

Decision in case 1354/2014/ANA concerning the handling by the Innovative Medicines Initiative (IMI) Joint Undertaking of an alleged conflict of interest in a tender procedure

Decision

Case 1354/2014/ANA - Opened on 02/09/2014 - Decision on 04/07/2016 - Institutions concerned IMI 2 Joint Undertaking (No maladministration found) | IMI 2 Joint Undertaking (No further inquiries justified) |

The case concerned IMI's handling of an alleged conflict of interest in the tender procedure for a research project on risks and benefits of a vaccination scheme in Europe.

The complainant, a member of a consortium that took part in the procedure, argued that IMI failed to address whether all the members of an evaluation committee were impartial. The complainant argued that two members had links to the winning consortium, which gave rise to a conflict of interests.

The Ombudsman found that IMI applied the relevant rules correctly and found no evidence of unjust treatment of the proposal from the complainant's consortium. Therefore, the Ombudsman found that there was no maladministration concerning this aspect of the complaint. The Ombudsman further considered whether experts in a conflict of interest situation with one proposal should be allowed evaluate a competing proposal. The Ombudsman found that, as the rules followed by IMI were drawn up by the European Commission, no further inquiries into this question are justified within the context of this specific complaint.

The background to the complaint

1. The Innovative Medicines Initiative Joint Undertaking (hereinafter, 'IMI') is an EU body established in 2007 [1] to improve the efficiency and effectiveness of the development of new medicines in the EU.
2. The complainant was a member of a consortium of research entities from various Member States (see paragraph 10 below) that, in 2012, unsuccessfully applied for a large research grant from IMI. After its application for funding was unsuccessful, the consortium contacted IMI to inform it that two experts on the IMI evaluation committee had a " *conflict of interests* " - it



argued that they had close links with the consortium that was awarded the grant.

3. IMI responded by stating that any possible conflict of interests situation was properly addressed and handled during the evaluation procedure - it stated that the two experts on the IMI evaluation committee with alleged links to the winning consortium had not evaluated the proposal made by the winning consortium.

4. The complainant's consortium wrote back to IMI arguing that experts who allegedly were in a conflict of interests should also have been excluded from the evaluation of **the other** proposals, and not only from the proposal with which they had a connection. It then asked IMI to state whether the experts in question had been involved in the evaluation of its proposal.

5. IMI replied stating that, if a conflict of interests issue arises, it takes all necessary measures to ensure that the conflict of interests will not undermine the evaluation process. IMI then reaffirmed that the evaluations were carried out in accordance with the applicable IMI rules and in full respect of the principles of excellence, transparency, fairness and impartiality, and confidentiality.

6. The consortium then submitted an appeal to IMI against the decision on its application for funding.

7. IMI rejected the appeal. In its detailed reply, IMI explained that it had complied with the rules on conflict of interests. It stated that any "*potential conflict of interest*" had been dealt with satisfactorily by excluding the experts concerned from the assessment of the proposal of the consortium with which they had links.

8. Following the rejection of its appeal, the consortium turned to the European Commission's Directorate-General for Research (DG Research) to express its dissatisfaction with the manner in which IMI had dealt with the issue. It insisted that the experts should not have evaluated any of the proposals, including those of the competing consortia.

9. In its reply, the Commission stated that any complaints must be brought to IMI directly. This notwithstanding, the Commission gave additional information and clarifications as regards IMI's handling of conflicts of interest. Specifically, the Commission stated that (a) IMI's appointment letter for experts follows precisely the letter which the Commission itself uses for independent experts appointed by it, and (b) experts with a 'potential' conflict of interest are excluded only from evaluating the proposal for which such a conflict exists. It added that only experts with what it called a 'disqualifying' conflict of interest are excluded from evaluating all proposals in a given call. The Commission added that it was satisfied that IMI had ensured that no expert with a "*disqualifying conflict of interest*" had participated in the evaluation and that, should there have been an expert with a "*potential*" conflict of interest, such an expert would not have evaluated the proposal for which such a "*potential*" conflict of interest existed. Moreover, based on the Independent Observers' Report [2], the Commission was satisfied that all proposals submitted had been evaluated by the required minimum number of experts and that the evaluation rules and procedures had been followed.



10. In light of both IMI and the Commission's replies, the consortium decided not to pursue further its request for redress. However, on 31 July 2014, a member of the consortium, made a complaint to the European Ombudsman. The complainant stressed that his complaint was submitted in a personal capacity and that he was not representing the consortium when making the complaint.

The inquiry

11. The Ombudsman opened an inquiry into the complaint and identified the following allegations and claim:

- 1) IMI failed to deal properly with the conflict of interest situation arising in the evaluation of proposals under the '7th Call Topic 1 Expressions of Interest'.
- 2) IMI improperly excluded the proposal submitted by the complainant's consortium from Stage 2 of the Call.
- 3) IMI should (a) suspend the financing of the winning project, (b) cancel the tender procedure, and (c) issue a new call for tenders.

12. In the course of her inquiry, the Ombudsman inspected the IMI's file on the case and prepared a report on the inspection of documents that was forwarded to the complainant for observations. The complainant submitted observations on the inspection report. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegations that IMI failed to deal properly with the conflict of interest situation and unjustly disqualified the proposal submitted by the complainant's consortium

Arguments presented to the Ombudsman

13. The complainant argued that experts in a conflict of interest situation should be disqualified from evaluating all proposals, and not only the proposals of the consortium with respect to which they have a conflict of interests. In support of this view, he stated that such experts would have strong incentives to downgrade other proposals (in order to increase the likelihood that their favoured proposal would win). Since the experts were not prevented from evaluating the other bids, he argues that the evaluation process was tainted by a lack of impartiality and objectivity.

