



## Decision in case OI/1/2016 on the failure by the European Commission to reply to a request for a legal review of a decision by an EU agency

Decision

**Case** OI/1/2016/ZA - **Opened on** 11/05/2016 - **Decision on** 22/12/2016 - **Institutions concerned** European Commission ( No maladministration found ) | European Commission ( Settled by the institution ) |

The case concerned the failure by the European Commission to reply to the complainant's request for a legal review of the Education, Audiovisual and Culture Executive Agency's decision to reject his project from EU funding under the Erasmus+ programme. The Ombudsman inquired into the issue and found that the Commission had already replied to the complainant. She therefore considered this part of the complaint as settled by the institution. She also examined the substance of the Commission's reply and found it comprehensive and reasonable. She therefore decided that there was no maladministration.

### The background to the complaint

1. On October 2014, the European Commission (EC) published a call [1] for proposals for the funding of projects in the context of Erasmus+ programme [2]. The call comprised two separate submission rounds. Proposals had to be submitted to the Education, Audiovisual and Culture Executive Agency (EACEA), which is responsible for implementing education, training, youth, sport, audiovisual, culture and volunteering programmes on behalf of the European Commission.
2. The complainant, who represents a Serbian Scientific Centre, submitted project proposals to both rounds. On 31 March 2015, he submitted a proposal entitled "Thinking skills and creativity by recreational mathematics games" [3] and, on 30 August 2015, a proposal entitled "Make the idea – get the job. Creative youth – the future business leaders" [4]. This complaint concerns the second proposal.
3. On 11 December 2015, the EACEA informed the complainant that his project was not selected for EU co-funding. The funding threshold had been set at 78/100 points whereas the applicant had received 40/100 points for his project [5]. The EACEA also informed him that it had received 171 applications in the second submission round of which 23 were selected for funding, with one was placed on the reserve list. The EACEA provided the complainant with the evaluation report of his project proposal, which contained the comments of the experts for each awarding criterion and the respective scores, as well as the experts' overall



comments on the project proposal.

4. On 18 December 2015, the complainant asked the European Commission to carry out a legal review of the EACEA's decision under Article 22 of the Council Regulation 58/2003 [6] . At the end of March 2016, the complainant had still not received either an acknowledgement of receipt or a reply, and he contacted the Ombudsman on 1 April 2016.

### **The inquiry**

5. The Ombudsman opened an inquiry into the complaint [7] and identified the following allegation and claim:

*The Commission failed to reply to the complainant's request to carry out a legal review of the EACEA's decision to reject his proposal for funding.*

*The European Commission should reply to the complainant's request and address his concerns about the exclusion of his project from the call for proposals.*

6. The Ombudsman opened an inquiry on 11 May 2016. The following day, the Commission informed the Ombudsman that it had sent the complainant a reply on 8 April 2016 already. The complainant was asked to submit his observations, which he did on 23 June 2016. In the course of the inquiry, the Ombudsman duly considered the information provided in the complaint.

### **Allegation that the European Commission failed to reply to the complainant's request for a legal review of the EACEA's decision and related claim**

Arguments made by the complainant and the institution

7. The complainant's main allegation and claim against the European Commission concerned its failure to reply to his request for a legal review of the EACEA's decision.

8. The Commission informed the Ombudsman that it had replied to the complainant on 8 April 2016, before the opening of the inquiry by the Ombudsman.

The Ombudsman's assessment

9. Following the Commission's reply, the Ombudsman considers this part of the complaint as settled by the institution.

### **Claim that the Commission should address the complainant's concerns about the exclusion of his project from call for proposals**

Arguments made by the complainant and the institution

10. In his request to the Commission, the complainant argued that his proposal had drawn



heavily on the one he had submitted in the first submission round. He therefore questioned how it was possible that his second proposal scored much lower (40/100) than the first one (70/100) [8]. In his view, the difference in the scores indicated that the criteria had not been applied consistently in the consideration of proposals. The complainant also maintained that the experts' comments showed lack of professionalism and academic competence.

