

## Decision of the European Ombudsman closing the inquiry into complaint 1205/2013/JF against the European Commission

Decision

**Case 1205/2013/JF - Opened on 23/07/2013 - Decision on 05/03/2015 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned a Swedish company that participated in a project financed by the European Commission's FP7 programme. Whilst the project was being implemented, the Commission decided to audit the company. The company disagreed with the audit results and, after the Commission had confirmed them, lodged a complaint with the European Ombudsman alleging a lack of objectivity on the part of the Commission and a failure to comply with the applicable rules.

The Ombudsman inquired into the issue and found no maladministration by the Commission. In particular, the audit results relating to the company's labour costs were based on the information that was available to the Commission at the relevant time. She suggested to the complainant that if it has further evidence, it consider submitting it to the Commission for its consideration. As regards the calculation of the company's productive time, the information which the complainant provided did not appear to be sufficient to permit the Commission to calculate the actual individual productive time, in accordance with the requirements of the FP7 rules. Consequently, the Ombudsman closed the case.

## The background to the complaint

1. The case concerns a Swedish company (the 'Company') which was established on 1 September 2008 by a person who was its sole owner, manager and employee (referred to as the 'OME' hereafter).
2. Between 1 September 2008 and 31 January 2012, the Company worked on a project funded by the European Commission's Seventh Framework Programme for research, technological development and demonstration activities (the 'FP7 Project'). At the same time, the OME also worked on a further two projects, which were funded by the Sixth Framework Programme (the 'FP6 Projects'). This was so because the OME used to be a partner in a different company, which was dissolved at the relevant time (the 'Former company'). The Former company initiated



the FP6 Projects. It was also the Former company that submitted the proposal for the FP7 Project and signed the relevant Grant Agreement with the Commission. All rights and obligations of the Former company were then transferred to the Company.

3. In March 2011, the European Commission conducted an on-site audit of the costs reported by the Company in respect of the FP7 Project for the period 1 September 2008 to 28 February 2010. During the visit at the Company's premises, the Commission auditors also looked into the FP6 Projects.

4. On 31 January 2012, the Company was dissolved. Subsequently, a legal representative of the Company (the 'complainant') discussed with the Commission its calculations concerning the Company's labour costs for 2008 and the OME's working time. No agreement was reached.

## **The inquiry**

5. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claims:

The Commission failed to conduct the audit relating to the FP7 and FP6 Projects objectively and in conformity with the applicable rules.

The Commission should

(i) objectively review the audit and correct the findings; and

(ii) pay EUR 42 103.74 plus interest for late payment.

6. 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 conduct the audit objectively and in conformity with the applicable rules and related claims**

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

7. The complainant argued that the Commission incorrectly calculated the Company's labour costs for 2008. Specifically, the complainant argued that the auditor recorded only three monthly payments of SEK 30 000 each in 2008. However, the Company's yearly accounts, which formed the basis of its annual return to the Swedish tax authorities, showed 12 monthly payments of SEK 30 000 between 1 September 2008 and 31 August 2009. This meant that, in 2008, four



payments of SEK 30 000 each representing monthly salaries were made by the Company, and not three. To these costs must be added the corresponding pension contribution for the OME. The complainant claimed that all of these sums should be paid by the Commission.

8. The complainant also argued that the Commission incorrectly recorded the working time of the OME. Specifically, the OME was contracted by the Company to work at the rate of 60% of full-time employment, that is, 84 hours per month. Between 1 September 2008 and 31 January 2012, the OME worked 2850.5 hours on FP6 and FP7 Projects and 245 hours on other non-EU contracts. This represented an average recorded working time of 75.5 hours per month and left 8.5 hours per month for other activities, which was largely sufficient considering that the Company had no commercial or marketing activities, no staff other than the OME, and subcontracted all its IT and accounting tasks.

9. In its opinion, the Commission considered the complaint unfounded. It claimed that the audit was carried out in accordance with the provisions of the Grant Agreement, the International Standards on Assurance and Audit Engagements, and the Audit Strategy common to the Commission's Directorates-General managing EU research funds and their Executive Agencies.

10. As regards labour costs for 2008, the Commission said that, in Sweden, the applicable law requires employers to report their employees' salaries to the national tax authorities by calendar year. The Company failed to report any salaries for the year 2008 to the Swedish tax authorities. This meant that the auditors could not establish with certainty that the Company had incurred any personnel costs during that year. However, in light of the OME's explanations provided during the audit, the fact that the Company had started its activities in 2008 and the information given by the Company to the national tax authorities in 2009, the auditors agreed that a part of the Company's salaries reported for 2009 could be considered eligible for 2008.

