

Decision in case 136/2016/MDC on the European Commission's refusal to revise a final audit report concerning a project co-financed by the European Union

Decision

Case 136/2016/MDC - Opened on 18/02/2016 - Decision on 13/12/2016 - Institution concerned European Commission (Solution achieved) |

The case was brought by an association of legal experts from all over the European Union which carried out a project co-financed by the European Commission. It concerned the alleged unfair recovery, following an audit, of sums wrongly considered ineligible under the Grant Agreement.

The Ombudsman inquired into the issue and concluded that, following her intervention, a solution had been found. She therefore closed the case.

The background

1. The complainant, an association of legal experts from all over the European Union, carried out a project between July 2010 and June 2012 which was co-financed by the European Commission, in accordance with a Grant Agreement.
2. In February 2014, the Commission informed the complainant that it had decided to audit the costs and income of the project. In July 2014, the auditors who had been sub-contracted by the Commission to carry out the audit sent the complainant a draft audit report to which the complainant replied in detail two months later.
3. In April 2015, the Commission sent the complainant the final audit report which stated that the auditors had considered the complainant's reply and had updated the audit report accordingly. The audit was considered closed and the Commission's Authorizing Officer fully endorsed the findings and recommendations of the audit report. The complainant was informed that it would receive a debit note requesting it to pay **EUR 11 112.57** .
4. In June 2015, the complainant submitted its final comments in which it highlighted some deficiencies in the manner in which the audit was carried out and contested certain aspects of the audit report. Two weeks later, the Commission's Authorising officer replied that neither the



deficiencies pointed out by the complainant nor the points raised in order to contest the audit conclusions were capable of putting into question the audit conclusions. The request for reimbursement was maintained.

5. On 16 July 2015, the complainant sent another letter to the Commission in which it indicated the matters which were unacceptable to it [1], the matters which it was ready to accept and its opinion on the balance it owed. However, the Commission re-sent the debit note and the complainant paid it.

The inquiry

6. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The Commission's refusal to revise the final audit report in light of the complainant's objections was unfair.

2) The Commission should annul its decision to consider ineligible items E75, E72 and E20 and to recover the interest on the invested sum and it should discuss some other rejected expenses with the complainant.

7. In support of its allegation, the complainant argued that (i) the Commission failed to take into account the objections raised by the complainant (in, among others, its letter of 16 July 2015) to the Commission's decision to consider ineligible three items of expenditure (items E75, E72 and E20) and to recover the interest on an invested sum which did not exclusively originate from the Commission's pre-financing payment; (ii) the Commission simply endorsed the audit report conclusions, thereby delegating its decision, without any consultation. This is unfair and unacceptable; and (iii) the complainant accepted some rejected expenses and requested that the Commission discuss with it some other rejected expenses but the Commission refused to do so.

8. 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 unfair refusal to revise the final audit report in light of the complainant's objections and related claim

Proposal for a solution

9. The Commission **initially** refused to consider eligible items E75 and E72. It considered that, since these sums had been set off against sums owed by the contractor, they could not be considered to amount to expenditure actually incurred and paid. This procedure did not generate a cash flow of an equivalent amount and these items were therefore ineligible.



10. As for the interest earned on the Commission's pre-financing payment, the Commission stated that the recovery of such interest was envisaged by the Grant Agreement. However, if the amount requested by the Commission was higher than the interest actually earned on the Commission's pre-financing payment, the complainant could submit proof of the interest actually earned.

11. With regard to item of expenditure E20, the Commission stated that although the auditors' conclusion concerning its ineligibility was in accordance with the Grant Agreement, it was ready to exceptionally accept these costs, given that they were essential for the implementation of the project.

12. The Commission also said that the auditors' conclusions were checked and that it did not simply endorse the audit conclusions. It added that the complainant had the opportunity to present its comments to the auditors. Moreover, the letters which the complainant sent to the Commission also received specific replies.

13. The **complainant** contested the Commission's position concerning the sums that had been set off. The invoice which the complainant issued and sent to the contractor related to an amount which was due by the contractor, and the invoices which the contractor issued also related to amounts due. According to the complainant, this set-off complied with the requirements of the Grant Agreement.

