

Decision of the European Ombudsman closing the inquiry into complaint 1731/2012/PL against the European Commission

Decision

Case 1731/2012/PL - **Opened on** 03/12/2012 - **Decision on** 02/09/2015 - **Institution concerned** European Commission (Friendly solution) |

The case concerned the Commission's decision to recover from a non-profit organisation the EU funds that it had invested in its social reserve between 2005 and 2009, considering them ineligible costs. As the reserve had been initially created with the Commission's support and cooperation, the organisation complained to the European Ombudsman. Having inquired into the complaint, the Ombudsman made a proposal for a solution to the Commission inviting it to reconsider its recovery decision. In reply, the Commission put forward a number of measures it had taken in order to secure the organisation's future. The Ombudsman considered these measures satisfactory and therefore decided to close the case.

The background

1. The complainant, a non-profit association, [...] [1] aims at promoting the interests of young people through a variety of actions. Approximately 80% of its budget is financed with an operating grant awarded by the Commission.
2. In 2009, an independent auditor raised concerns regarding a reserve fund (the 'complainant's social reserve') set up by the complainant to provide for a situation in which it might become bankrupt and have to provide for staff made redundant as a result. The auditor questioned the compatibility of the reserve with the grant agreement (the 'Grant Agreement') with the Commission and with the EU's Financial Regulation [2] . The Commission arrived at the conclusion that the reserve was to be considered non eligible for funding by the EU. In view of this, in 2011, the Commission issued recovery orders to the complainant for an amount of approximately EUR [...] for the period between 2005 and 2009.
3. Although the complainant returned the requested amount, it considered the recovery unfair, as the Commission had not only been aware of the existence of the social reserve but had helped the complainant create it. The complainant turned to the Ombudsman in August 2012.



4. The Ombudsman opened an inquiry into the allegation that the Commission had unfairly recovered the funds. In the course of the inquiry, the Ombudsman received the opinion of the Commission and the complainant's subsequent comments, in light of which she proposed a solution. [3]

Allegation of wrong and unfair recovery of funds

The Ombudsman's proposed solution

5. The Ombudsman considered that the Commission's interpretation of the Grant Agreement was reasonable and that the costs of the social reserve could not be regarded as eligible costs. She took the view, however, that given the particular circumstances, the recovery of the funds appeared to be unfair. In line with the Ombudsman's mission to seek fair outcomes to complaints that satisfy both the complainant and the institution concerned, she made the following proposal for a solution:

Taking into account the above findings, the Ombudsman proposes that the Commission could reconsider its recovery decision. In doing so, the Commission could have regard to the extent to which its own actions, and inactions, contributed to the present difficulty and it could seek a solution which is proportionate and fair in view of all of the circumstances.

6. In its reply to the Ombudsman's proposal, the Commission reiterated that the fact that it was involved in the establishment of the reserve, and was regularly informed about this reserve by the complainant, did not imply that it could consider the contributions to this reserve to be eligible costs after an audit had pointed out the contrary.

7. The Commission also reiterated that legitimate expectations could not be based on an error of law and considered that the previous practice could not be regarded as an exceptional circumstance that would justify waiving the recovery in question.

8. The Commission clarified that both under the old and the current Financial Regulation, the allocation to the reserves was an ineligible cost, the current Regulation simply confirming that these allocations are not to be taken into account for the purpose of applying the non-profit principle.

9. The Commission also contested that the recovery of the funds had created difficulties for the complainant. It pointed out that, in 2011, it had identified measures compatible with the Financial Regulation that would allow it to cover the costs that would arise in the event that the complainant's organisation was to be dissolved. Furthermore, in 2013 the Commission had included in the Grant Agreement an insurance premium designed to increase the protection of the association's senior staff.

10. The Commission stressed that its recovery concerned only about a third of the reserve that



had been created by the complainant.

11. Moreover, the Commission explained that the complainant had been designated as a beneficiary of a new programme assuring its funding until 2020. It also pointed out that, under the current version of the Financial Regulation dating from 2012, an increase in the rate of co-financing was possible which would enable the organisation to free own resources that could be used to boost the social reserve until 2020. The Commission added that it had already considered the possibility of increasing the rate of co-financing for 2015.

12. In its observations, the complainant noted that it did not contest the interpretation of the law, but the fairness of the recovery order. It added that it disagreed in particular with the way the amount to be recovered was calculated, considering that 20% of that amount corresponded to its own resources. It also disagreed with the Commission's view that a solution had been found to the problem of the social reserve, insofar as the risk of dissolution after 2020 remained.

The Ombudsman's assessment after the proposal for a solution

13. In her solution proposal, the Ombudsman took the view that although the Commission's interpretation of the Grant Agreement was, from a legal point of view correct, given the circumstances, the recovery of the funds had been unfair. She considered therefore that there was scope for the Commission to seek a solution as regards the recovery of the funds.

14. In its reply, the Commission made it clear that such a solution cannot consist in returning the funds that were recovered to the complainant. This said, the Ombudsman notes that the Commission has taken a number of measures to address the risk against which the complainant wished to make provision by setting up a social reserve. These measures are intended to enable the complainant to make provision for the payments it would have to make to its employees in the event that it becomes bankrupt and has to make them redundant. The complainant does not appear to dispute that these measures are sufficient as regards the period until 2020 but argues that its future beyond that date is uncertain. The Ombudsman notes, however, that the measures adopted or to be adopted by the Commission do not only provide for a sufficient margin of security until that date but also enable the complainant to add to its remaining reserve during that period. The complainant has not established that the measures to which the Commission referred would nevertheless be insufficient to allow it to attain the purpose it pursues.

15. In light of the above, the Ombudsman considers that the Commission has taken the necessary steps to find a fair and proportionate solution and thus resolve, as far as possible, the situation.

16. As regards the complainant's claim that the Commission should return part of the recovered funds, inasmuch as 20% of these amounts were not financed by EU funds, but by the complainant, the Ombudsman notes that this issue was raised by the complainant with the



Commission prior to its complaint to the Ombudsman. In reply, the Commission explained that according to the operating grant agreement the Commission shall contribute a maximum of 80% of the total **eligible** costs and that non-eligible costs shall always be covered by non-EU funding. The Commission also confirmed to the complainant that it was recovering only its own contributions.

17. The Ombudsman notes that the complainant received its funding on the basis of the amounts added to the social reserve it declared to the Commission. It was therefore correct for the Commission to recover 100% of the amounts that it had contributed to the social reserve.

Conclusion

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

By taking steps to find fair and proportionate measures to help the complainant, the Commission accepted the Ombudsman's solution proposal.

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

Emily O'Reilly

Strasbourg, 02/09/2015

[1] Brackets [...] are used in this Decision to ensure, where necessary, it's the confidential nature

[2] [Regulation \(EU, EURATOM\) No 966/2012 \[Link\]](#) 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. [Official Journal L 298 of 26.10.2012]

[3] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's solution proposal available at:
<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/60849/html.bookmark> [Link].