11. As regards the working time of the OME, the Commission referred to the applicable rules, according to which:

*"[a] simple estimation of hours worked is not sufficient. Productive hours must be calculated according to the beneficiary's normal practices. The annual number of productive hours can be calculated in two ways: - by calculating a standard number of productive hours used for all employees; - by calculating an actual individual number of productive hours for each employee. The first option, the use of standard number of productive hours, is the most efficient one. The use of actual productive hours per employee to compute hourly personnel rate is the most precise. In general, the actual productive hours should be close to the standard productive hours. In addition, the time recording system of the beneficiary must allow keeping track of this number of actual individual number of productive hours. Productive hours per year should exclude annual leave, public holidays, training (if not project related) and sick leave. A figure of 210 working days-year could be considered representative in most cases... The above will vary depending on the personnel category, industry sector, unions, contracts and national legislation which must be taken into account. Some beneficiaries use the (much lower) number of "billable" hours instead of the number of productive hours, with a higher hourly rate as a result. This is not acceptable. Productive hours are not the same concept as "billable" hours. Productive hours*



*include all working activities of the personnel of the beneficiary; they include also activities such as: Sales and Marketing, Preparation of proposals, Administrative time, "Unsold time"/"non-billable" hours, Non-project related, general research activities, In the case of universities or similar bodies: teaching, training or similar hours ".*

**12.** The Commission interpreted these rules as follows: There are 210 working days per year. When in full-time employment, the annual productive time of an employee can be estimated at 1 680 hours (corresponding to 140 hours per month). The Commission thus took the view that the Company limited itself to recording the time the OME worked on the FP6 and FP7 Projects only. The Company had made a table where it referred to the time the OME spent on each project. According to the Commission, however, the Company should have also recorded the time it spent on other activities. Therefore, the actual individual number of productive hours of the OME could not be calculated. Hence, the Commission based its calculations on the standard number of productive hours.

**13.** In addition, if the Commission were to consider the OME's productive time per year to constitute 60% of full-time employment, as the complainant claimed, this would mean that the annual productive time would amount to 1 008 hours (corresponding to 84 hours per month). However, the Company's records demonstrate that its OME worked on FP6 and FP7 Projects for a total of 1 089.5 hours (corresponding to an average of 90.8 hours per month) during the first 12 months of her employment, that is, between 1 September 2008 and 31 August 2009. The fact that the time indicated in these records exceeded the total 'workable' time of the OME implied that the information provided by the Company in respect of its productive time was not reliable. Hence, the Commission considered the OME's hourly personnel rates to be based on full-time employment.

**14.** The Commission said also that it calculated the Company's hourly personnel rate on the basis of the budget included in the FP7 Project proposal, which indicated EUR 167 500 for 42 person months. This gives an hourly rate of EUR 28.49 based on 140 productive hours per month. The Commission also looked into the rates that prevailed on the relevant market, that is, the hourly personnel fees paid to individuals having similar qualifications, performing similar tasks, and working in similar organisations as the OME. Moreover, according to the information provided by the OME herself during the audit, in her previous job, she charged an hourly fee of EUR 40.70 for managing FP6 projects. The auditors found therefore that the rate claimed by the Company for the OME, namely EUR 69.52 (later raised to EUR 70.47 and then to EUR 71.52) based on 60% of full-time employment was, therefore, not consistent with the prevailing market rates.

**15.** In his extensive observations, the complainant explained, among other things, that the Company deferred the payment of the 2008 salaries to its OME to 2009. However, in 2009, the Company mistakenly did not report to the Swedish tax authorities one month's salary for 2008. This error was promptly corrected in the tax declaration for 2010. The Company's accounts between September 2008 and August 2009 and its bank statements enclosed both with the complaint and with the observations to the Ombudsman correctly record 12 monthly salaries and demonstrate that salaries in respect of four months, not three, were paid in 2008.



**16.** As regards the calculation of the working time of the OME, the complainant explained that the Company charged a EUR 1 000 fee a day for consultancy services relating to the preparation of FP7 proposals for potential applicants. Those services were, therefore, " *a billable activity* " and the complainant had already explained to the Commission that the Company did not perform any further marketing or sales activities. All IT and accounting tasks, namely the reporting to the Swedish authorities, were subcontracted and, since it had only one employee, no human resources management was necessary.

**17.** The complainant argued that the Company recorded that time in accordance with the standard required to meet the applicable FP7 rules. " *However, most non-EU work was conducted under daily or hourly agreement and it is possible to determine the time spent through comparing the contractual conditions with the value of the invoice.* " The complainant did so and informed the Commission of the outcome of that comparative exercise.