**11.** Concerning the specific awarding criteria, the complainant made the following remarks:

(i) Concerning the first criterion (*'Relevance of the project'*), the complainant contested the experts' views that his proposed project was not in line with the priorities of the 'Capacity Building in the Field of Youth' key action. He also contested the view that his proposal included limited participation of professionals engaged in youth work [9].

(ii) Concerning the second criterion (*'Quality of the project design and implementation'*), the complainant did not accept the experts' criticism that the proposal lacked sufficient information on the methodology to be used during the project's youth exchange activities. He argued that this alone could not justify the proposal's low score under this criterion [10].

(iii) Concerning the third criterion (*'Quality of the project team and the cooperation arrangements'*), the complainant contested the criticism that the project would not be of direct benefit to the youth sector. He also considered the view that the project's members lacked "*relevant experience in youth work*" as a "scandalous statement", which was based on incorrect information [11].

(iv) Concerning the fourth criterion (*'Impact and dissemination'*), the experts stated that the "*impact of the project on participants during the international activities and learning outcomes of these events are not defined*", which made it hard to evaluate. The complainant stated that this justification was "fabricated" by the EACEA, as was its criticism that the project was not cost-effective. Finally, the complainant repeated his view that the experts had rejected the project based, to a large extent, on the weakness of the proposed exchange activities, which constituted only a very small part of the whole project.

**12.** In its reply [12] the Commission presented the arguments of both the complainant and the EACEA, and addressed all the points the complainant had raised in his request.

**13.** First, the Commission argued that the scope of its review was limited to: checking the EACEA's compliance with the rules governing the selection procedure; assessing the completeness of the statement of reasons; ensuring the facts were correct; and verifying that there was no manifest error of assessment or abuse of power. The Commission also pointed out that the EACEA enjoyed broad discretion as regards the factors to be taken into account in deciding to award a grant, and clarified that its role was not that of a second evaluation committee [13].

**14.** Second, the Commission pointed out that the two project proposals submitted by the complainant actually had a different focus. Furthermore, the competitive conditions in the two submission rounds were different [14]. It maintained that the simple fact that the



scores obtained for the two project proposals were different did not, in itself, constitute sufficient evidence that the award criteria had not been applied consistently [15] . Moreover, the Commission argued that the quality of a proposal should be assessed on the basis of the proposal itself [16] . Consequently, a previous evaluation of a grant application perceived as being similar could not serve as a reference for comparison in the context of a different call for proposals.

**15.** Third, the Commission endorsed the EACEA's assertion that the statements contained in the evaluation report (under the section 'Overall comments') were in fact made by the external experts and not the EACEA. The Commission substantiated this view in the subsequent detailed analysis of the complainant's more specific points.

**16.** Following its initial remarks, the Commission's decision addressed the complainant's points one-by-one:

(i) Concerning the assessment of the first criterion ( *Relevance of the Project* ), the Commission concluded that the complainant failed to provide solid arguments and facts to challenge the assessment that the project was not in line with the priorities under the Capacity Building in the Field of Youth key action. The Commission maintained that the complainant merely stated that his proposal was fully compatible with EU Youth Strategy. Therefore, the Commission concluded that the complainant's claim was unsubstantiated.

(ii) Concerning the assessment of the second evaluation criterion ( ' *Quality of the project design and implementation* ' ), the Commission found there were weaknesses in the complainant's proposal due to 'it " *lacking information on the methodology used during youth exchanges* " and, therefore, the Commission did not find a manifest error in the experts' evaluation. The Commission pointed out that the importance of the exchange activities should not be underestimated merely because of their comparatively short duration and stressed that these activities would amount to around 28% of the total grant.

(iii) Concerning the third evaluation criterion ( ' *Quality of the project team and the cooperation arrangements* ' ), the Commission confirmed that the experts' statements concerned both the individual award criteria and the overall evaluation of the proposal. It noted that the statements/comments were consistent but not necessarily identical, which they should not be. As regards the proposed project participants' alleged lack of relevant experience in youth work, the Commission concluded that the experts' position appeared valid, namely that vocational secondary schools which constituted formal educational institutions were not directly related to youth work [17] . The Commission added that, even if it were considered that the experts had wrongly assessed the experience of the project coordinator and team members in the field of youth work, that error would have had no decisive effect on the outcome of the assessment, as the overall score of the project was so low [18] . The Commission therefore regarded this point as "ineffective" [19] .

