

Proposal for a solution in complaint 2048/2014/JAP against the European Commission concerning its handling of a financial audit on a research institute based in country Z

Solution - 30/01/2015

**Case 2048/2014/JAP - Opened on 30/01/2015 - Decision on 22/05/2017 - Institution
concerned** European Commission (Solution achieved) |

The complainant, a research institute based in country Z, took part in an EU-funded project under the Seventh Framework Programme for Research and Technological Development. After an audit had revealed some irregularities, the Commission sought to recover more than 500 000 Euro from the complainant. The complainant then provided clarifications as to the costs incurred during the project. This led the Commission to reduce the recovery order by nearly 200 000 Euro. However, the complainant was not satisfied and thus lodged a complaint with the European Ombudsman.

The Ombudsman inquired into the issue and found that some of the auditors' findings were based on several uncertainties. Since the most crucial issue at hand was the determination of the actual start date of the project, the Ombudsman suggests that the Commission consult an expert to verify the auditors' finding in that regard or order a technical audit under Article II.23 of the General Conditions.

The background to the complaint

1. The complainant, a research institute, took part in a collaborative project funded by the EU under the Seventh Framework 2008-12 Programme (FP7) for Research and Technological Development. The complainant was a member of the consortium running the project.
2. After audits of certain members of the consortium, the European Commission identified a number of problems. It then extended the scope of the audit to other consortium partners. Accordingly, the complainant was audited between 21 and 24 January 2013. That audit revealed errors in the eligible costs claimed by the complainant, amounting to more than 500 000 EUR. The Commission sent the complainant its draft audit report in June 2013, and asked the complainant to submit comments. The complainant challenged the auditors' findings and provided extensive clarifications and additional evidence. The Commission then revised its draft audit report and reduced the disallowed amount by nearly 200 000 EUR. The changes following



the revision were included in the final audit report, which was sent to the complainant on 8 January 2014. The complainant was not satisfied and turned to the Ombudsman.

The inquiry

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

The audit findings presented in the final audit report are flawed.

The Commission should revise its final audit report or explain why the complainant's arguments do not justify a revision.

5. On 30 January 2015 the Ombudsman requested the opinion of the Commission on the complaint. The Commission requested two deferrals of the deadline for submission of the opinion, which was eventually provided on 1 July 2015.

6. Subsequently, the Ombudsman received the comments of the complainant in response to the Commission's opinion. Her preliminary assessment takes into account the arguments and opinions put forward by the parties.

7. In its observations on the opinion, the complainant submitted a number of new claims and allegations. Since the Commission did not have a chance to comment on these, as the complainant raised these issues after having received the Commission's opinion, the Ombudsman has decided not to include these statements in her analysis.

The Ombudsman's preliminary assessment

8. The Ombudsman is not in a position to conduct an alternative audit of the financial management of the complainant's project. It is the Commission's task to carry out a financial audit and decide to what extent the recommendations of the auditors should be followed. In accordance with the well-established practice of the Ombudsman [1], her assessment is therefore focused on establishing whether the Commission's stance was reasonable, whether the procedures in place were complied with and whether the complainant received satisfactory explanations.

9. This complaint is particularly complex. The complainant has identified many aspects, which it claims were not appropriately dealt with by the auditors and by the Commission. The Ombudsman will deal with all these aspects separately, starting with the analysis of those aspects where she does not find maladministration (PART A) and closing the solution proposal by dealing with those aspects (PART B) where she has found maladministration.

PART A (no instances of maladministration found)

(i) Quality of scientific work



10. The complainant noted that the Commission questioned the quality of the scientific work performed by the complainant's staff in the project. However, in its opinion, the Commission submitted that the auditors did not question the quality of the complainant's contribution to the project. It reiterated that the costs had been deemed ineligible merely due to the non-compliance with the formal cost eligibility criteria.