**18.** The complainant emphasised also that the FP7 Project proposal concerned the Former company in which the OME had been a partner, but which was dissolved at the relevant time. All its rights and obligations had been transferred to the Company. Because the Former company was a partnership (where partners received no salaries) and the Company is a share company (paying wages, social charges and pensions to its employee), there were changes to personnel costs. The Grant Agreement was signed with the Former company and all necessary adjustments had to be made afterwards. This should not have been problematic because, according to the Amendments Guide for FP7 Grants (the 'Amendments Guide'): " *Universal transfer of rights and obligations does not usually require an amendment of the GA concerned* ". The OME then requested an amendment to reflect the changes in personnel costs but the Commission refused, ordering the audit instead.

**19.** The complainant also disagreed with the Commission's calculation of the prevailing market rates. He explained that the OME's previous non-permanent position as docent at the Lund University was financed from external sources. Had it been financed from University funds, she would have been paid much more than she would have earned working on a full-time basis with the Company. If she had worked for a private company, her salary would have been even higher. In addition, at the time of the audit, the OME had already been placed on a reserve list for an AD 8 position with the European Research Council, which she took up later, in February 2012. That position involves tasks similar to those performed when she was working for the company. Consequently, the salary that should have been taken into consideration was that of an AD 8 EU official which was, at the relevant time, in the range of EUR 6 300 per month.

**20.** Finally, the complainant informed the Ombudsman that OLAF conducted investigations into alleged financial irregularities during the implementation of the three research projects and a possible breach of the rules pertaining to the rights and obligations of officials of the European Union. The complainant enclosed a letter from OLAF informing him that no evidence of fraud or of further irregularities could be established and that the rules applicable to EU officials had not been breached.



## The Ombudsman's assessment

**21.** This case concerns a dispute relating to the analysis and interpretation of the company's accounts and the calculation of eligible costs by the Commission. Given the technical character of the matter and its complexity, the Ombudsman will focus her assessment on the procedural aspects and will seek to determine, on the basis of the evidence provided to her by the Commission and the complainant, whether the allegation that the Commission has failed to conduct the audit objectively and in conformity with the applicable rules is well-founded.

**22.** According to the applicable rules, the Commission could carry out a financial audit into the FP7 Project at any time during its implementation and up to five years after the end of the project. The Company was required to make available any information requested, namely that relating to individual salaries of persons involved in the project. Following the audit, the Commission was to send the Company a provisional report, on which it would have an opportunity to comment. A final report was then to be prepared, on the basis of which the Commission could decide on the appropriate course of action, namely whether to issue recovery orders and apply sanctions [1]. It appears from the facts of the case that all these different phases have taken place and that, in addition to the information the OME provided during the on-site visit, the complainant had ample opportunity to react to the auditor's and the Commission's conclusions.

**23.** As regards the labour costs for 2008, the Ombudsman notes that, in its opinion, the Commission referred to the information the Company provided to the Swedish tax authorities in 2009 in order to calculate the salaries payable to its employee in 2008. According to the complainant's statements in his observations, the Company failed to mention one month's salary in respect of 2008 in its declaration to the tax authorities in 2009 but this error was corrected in the Company's declaration of 2010. The 2010 declaration, supported by relevant bank statements demonstrates, according to the complainant, that, in 2008, the Company paid to its OME four monthly salaries of SEK 30 000 each and not three. The Company considered these four salaries to constitute costs eligible under the FP7 Project.

**24.** The Ombudsman considers that if the payment of the extra salary is supported by evidence, this could indeed result in its being considered to constitute an eligible cost under the relevant project. However, the Ombudsman notes that the complainant did not enclose a copy of its 2010 declaration to the Swedish tax authorities with his observations to the Ombudsman (the declaration for 2009 was included with the Commission's opinion and forwarded, together with that opinion, to the complainant for his observations) and that no mention of that 2010 declaration is made in the documents which were submitted to the Ombudsman prior to the complainant's observations. The Ombudsman therefore concludes that the Commission may not have been aware of the Company's 2010 declaration to the Swedish tax authorities and that, therefore, it could not have taken that declaration into consideration. Therefore, the Commission's calculations, made on the basis of the applicable rules and the information which was made available to it by the Company's OME herself during the audit, cannot be put into question. Consequently, no maladministration by the Commission may be found as regards this





aspect of the complaint.

**25.** The foregoing finding does not, of course, preclude the complainant from contacting the Commission again and requesting it to review its calculation of the Company's 2008 salaries on the basis of the new evidence, that is, the 2010 tax declaration, that the complainant will submit to it directly. The Ombudsman will also forward to the Commission the complainant's observations that include copies of its bank statements so that it may take that additional evidence into consideration when responding to the complainant's request, if the complainant decides to make one. If the complainant is not satisfied with the Commission's reply, he could consider submitting a new complaint to the Ombudsman. In this respect, the Ombudsman will make a further remark below.