14. As for the interest earned on the Commission's pre-financing payment (EUR 2 941.32), the complainant agreed that the recovery of such interest was envisaged by the Grant Agreement. It calculated the amount of interest earned (and deducted the tax it had paid on that interest) and stated that it owed the Commission by way of interest EUR 1 728.70. The complainant explained the method it used to calculate this sum and submitted supporting documents to the Commission.

15. Since the parties did not come to an agreement, the Ombudsman's inquiry team contacted the Commission and asked it to reply to two questions, whilst commending it for having agreed to consider item of expenditure E20 eligible.

16. As regards the sums that had been set off, the Ombudsman's inquiry team noted that the Commission considered that since no cash flow had been generated, these items of expenditure had to be considered ineligible. However, it was not clear whether there was a rule which laid down that a cash flow must be generated. The Grant Agreement stated that solely costs actually incurred may be considered eligible. From the complainant's explanations, it appeared that the sums which had been set off were actually incurred. They were simply not actually paid due to the set-off. Therefore, the Commission was asked to explain if there was a rule which laid down that a cash flow must be generated. It was pointed out that if there was no such rule, it appeared that any sums which had actually been incurred and which complied with the other conditions of Article II.14 of the Grant Agreement had to be considered eligible (regardless of whether they generated a cash flow).



17. As for the interest earned on the Commission's pre-financing payment, the Ombudsman's inquiry team welcomed the Commission's decision to give the complainant the opportunity to revise the amount. The Commission was asked to state whether it agreed with the revised amount and to give reasons for its position if it disagreed with it. It later turned out that the Commission had already agreed with the revised amount but the Ombudsman had not been informed of this.

18. In August 2015, the Commission informed the Ombudsman's inquiry team that it had changed its position concerning the sums that had been set off. It considered that these sums effectively constituted costs that had actually been incurred and were therefore eligible. The complainant later informed the Ombudsman that it had held a calm discussion with the Commission during which the arguments of both sides were exchanged and heard. It added that it was satisfied with the outcome of the discussion and thanked the Ombudsman for her intervention.

The Ombudsman's assessment after the proposal for a solution

19. The Ombudsman is pleased to note that the complainant and the Commission have come to an agreement about the matters raised in this complaint and that the complainant is satisfied with the outcome. She therefore considers that a solution has been found.

Conclusion

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

The Ombudsman considers that a solution has been found.

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

Marta Hirsch- Ziembinska

Unit 1- Inquiries and ICT

Strasbourg, 13/12/2016

[1] The following three points were unacceptable to the complainant who requested the Commission to annul the three decisions relating to them:

1. The refusal to take into account two items : (i) item E75 (rejected costs: EUR 2 419),



which related to bills which the complainant had not actually paid to the contractor because they were set off (in accordance with French law) against amounts owed by the contractor to the complainant. The complainant stated that this set-off was proven (by a registered letter of the contractor) and was in accordance with French law. Moreover, the Commission had agreed to it; and (ii) the same applied to item E72 (rejected costs: EUR 975), which corresponded to participation fees paid by two participants in a conference to the contractor but which the contractor did not pay to the complainant. The complainant therefore deducted the amount of EUR 975 from the sums due.

2. The Commission's decision to recover " *interest of €2,941.32 earned on Commission pre-financing which had not been declared.* " The complainant stated that it invested excess money and received interest. The Commission insisted that this interest be fully repaid although:

- a) such repayment is not contractually provided for,
- b) a (minimal) part of the invested sums does not originate from the grant paid by the European Commission;
- c) The interest received was taxed. This Decision of the Commission means that it is making profit on which the complainant has paid taxes in France. This is unfair.
- d) It is impossible for the complainant to understand exactly how the auditors calculated this sum, since they did not provide details about it.

3. The Commission's rejection of item E20. Without any discussion, the Commission rejected item E20 (EUR 1020), which was an expense of a partner in the project. The expense related to accommodation expenses of members of a committee who had to take a quick decision following a conference. This expense was perfectly justified and an accounting document was provided.