12. The Ombudsman accepts that the auditors criticised the project's poor financial management and non-compliance with the requirements of the grant agreement. The quality of the work carried out was not at issue. The Ombudsman concludes that the complainant's argument is thus not relevant to the case.

(ii) *The costs of temporary staff members*
- Mr W.

13. The *Commission* explained that since the timesheets provided for Mr W.'s work did not contain any description of the tasks performed, contrary to the Guide to Financial Issues relating to FP7 Indirect Actions, the auditors relied upon alternative evidence that showed that Mr W. performed sediment sampling activities. Sediment sampling activities were not listed as a major activity requiring a work package. Thus, the auditors approved the partial reimbursement of costs only. The cost of tuition fees for his PhD could be accepted only if his research work had been performed **for the sole purpose of achieving the objectives of the projects**. Since the PhD activities did not comply with these requirements, the cost was rejected.

14. *The complainant* states that the Commission's Project Officer, in an e-mail of 8 February 2011, explained that, in principle, personnel-related costs (including PhD tuition fees) could be claimed. Despite this reassurance, these costs were not considered eligible. The complainant further argued that Mr W. was a full time employee of the project and thus worked longer on the project than other researchers (who spent up to 50% of their working time [on average] on the project). The complainant also argued that Mr W.'s work was indispensable to the project.

15. The complainant stated that, although sediment sampling was only one of the many activities carried out by Mr W., the auditors singled it out from his CV for unknown reasons. Mr W. also appears as a co-author on three papers, of which only one is related to sediments and is not listed as a paper related to the project. The other two deal with terrestrial application of the project technology and characterisation of the industrial waste, both being in accordance with one of the project's objectives which was to explore the possibilities of technology transfer to other fields.

16. *The complainant* further submitted that Mr W.'s thesis, which the auditors referred to, was in fact not his PhD thesis but an undergraduate one, completed by him in 2009, that is before the project started. Moreover, the Commission concluded that he worked on sediment analyses during the project, although both the complainant and Commission agree that large sediment sampling campaign and analysis had finished long before Mr. W. started working for the project, in January 2010.



17. The *Ombudsman* points out that the available documents show that, although the complainant provided the Commission with Mr W.'s CV, it did not explain in reply to the auditors findings why the PhD was relevant or how it contributed to the project. Even though the complainant, in its observations, pointed out that the auditors had relied upon Mr W.'s undergraduate thesis and not his PhD thesis, it did not disclose or explain his PhD research proposal to the Commission, which could clarify this contentious issue.

18. In light of the above, the *Ombudsman* does not see why the complainant considers that the information provided to it by the Commission in the e-mail of 8 February 2011 by the Project Officer should be deemed to constitute an approval of Mr W.'s PhD costs. His CV in question includes sediments sampling and several analysis methods, however, it does not explain in more details any actions performed for the project. Therefore, the *Ombudsman* takes a preliminary view that the arguments used by the complainant in this regard, that the costs related to Mr W.'s PhD should be accepted, are not convincing.

- *Other temporary staff*

19. The *Commission* explained that no timesheets were available for certain temporary staff members and the complainant failed to provide alternative evidence to substantiate the costs claimed. In these circumstances, the Commission noted that the declared costs could not be directly attributed to the project as required under Article II.15.1 of the GC. Consequently, the auditors had to reject the reported costs as 'not eligible'.

20. The *complainant* argued that the work of temporary project staff was not always recorded in timesheets 'based on current regulations and understandings'. Moreover, it did not receive an opportunity to present the auditors with the alternative evidence dealing with the temporary project staff.

21. The *Ombudsman* notes that the complainant was given the opportunity to submit alternative evidence instead of timesheets as regards Mr W.'s work. Moreover, Article II.15.1 [2] of the GC and recommendations in the Guide to Financial Issues relating to FP7 Indirect Actions [3] require that alternative evidence be provided where timesheets are not available. The complainant did not avail itself of this possibility. Instead, it simply stated that such timesheets were **not necessary** for temporary staff. Since no additional or alternative evidence was provided to the Commission, the *Ombudsman* notes that the Commission's position is reasonable.