(iv) Concerning the fourth criterion ( ' *Impact and dissemination* ' ), the Commission also considered the complainant's claims to be unsubstantiated. It agreed with the experts' initial assessment that the information about the youth exchanges was not sufficiently detailed.



Furthermore, the Commission agreed with the evaluation that the impact of the project on the youth sector and participating organisations was not sufficiently detailed. It added that the complainant had failed to provide any new arguments or evidence in his letter to the Commission. Finally, the Commission maintained that the statement concerning the cost effectiveness of the project reflected various statements made under the individual criteria and was not a statement " *fabricated by the Agency* ".

**17.** The complainant questioned the review's thoroughness and made the following three main points:

(i) Concerning the *Quality of the project design and evaluation* criterion, he argued that there were inconsistencies in the experts' views concerning the selection of the participants in the project's exchange activities, which the Commission had failed to identify [20] .

(ii) Concerning the same criterion, the complainant insisted that the deduction of 19 points from the project's evaluation under this criterion, based exclusively on the proposal's weakness concerning the methodology of the five-day exchange activity, was not justified.

(iii) Concerning the criterion *Quality of the project team and the cooperation arrangements*, the complainant insisted that the Commission was wrong in accepting the experts' view that the project's proposed participants did not have relevant experience in youth work [21] . Finally, the complainant described as " *uttermost cynicism* " the Commission's argument that an error of assessment in this regard would have no bearing on the outcome as the project's score was so far below the funding threshold.

The Ombudsman's assessment

**18.** The Ombudsman notes that her role is limited to assessing whether the Commission's reply was reasonable and that there was no manifest error in its assessment. The Ombudsman's role is not to substitute her own assessment for that of the institution.

**19.** Concerning the Commission's scope of review, the Ombudsman notes that the Commission convincingly explained why its role was not to act as a second evaluation committee but to check that there was no manifest error of assessment or misuse of power (point 21 of Commission's reply) [22] .

**20.** Furthermore, the Commission justified why its review focused on the complainant's second proposal only and, based on case law, explained why the previous evaluation of a grant application perceived as essentially similar cannot constitute a reference for a new evaluation (point 20 of the Commission's reply) [23] .

**21.** With regard to the complainant's comments about the individual criteria, the Ombudsman notes that the Commission's review was detailed and addressed the complainant's arguments one by one (point 22-25 of Commission's reply). The Commission provided sound reasoning for its position and, when necessary, gave concrete examples to justify its position [24] .



**22.** The complainant's observations did not add new evidence that could challenge the Commission's reply. Concerning the criterion used to select the participants in the project's exchange activities (first observation), the Ombudsman understands that the Commission criticised the type of criterion used for selecting the participants and not the need to carry out a selection process, per se.

**23.** With regard to the complainant's argument that the weakness in the methodology for the five-day exchange activity alone cannot justify the deduction of 19 points (second observation), it should be pointed out that, in each evaluation criterion, the score reflects the overall experts' comments on that criterion and not just one individual point or criticism [25].

**24.** Concerning the complainant's insistence that the Commission was wrong in accepting the experts view that the project participants did not have experience in youth work (third observation), the Ombudsman notes that the Commission's reply was nuanced and based on the fact that two out of the three participants were from the formal education sector. The participation of schools was allowed, but, as both the Commission and the experts argued, they were overrepresented in this project and they were therefore not best placed to contribute to the overall objective of strengthening the youth sector. Finally, the Commission's related argument on *the ineffectiveness of the applicant's related claim* was based on established case-law [26].

**25.** The Ombudsman concludes that the Commission's reply appears comprehensive and reasonable and therefore finds no maladministration.

