

Decision of the European Ombudsman in case 697/2014/MG concerning the alleged duty of the European Commission to recover funds from an EU project partner

Decision

Case 697/2014/MG - Opened on 10/06/2014 - Decision on 17/02/2016 - Institution concerned European Commission (No maladministration found) |

The case concerned the Commission's decision not to accept certain costs declared by a partner to a project funded by the EU. The Commission's decision meant that its final payment to the consortium was reduced by the sum that this partner had received by way of pre-financing. The coordinator argued that it was the Commission's duty to recover the funds incorrectly paid to the partner in question.

The Ombudsman found that the Commission had handled the issue correctly as it could have initiated a recovery only had there been a debt towards the Union. The distribution of financing among project partners is a question of a different nature, in which the Commission has no obligation to intervene. The Ombudsman therefore found no maladministration by the Commission.

The background to the complaint

1. The complaint concerns the Commission's decision not to accept certain costs declared by a partner to a project funded by the EU under the FP7 [1]. The project involved a consortium of several international partners. The complainant is a representative of University A, which acted as the project coordinator. The coordinator submitted the required deliverables, the mid-term evaluation and yearly reports, as well as the Final Report on time. The reports were approved by the Commission. However, the Commission decided to reduce the final payment to the consortium by EUR 125 627.97, equivalent to the pre-financing provided to one of the partners of the consortium (Partner Z), the costs of which the Commission did not accept. The Commission informed the complainant that it was for the coordinator, to recover the funds that had been incorrectly paid to Partner Z.

2. In May 2013, the complainant asked the Commission to give the legal basis for its conclusion that it was the coordinator's responsibility to recover funds incorrectly paid to partners. The



complainant made specific references to provisions of the Grant Agreement and of the Guide to Financial Issues, on the basis of which he argued that the responsibility to recover amounts incorrectly paid lies with the Commission.

3. In January 2014, the Commission replied that its refusal to make any payment to Partner Z was based on the relevant provisions of the Grant Agreement.

4. Dissatisfied with the Commission's answer, the complainant turned to the European Ombudsman in April 2014.

The inquiry

5. The Ombudsman decided to open an inquiry into the following allegations and claims:

Allegations:

- 1) The Commission failed to address the complainant's arguments, submitted in May 2013, concerning the unfair reduction of the final amount paid to the consortium.
- 2) The Commission failed to initiate the appropriate recovery procedures against Partner Z concerning the incorrectly paid pre-financing.
- 3) The Commission has dealt with the matter with great delays.

Claims:

- 1) The Commission should reply to the complainant's arguments concerning the unfair reduction of the final amount paid to the consortium.
- 2) The Commission should initiate the appropriate recovery procedures against Partner Z.
- 3) The Commission should deal with the matter without further delay.

6. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the observations 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.

Allegations

Arguments presented to the Ombudsman



7. The complainant argued that the Guide to Financial Issues [2] clearly provided that the Commission should carry out the recovery procedure and activate the guarantee fund. [3] The Commission had failed to address the complainant's argument in this regard.

8. In its opinion the Commission explained why the costs declared by Partner Z were not accepted:

9. Partner Z submitted a financial statement (Form C) for Reporting Period 1 (RP 1) that was signed by a legal entity different to that which signed the Grant Agreement. For the costs to be eligible, they must be incurred by the beneficiary [4] . The Commission therefore could not take into account Form C without the Grant Agreement being amended to reflect Partner Z's change of name. The Commission thus made an interim payment to the coordinator for those costs of the consortium for RP 1 that were eligible (that is, excluding the costs declared by Partner Z), pending the amendment of the Grant Agreement. After the Grant Agreement had been amended to reflect Partner Z's new name, Partner Z submitted a Form C under its new name for Reporting Period 2 (RP 2) and an amended Form C for Reporting Period 1 (RP 1), declaring higher costs for RP 1 than it did in the previous version of Form C for RP 1. The Commission asked for clarifications from Partner Z as regards the higher costs declared for RP1. However, the Commission regarded Partner Z's response as insufficient. The Commission therefore made an interim payment for RP 2 to the coordinator, which again excluded the costs declared by Partner Z.

