23. The EASME has not indicated to the Ombudsman any date by which it expects the review procedure to be in place. It merely stated that " *in the meantime* " applicants could use the general review procedure provided by Article 22 of the Regulation on Executive Agencies. The Ombudsman does not consider the EASME's position to be in line with Regulation 1290/2013 and the Commission's Act of Delegation. Since the EASME was entrusted with the management of the Horizon 2020 programme as from March 2014, it is logical to assume that a specific review procedure for Horizon 2020 calls for proposals should have been established by that date. It is clear, however, that this was not done. Nor does such a specific review procedure seem to have been established in the meantime. It is true that this failure does not deprive applicants of the possibility of resorting to the general review procedure before the Commission. In the Ombudsman's view, however, this general review procedure cannot compensate for the absence of a proper internal review procedure. First, the absence of such a procedure means that, at present, applicants cannot benefit from a review by an evaluation review committee, whereas applicants who respond to similar calls for proposals launched by the REA and the ERCEA can. Second, and even more importantly, there is no guarantee that the general review procedure covers all the aspects that a proper review procedure should address (see point 21 above). The Ombudsman will therefore make the draft recommendation below, in accordance



with Article 3(6) of the Statute of the European Ombudsman.

24. As regards the existence of an evaluation review procedure in the context of the award of grants under the **COSME, LIFE and EMFF programmes**, the Ombudsman notes that the EASME has stated that it was in the process of analysing the possibility of establishing a similar procedure to the one required for the purposes of the Horizon 2020 programme. It is true that, as argued by the EASME, there is currently no *specific* legal basis for a review procedure of decisions taken under those programmes.

25. However, the fact that there is currently no *specific* legal basis for a review procedure in respect of those programmes should not prevent the EASME from establishing such a procedure. Indeed, good administration requires that applicants who respond to calls for proposals launched under those programmes should be treated as far as possible in the same way as applicants who respond to calls for proposals launched under the Horizon 2020 programme. It would indeed constitute inconsistent administrative behaviour if applicants who respond to calls for proposals launched under the Horizon 2020 programme were able to benefit from an evaluation review procedure (by an evaluation review committee), whereas applicants who respond to calls for proposals launched under the other programmes would not and would instead have to resort to the general review procedure provided by Article 22 of the Regulation on Executive Agencies (which does not provide for a review by an evaluation review committee).

26. The Ombudsman notes that Article 22 of the Regulation on Executive Agencies provides that an appeal against any act of an executive agency may be referred to the Commission. However the Regulation on Executive Agencies was adopted more than 10 years ago, and thus long before the EASME was established. Since the task of dealing with applications under the various programmes has since been delegated to the EASME (and other agencies), it would only be logical and appropriate if any request for review of decisions taken under the various programmes - in accordance with what has been provided for in respect of the Horizon 2020 Programme - would no longer need to be addressed to the Commission but to the EASME itself.

27. The Ombudsman is aware that, in order to establish such a review procedure, the EASME has to cooperate closely with the various parent DGs and would need the Commission's approval. It is however for the EASME to take the initiative in this respect and to act in a pro-active manner. From the EASME's opinion, it does not appear that the EASME is proceeding as rapidly as it ought to on this matter. The Ombudsman is in any event not convinced that, in order to establish such a specific review procedure, the Regulations on the relevant EU programmes would first need to be amended [13]. The Ombudsman considers that the EASME should establish similar review procedures for all the EU programmes under which it awards grants, as a measure of good administration. It should not wait for an explicit invitation to do so by the legislator.

28. On the basis of the above, the Ombudsman takes the view that, in light of the review procedure that needs to be established under the Horizon 2020 programme, the EASME, should, as soon as possible, take the necessary steps to establish a similar review procedure



for calls for proposals under the other EU programmes which it manages. She will therefore make a corresponding draft recommendation below.

The draft recommendations

On the basis of her own-initiative inquiry into this matter, the Ombudsman makes the following draft recommendations to the EASME:

1. In accordance with Article 16 of Regulation 1290/2013 and Annex I to Commission Decision C(2013) 9414 final, the EASME should, as soon as possible, take the necessary steps to establish an evaluation review procedure for applicants who respond to calls for proposals under the Horizon 2020 programme and inform the Ombudsman of the date by which the review procedure will be in place.

This review procedure should cover cases where applicants put forward claims of (i) procedural errors, (ii) factual errors or (iii) a *manifest* error of assessment.

2. The EASME should take the necessary steps to establish a similar review procedure for applicants who respond to calls for proposals launched under the other EU programmes and inform the Ombudsman of the date by which the review procedure will be in place.

The EASME will be informed of these draft recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, the EASME shall send a detailed opinion by 31 January 2015. The detailed opinion could consist of the acceptance of the draft recommendations and a description of how they have been implemented.

Emily O'Reilly

Done in Strasbourg on 17 October 2014

[1] "Horizon 2020" is the EU Framework Programme for Research and Innovation (2014-2020).

[2] Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex. The report is available at:
<http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark>

[3] Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003, L 11, p. 1.



[4] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of

25 October 2012 on the financial rules applicable to the general budget of the Union and repealing

Council Regulation (EC, Euratom) No 1605/2002, OJ 2012 L 298, p. 1.

[5] Commission Decision C(2013)9414 final of 23 December 2013 delegating powers to the Executive

Agency for Small and Medium-sized Enterprises with a view to performance of tasks linked to the

implementation of Union programmes in the fields of energy, environment, climate action,

competitiveness and SMEs, maritime policy and fisheries, research and innovation and ICT, comprising, in particular, implementation of appropriations entered in the general budget of the Union. This Decision was amended by Commission Decision C(2014) 4636 final of 11 July 2014 in order to take into account the new tasks entrusted to the EASME under the European Maritime and Fisheries Fund 2014-2020 ("EMFF").

[6] "COSME" is the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (2014-2020).

[7] "LIFE" is the [EU programme for the Environment and Climate action \(2014-2020\)](#). [\[Link\]](#)

[8] Regulation (EU) No 1290/2013 of the European Parliament and of the Council of 11 December 2013

laying down the rules for participation and dissemination in "Horizon 2020 – the Framework

Programme for Research and Innovation (2014-2020)" and repealing Regulation (EC) No 1906/2006, OJ 2013, L 347, p. 81.

[9] See footnote 1 above.

[10] See footnote 7 above.

[11] See Annex I (B)(a); Annex II (B)(a), first indent; Annex III (B)(a), first indent; Annex IV (B)(a), first indent; and Annex V (B)(a), first indent of the Commission's Act of Delegation.

[12] See the Ombudsman's decision in case 2111/2011/RA against the REA (paragraph 24); see also the Ombudsman's decisions in case 1458/2011/(BEH)JN against the ERCEA (paragraph 17) and in case 857/2012/(ER)PMC against the REA (paragraph 7), available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/50011/html.bookmark>.



[13] In this respect, the Ombudsman refers to the Complaints Mechanism set up by the European Investment Bank (EIB) for members of the public who are affected by the EIB's decisions, actions or omissions: <http://www.eib.org/about/accountability/complaints/index.htm> [Link]. This Complaints Mechanism was introduced without any change in the legislation.