## **Conclusion**

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusions [27] :

**As regards the first allegation the matter has been settled by the institution, and as regards the second claim, there was no maladministration.**

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

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Unit 1- Inquiries and ICT

Strasbourg, 22/12/2016

[1] EAC/A04/2014; Key Action 2: Cooperation for innovation and exchange of good practices, Action: Capacity Building in the field of youth



[2] Regulation 1288/2013

[3] Application no. 565824-EPP-1-2015-1-RS-EPPKA2-CBY-WB. On 6 July 2015, the EACEA informed the applicant that his project proposal was not selected for EU co-funding, as the funding threshold was set at 78/100 points and the applicant had received 70/100 points. 43 out of the 146 grant applications which were received by the EACEA in that first round had been selected for funding.

[4] Application no. 569424-EPP-1-2015-2-RS-EPPKA2-CBY-WB.

[5] Awarding criteria: relevance of the project 7 out of 20 points; quality of the project design and implementation, 11 out of 30 points; quality of the project team and the cooperation arrangements, 12 out of 30 points; and, impact and dissemination, 10 out of 20 points.

[6] Regulation laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes. Its Article 22 stipulates that "1. *Any act of an executive agency which injures a third party may be referred to the Commission by any person directly or individually concerned or by a Member State for a review of its legality. Administrative proceedings shall be referred to the Commission within one month of the day on which the interested party or Member State concerned learnt of the act challenged. After hearing the arguments adduced by the interested party or by the Member State concerned and those of the executive agency, the Commission shall take a decision on the administrative proceedings within two months of the date on which proceedings were instituted. Without prejudice to the Commission's obligation to reply in writing giving grounds for its decision, the failure by the Commission to reply within that deadline shall be taken as implicit rejection of the proceedings*".

[7] The complainant represented a scientific centre based in Serbia. According to Article 2.2 of the Ombudsman's Statute, the complainant was not authorised to lodge a complaint with the Ombudsman. However, in such circumstances, the Ombudsman assesses on a case by case basis whether she finds grounds to carry out an inquiry on her own initiative. This occurs when the Ombudsman considers that her intervention would serve the public interest or rectify an incident of maladministration.

[8] The complainant noted that he had taken into account the experts' comments concerning the weak points of his first proposal and tried to correct these in the second proposal: the team comprised 8 people instead of 3; the aims of the project were more focused on creativity and entrepreneurship; and there was a better explanation of the impact and dissemination strategy of the project.

[9] A 'youth worker' is a professional or volunteer involved in non-formal learning who supports young people in their personal socio-educational and professional development.

[10] He pointed out that the exchange activities would last a week only, while the programme was to run for 12 months. He also pointed out that the exchanges concerned a limited number of students.



[11] To this end, he referred to his recent experience with more than 500 students aged between 15 and 19 in various European countries, as well as to his recognised academic work on a new and original methodology on how to reinforce young people's creativity.

[12] C(2016)1995 final, Commission Implementing Decision of 5.4.2016 on the review of the legality of an act of the Education, Audio-visual and Culture Executive Agency (EACEA) pursuant to Regulation (EC) No 58/2003.

[13] The Commission referred to the Judgment of the Court of 8 May 2003, *Italy and SIM 2 Multimedia v Commission*, C-328/99 and C-399/00, ECLI:EU:C:2003:252, paragraph 39.

[14] In the first round, 43 out of 146 grant applications were selected, while in the second one 23 out of 171.

[15] The Commission also notes that that "undertaking an investigation into this alleged inconsistency would go beyond the scope of the request for review of the legality under Article 22(1) of Regulation (EC) No 58/2003, as the Commission can only review the legality of an act of the Agency which injured the applicant; it cannot carry out an assessment such as the comparative examination of two decisions taken by the Agency".

[16] See *mutatis mutandis*, Judgment of the General Court of 12 December 2012, *Evropaiki Dynamiki v EFSA*, T-457/07, ECLI:EU:T:2012:671, paragraph 104; and Judgment of the Court of First Instance of 26 February 2002, *Esedra v Commission*, T-169/00, ECLI:EU:T:2002:40, paragraph 158.

[17] The Commission referred to the definition of youth worker in Article 2(12) of the Erasmus+ Regulation which stipulates that "youth worker means a professional or a volunteer involved in non-formal learning who supports young people in their personal socio-educational and professional development".