**26.** As regards the working time of the Company's OME, the Ombudsman notes that, according to the Guide to Financial Issues relating to FP7 Indirect Actions (the 'FP7 Guide'), there are two possible ways for a beneficiary to calculate the number of its productive hours: it either (i) applies a standard number of productive hours; or (ii) calculates the actual individual number of productive hours. According to the FP7 Guide, the first option is the most efficient one and a figure of 210 working days is assumed to be representative in most cases. However, if a beneficiary opts for the second option, it needs to have in place a time recording system that allows it to keep track of the actual individual number of its productive hours. It also needs to consider all its working activities. The FP7 Guide expressly prohibits a beneficiary, when determining the productive time, to take into consideration only billable hours.

**27.** The complainant disputes the Commission's understanding that the OME worked full-time. According to the complainant, the contract signed between the Company and the OME provides that the latter worked at a rate of 60% of full-time employment, that is, 84 hours per month. The Commission, however, argues that it was not possible to calculate the "*actual individual number of productive hours*" because the Company recorded the time the OME worked on FP6 and FP7 Projects only. It did not record the time spent on any other working activities.

**28.** Having regard to the activity of the Company, which was to develop the FP6 Projects and FP7 Project, the Ombudsman understands the "*other working activities*" and "*non-EU work*" to correspond to tasks performed by the OME which were not related to those (then) ongoing FP6 Projects and FP7 Project, namely consultancy services to other companies that wanted to apply for other FP7 projects. This is because, according to the complainant, a "*financial director*" took care of the Company's financial management, audits were conducted externally, and IT tasks were subcontracted. The Company had no other administrative, management, marketing, communication or sales activities. Consequently, the Company did not spend time on any of these activities. In other words, the only "*non-EU work*" involved consisted in the OME providing consultancy services to those in need of help to prepare their proposals for FP7 projects.

**29.** Both the Commission and the complainant agree that the OME invoiced EUR 3 000 for "*non EU projects*". However, while, according to the audit's results, the OME explained during the audit that she neither invoiced nor recorded the time she spent on providing consultancy



services related to proposals for projects where she had the possibility of becoming a participant, the complainant stated that the Company charged a EUR 1 000 fee a day irrespective of whether it could be a participant or not. The complainant was " *aware* " of only one " *possible exception* " where the Company did not charge the fee, namely for the preparation of a proposal for another FP7 project, in 2010.

**30.** It is, therefore, clear that the OME (i) spent, at least, the equivalent of three full days providing consultancy services to other companies in order to help them prepare proposals for FP7 projects during the period concerned by the Commission's audit ( it is not clear whether she worked on any other unspecified proposals or for more than those three days providing consultancy services to FP7 proposals ); and (ii) she also spent an undetermined time on a further specific proposal for an FP7 project.

**31.** The complainant argued that " *most non-EU work was conducted under daily or hourly agreements and it is possible to determine time spent through comparing the contractual conditions with the value of the invoice. This was done and the results delivered to the Commission.* " According to the complainant, the " *analysis of the non-EU (commercial) work* " conducted between 1 September 2008 and 31 January 2012 revealed 245 working hours at an average rate of approximately EUR 117.50 per hour.

**32.** In this respect, the Ombudsman notes the rules relating to working and productive hours laid down in the FP7 Guide: "[t] he time recording system of the beneficiary must allow keeping track of... [the] actual individual number of productive hours " (emphasis added). The fact that the complainant " *compar [ed] the contractual conditions with the value of the invoice* " and the " *analysis of the non-EU (commercial) work* " do not appear sufficient to comply with the Company's obligation to have had in place a " *time recording system* " appropriate to keep track of the actual individual number of productive hours.

**33.** In light of the foregoing, the Ombudsman considers the Commission's position that it was not possible to establish the OME's actual individual number of productive hours to be reasonable.

**34.** Finally, as regards the hourly rate, although, as the complainant argues, that rate was proposed by the Former company (in which the OME was a partner at the relevant time), following its dissolution, " *all of its activities, rights and obligations* " were transferred to the Company. The complainant confirmed this in his comments on the draft audit report and in his observations on the Commission's opinion. In accordance with the Amendments Guide, no amendment to the Grant Agreement was, in principle, necessary following a " *universal transfer of rights and obligations* ".

**35.** In light of all the above, the Ombudsman concludes that the Commission's decision to calculate the hourly personnel rate on the basis of the budget included in the FP7 Project proposal was reasonable. Consequently, it may be concluded that no maladministration in respect of this aspect of the complaint could be found.





## Conclusion

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

**The Ombudsman finds no maladministration by the Commission.**

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

## Further remark

**The Commission could consider assessing the Company's 2010 declaration to the Swedish tax authorities and the relevant bank statements which the complainant would submit to it directly in due course.**

Emily O'Reilly

Strasbourg, 05/03/2015

[1] In accordance with Article II.22., entitled 'Financial audits and controls' (which falls under Section 3, entitled 'Controls and Sanctions'), of Annex II to the Grant Agreement.