10. For Reporting Period 3 (RP 3), the Commission asked Partner Z and the coordinator for clarifications on the Form C, submitted by Partner Z. Neither of them provided the requested information and the Commission was therefore unable to assess and verify the eligibility of the declared costs for that reporting period.

11. Given the lack of information as regards the costs declared by Partner Z, the Commission remained unable to examine the eligibility of those costs and whether they had actually been incurred by that beneficiary . As a result, the Commission decided to reject as ineligible *all* of the costs declared by Partner Z and to proceed to a final payment to the coordinator of the remaining funding based on the eligible costs incurred by the Consortium as a whole.

12. As to the complainant's allegation that the Commission should have initiated a recovery procedure against Partner Z, the Commission explained that **a recovery procedure is possible only when there is a debt vis-à-vis the Union** . Even though the costs declared by Partner Z were not taken into account for the calculation of the final amount due, the total eligible costs declared by the other partners lead to a final amount higher than that already paid to the consortium through the interim payments. Accordingly, the consortium had no debt vis-à-vis the Union and no recovery was possible.

13. As to the use of the guarantee fund, the Commission said that the guarantee fund cannot be activated solely because a member of the Consortium does not fulfil its obligations under the Grant Agreement. The purpose of the guarantee fund is to protect **the Union's** financial interests and not to cover for costs not properly justified by the beneficiaries or to add additional



funds to the EU contribution set out in the Grant Agreement where a beneficiary does not respect its obligations. The Commission activates the guarantee fund procedures only in order to recover a **debt** due to the Union.

14. The Commission stated that it would be ready to re-assess the eligibility of the costs declared by Partner Z were it to receive the requested additional information.

15. In its observations, the complainant stated that it is impossible to provide the requested information as Partner Z no longer exists. The Commission still has not addressed his argument that the pre-financing amount paid to Partner Z corresponded to the work it had really performed for the project and this work had already been incorporated in the technical reports and deliverables that the Commission had already accepted.

The Ombudsman's assessment

16. All the financial contributions of the Union to a project financed under the FP7 are paid to the coordinator who is responsible for administering it and allocating it between the beneficiaries. [5]

17. The Grant Agreement determines which costs, declared by the partners of the project, are eligible for funding. The costs must be actual and incurred by the beneficiary during the duration of the project, they must be used for the sole purpose of achieving the objectives of the project and they must be indicated in the estimated overall budget. [6] It is the duty of the consortium to submit a report, through the coordinator, to the Commission for each reporting period, which shall include an overview of the progress of work and a financial statement from each beneficiary. The consortium must also submit a summary financial report consolidating the claimed Community contribution of all the beneficiaries in an aggregate form, based on the information provided in Form C (Annex VI of the Grant Agreement) by each beneficiary [7] . Furthermore, Form C must be signed by the authorised persons within the beneficiary's organisation. [8]

18. On the basis of the above provisions, the Commission was unable to accept the costs declared by Partner Z for RP 1, given that the Form C that it provided was in the name of an entity that was not among the original partners of the project. Such a form could thus not serve as proof that the costs had been incurred by Partner Z. Additionally, the beneficiaries were under a duty to inform the Commission, through the coordinator, of any changes related to their legal status. [9] The information related to the name change of Partner Z was not communicated to the Commission in advance of submitting Form C for RP 1.

19. After the name issue had been clarified, other issues arose. Most notably, Partner Z appears to have failed to explain the change of costs declared for RP 1 in the adjusted Form C. Furthermore, Partner Z appears to have failed to explain why certain declared costs were higher than the costs envisaged in the estimated budget. Although the coordinator provided an overview of the work, carried out by Partner Z, the nature of this information was very general



and did not refer to actual costs incurred by Partner Z. The information provided by the coordinator was thus not enough to prove the actual costs of Partner Z, even if it may be, as argued by the complainant, that the declared costs corresponded to work that Partner Z had really performed.

20. On the basis of the above, there is nothing to suggest that the Commission's refusal to accept the costs declared by Partner Z was not justified.

21. The Commission's decision not to accept the costs declared by Partner Z meant that the pre-financing which this partner had received was unjustified. The complainant considers that the Commission should have recovered the pre-financing from Partner Z and activated the guarantee fund, in accordance with Point II.21 of the General Conditions of the Grant Agreement.