14. He also states that if the two experts had been excluded from the evaluation of the



successful consortium, the evaluation by 5 independent experts, as required by Article 3.8(c) of IMI's Rules, would not have been possible.

The Ombudsman's assessment

15. IMI applies the Commission's rules to the management of conflicts of interest in the appointment of experts [3] . The IMI rules draw a distinction between " *disqualifying* " [4] and " *potential* " [5] conflict of interest. A disqualifying interest would prevent an expert from evaluating the proposal in which he or she has an interest or participating in a panel review concerning that proposal. In the case of a potential conflict of interest, it would need to be established, on the basis of objective elements at IMI's disposal, whether it amounts to an effective conflict of interest. If it does, the expert is excluded from evaluating the proposal in which he or she has an interest in the same manner as for a disqualifying interest. If it does not, the expert may be allowed to evaluate the proposal concerned.

16. It is not in dispute that the two experts concerned had some professional connections to the winning consortium.

17. The Ombudsman proceeds to the assessment of the complainant's allegations by examining the three arguments he put forward in support of those allegations.

(1) The experts in a conflict of interest situation should have been excluded from the evaluation of the bid of a consortium with which they had connections

18. The Ombudsman's inspection of the relevant file has established that the relevant experts did not, in fact, take part in the evaluation of the proposal of the consortium with which the experts had a connection.

(2) Article 3.8(c) of IMI's Rules requiring evaluation by five independent experts was not complied with

19. The Ombudsman inspected IMI's files and was satisfied that no infringement of the conditions laid down in Article 3.8(c) of IMI's Rules occurred. On the basis of the information obtained in the course of the inspection, the Ombudsman is satisfied that the winning consortium's proposal was evaluated by five experts.

3) Experts in a conflict of interest situation should not have evaluated the proposal of the complainant's consortium

20. The complainant has argued that an expert in a conflict of interest situation might "



downgrade a competing proposal ", in order to increase the probability that the proposal he or she has a connection with might win. The Ombudsman accepts that this argument has some merit. It is indeed possible that an expert with an interest in favouring a particular bid could, even though excluded from its evaluation, confer an advantage on that bid, by giving lower marks than actually warranted to competing bids.

21. The Ombudsman has carefully inspected the file in the present case. There is nothing in the inspection files to support the complainant's assertion that the proposal of his consortium " *might have been downgraded* " by the experts. Indeed, it is clear that, in relative terms, the experts concerned evaluated the bid of the complainant's consortium positively.

22. In light of the above findings, the Ombudsman considers that any procedural irregularity that might have affected the impartiality and objectivity of the evaluation procedure **did not give rise to any downgrading of the complainant's consortium. Thus, no further inquiries are necessary as regards this aspect of the case.**

23. This complaint, however, raises a broad systemic issue about managing conflicts of interest in the evaluation of proposals for funding by EU bodies. It is legitimate to question whether an expert, with a potential conflict of interest in relation to one or some applicants, should nevertheless be allowed participate in the evaluation of applications to which he or she has no potential conflict of interest. The rules followed by IMI in this case were those of the Commission and it would seem proper that any consideration of the appropriateness of these rules should take place in that context. The Ombudsman will thus consider whether it might be useful to consider this systemic issue by way of a systemic own-initiative inquiry directed towards the Commission, which is the originator of the rules in question.

24. Therefore, the Ombudsman closes this case.

Conclusion

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

The Ombudsman found that IMI applied the relevant rules correctly and found no evidence of unjust treatment of the proposal from the complainant's consortium. Therefore, the Ombudsman found that there is no maladministration concerning this aspect of the complaint.

The Ombudsman considered the question of whether experts in a conflict of interest situation with one proposal should be involved in the evaluation of competing proposals. The Ombudsman found that no further inquiries are justified into this question within the context of this complaint.

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



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Strasbourg 04/07/2016

[1] Article 3 of Council Regulation (EC) No 73/2008 of 20 December 2007 setting up the Joint Undertaking for the implementation of the Joint Technology Initiative on Innovative Medicines (Text with EEA relevance), OJ 2008, L 30, p. 38.

[2] Independent Observers' Report: IMI – 7th Call 2012 - Evaluation of Stage 1, available at: http://www.imi.europa.eu/sites/default/files/uploads/documents/7th_Call/7thCall_Stage1_ObserversReport.pdf [Link], November 2012.

[3] Commission Decision of 28 February 2011 amending Decision C(2008) 4617 related to the rules for proposals submission, evaluation, selection and award procedures for indirect actions under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) and under the Seventh Framework Programme of the European Atomic Energy Community (Euratom) for nuclear research and training activities (2007-2011), O.J. 2011, L. 75, p. 1-44.

[4] " - *is a director, trustee or partner of an applicant organisation;*

- is employed by one of the applicant organisations in a proposal;

- is in any other situation that compromises his or her ability to evaluate the proposal impartially. "

[5] " - *is involved in a contract or research collaboration with an applicant organisation, or had been so in the previous three years; "*