[18] The Commission noted that " *even if the applicant were to be granted the maximum number of points for this criterion, the overall score of its grant application would still be below the financing threshold*", namely 58 out of 100

[19] Judgement of the General Court of 15 March 2012, *Evropaiki Dynamiki v Commission*, T-236/09, ECLI:EU:T:2012:127, paragraph 120.

[20] The experts found that the criteria for the selection of the participants in exchange activities were not appropriate and contradicted the 'exchanges' philosophy. The complainant argued that the award criteria and the detailed description of the project required that certain criteria apply for the selection of the participants in the exchange activities.

[21] The complainant insisted that the project participants were experienced in youth work despite the fact that two of the three partners were formal educational institutions. He also



argued that schools were eligible participating organisations.

[22] Judgement of the General Court of 10 April 2014, *Evropaiki Dynamiki v Commission*, T340/09, EU:T 2014:208, paragraph 50, “ *At the outset, it must be noted that the institutions of the European Union enjoy broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Judicial review of the exercise of that discretion is therefore limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (see Case T<sup>211</sup>/02 *Tideland Signal v Commission* [2002] ECR II<sup>3781</sup>, paragraph 33, and judgment of 10 September 2008 in Case T<sup>465</sup>/04 *Evropaiki Dynamiki v Commission*, not published in the ECR, paragraph 45)”. See also Article 22 (1) of Regulation 58/2003.*

[23] Judgment of the General Court of 12 December 2012, *Evropaiki Dynamiki v EFSA*, T-457/07, ECLI:EU:T:2012:671, paragraph 104: “ *It must be recalled that, according to settled case-law, the quality of the tenders must be assessed on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of the tenderers’ technical or professional capacity, which were already checked at the selection stage and which cannot be taken into account again for the purpose of comparing the tenders (Esedra v Commission, paragraph 80 above, paragraph 158; TQ3 Travel Solutions Belgium v Commission, paragraph 80 above, paragraph 86; see also, to that effect and by analogy, Beentjes, paragraph 63 above, paragraph 15). Furthermore, a criterion based on the tenderers’ experience cannot, as a rule, constitute an award criterion within the meaning of Article 138 of the Implementing Rules (see, by analogy, Lianakis and Others, paragraph 63 above, paragraph 31, and Commission v Greece, paragraph 63 above, paragraph 56)”. .*

[24] For instance, concerning the complainant’s observation that the experts should not have considered the lack of detailed information about the methodology to be used during youth exchanges to be important, the Commission pointed out that both the application form and the detailed description of the project lacked this information. It also set out financial considerations in support of its view, noting that the part of the grant meant to cover the exchange activities amounted to around 28% of the total grant. Concerning the complainant’s view that it was the EACEA that claimed the project was not cost effective, and not the experts, the Commission emphasised that the statement reflected points included in other parts of the evaluation report, and thus was consistent with the overall evaluation.

[25] The experts’ comments also referred to ‘ *lacking detailed information about different phases for preparation, implementation, monitoring, evaluation, and dissemination* ’; low cost effectiveness, not sufficiently justified dissemination activities; activities carried out in the frame of formal education institutions; international events lacking clear aims and/or objectives.

[26] This argument is based on the Judgement of the General Court of 15 March 2012, *Evropaiki Dynamiki v Commission*, T-236/09, ECLI:EU:T:2012:127, paragraph 120, which stipulates that “ *It follows that, even if the evaluation committee had made an error in its*



assessment of the applicant's tender for lot 2, that error would have no bearing on the Commission's ultimate finding that the applicant's tender did not obtain a score in respect of the quality/price ratio that was sufficient for it to be awarded the contract. Such an error would be immaterial and accordingly would not be sufficient to warrant annulment of the contested decision since, in the particular circumstances of the case, it could not have had a decisive effect on the outcome (see, to that effect, Case T $\pi$ 126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II $\pi$ 2427, paragraph 49 and the case-law cited)".

[27] Information on the review procedure can be found on the Ombudsman's website :  
<http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/70669/html.bookmark>