22. In this regard, the Ombudsman agrees with the position of the Commission as regards its recovery obligations: The final payment to the consortium is made on the basis of the eligible costs of all the beneficiaries throughout the whole duration of the project. Where the amount already paid by the Commission as pre-financing and as interim payments is *higher* than the accepted contribution, the Commission recovers the difference. If, on the other hand, the previously paid amounts are *lower* than the eligible costs, the Commission pays the difference to the consortium. [10] It has to be noted that the Grant Agreement refers to the final payment as covering the financial contribution of the *project as a whole*.

23. There was no debt of the consortium to the Union when calculating the final payment. On the contrary, despite the costs of Partner Z not being accepted, an amount was still due to **the consortium**.

24. However, the issue of distribution of funds among the project partners is separate from the issue of a possible debt towards the Union. The Ombudsman finds no basis in the Grant Agreement for the conclusion that the Commission has an obligation to intervene in cases where the funds have to be redistributed among the partners.

25. The guarantee fund is established to manage risks associated with non-recovery of **sums due to the Union**. [11] Given that, in the present case, there were no sums due to the Union, there was no basis for the Commission to activate the guarantee fund.

26. On the basis of the above, the Ombudsman finds no maladministration by the Commission in relation to its substantive decision to reduce the final payment to the consortium.

27. As regards the alleged delays by the Commission to handle the matter, the Ombudsman notes that there has been a regular exchange of correspondence between the coordinator and the Commission. The only delay that appears to have occurred was that the Commission's response to the complainant's letter of 29 May 2013 was not sent until January 2014, after two reminders. While this delay was regrettable, the Ombudsman finds no grounds to pursue this issue further.



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 Commission will be informed of this decision.

Emily O'Reilly

Strasbourg, 17/02/2016

[1] The Seventh Framework Programme (FP7) was a programme funding European research and technological development from 2007 to 2013.

[2] Guide to Financial Issues relating to FP7 Indirect Actions

[3] When the Commission pays the pre-financing to the coordinator, it transfers a certain proportion of that sum into the guarantee fund (Article 6 of the Grant Agreement). The guarantee fund is established to manage the risk associated with non-recovery of sums due to the Community by the beneficiaries (Point II.20.2 of the General Conditions of the Grant Agreement).

Where, following a request from the Commission, a beneficiary in an on-going grant agreement does not reimburse the requested amount to the coordinator, the Commission activates the fund. The amount is transferred from the fund directly to the coordinator. Where an amount is due to the Community by a beneficiary after termination or completion of a grant agreement, the Commission first requests the payment directly from the beneficiary concerned. If the beneficiary does not make the payment, the Commission recovers the sum from the guarantee fund. Whenever an amount has been transferred from the fund, the beneficiary in question is under a duty to reimburse it. The Commission issues a recovery order against that beneficiary to the benefit of the fund (Points II.21.1 and II.21.2 of the General Conditions of the Grant Agreement).

[4] Point II.14.1(b) of the General Conditions of the Grant Agreement.

[5] Points II.2.2 and II.2.3 of the General Conditions of the Grant Agreement

[6] Point II.2.14 of the General Conditions of the Grant Agreement



[7] Points II.4.1 and II.4.4 of the General Conditions of the Grant Agreement

[8] Point II.4.5 of the of the General Conditions of the Grant Agreement

[9] Point II.3(f) of the General Conditions of the Grant Agreement reads: "*Each beneficiary shall inform the other beneficiaries and the Commission through the coordinator in due time of (i) the names of the persons who shall manage and monitor its work, its contact details and any changes to that information; (ii) any event which might affect the implementation of the project and the rights of the Community; (iii) any change in its legal name, address and of its legal representatives, and any change with regard to its legal, financial, organisational or technical situation [...]; and (iv) any circumstance affecting the conditions of participation [...]*"

Where the amount of the corresponding Community financial contribution is more than any amount already paid to the consortium, the Commission shall pay the difference as the final payment within the limit of Articles 5.1 and II.20 ."

[11] Article 38(2) of the FP7 Rules for Participation, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:391:0001:0018:EN:PDF>