(iii) *Mistreatment of the principal investigator*

22. The *Commission* said it worked well with the complainant's principal investigator. It denied having treated him inappropriately. It did, however, acknowledge that perhaps he did not feel comfortable when the auditors disclosed to his superiors the fact that he had not provided all the relevant information and that he had been hired to do some work by another partner in the project.



23. The *complainant* argued that, during the audit, the principal investigator was directly or indirectly **accused** of hiding the information with the intention to commit fraud. He was accused of hiding the fact that he worked for another partner in the **Consortium** because those activities were not reported in his timesheets.

24. The *complainant* also explained that its principal investigator had been paid by another partner of the Consortium for preparation of publishing materials (books), of which he is a co-author. The auditors were provided with the copies of the copyright contracts. This work was, as the complainant stated, performed in his free time, so she was neither able nor obliged to report it in his timesheets. There was no obligation for him to report activities outside the project-related work because they did not relate to or interfere with his duties at the complainant's Institute. The complainant also noted that the auditors were presented with wrong information and statements, which led them to a misleading conclusion. Moreover, in its observations, the complainant insisted that its principal investigator was seriously discredited as a scientist because of these conclusions. As a result, he was excluded from an EU-funded project worth more than 10 million EUR and his cooperation with another partner in the consortium was terminated.

25. The *Ombudsman* notes that, in its comments on the draft audit report provided for in the letter of 11 July 2013 as well as in the complainant's observations on the Commission's opinion, the complainant admitted that it submitted to the auditors an inaccurate statement about other activities performed by its principal investigator. This contentious statement, and not the Commission's behaviour, led to a misunderstanding. The *Ombudsman* also notes that the complainant did not submit evidence to show that the Commission's comments about the principal investigator were disrespectful. In the absence of any substantive evidence, the Ombudsman has no reason to believe that the Commission's services in any manner mistreated the principal investigator.

(iv) *Costs related to in-house consultant Mr Y.*

26. *The Commission* took a view that costs claimed by the complainant for the in-house consultant, Mr Y., were based on the delivery of specific outputs/products, and not on the declared working hours as required by the Guide to financial Issues relating to FP7 Indirect Actions. Since these costs did not comply with all of the cumulative criteria for the recognition of working hours for the in-house consultants [4], they were considered to constitute subcontracting costs. However, the subcontracting tasks were not foreseen by the Project, as required by Article II.7.2 of the GC. Consequently, the Commission rejected them.

27. *The complainant* was of a view that the costs of in-house consultant constituted part of personnel costs, unless the eligibility check proved otherwise. It also submitted that 'in the case these costs have to be classified as subcontracting costs, they should be eligible (except for indirect costs) since it is allowed [5] to transfer the budget between different activities in so far as the work is carried out as foreseen in Annex I'. Furthermore, the complainant argued that the Guide to Financial Issues relating to FP7 Indirect Actions explicitly mentions the possibility of claiming subcontracting costs of minor services not foreseen in Annex I.



28. *The Ombudsman* notes that, as required by Article II.7.2 of the GC, using of third parties or subcontracting must be identified in Annex I ('Description of Work') to the Grant Agreement. Otherwise, the costs claimed are to be identified as non-eligible. Since the subcontracting for the project was not mentioned in Description of Work, the complainant's submission does not appear convincing. If such an action proves necessary in the duration of the project, the beneficiary needs to seek an approval in a form of amendment to the grant agreement. However, the evidence available shows that the complainant did not avail itself of this opportunity. Therefore, the Ombudsman notes that the Commission's explanation for rejecting the costs for subcontracting activities is reasonable.

(v) *The cost of a battery*

29. *The Ombudsman* notes that the draft audit report included a statement that an invoice of 38 121.90 HRK (equivalent to ca. 5,000 EUR) for a battery was not available. The complainant then presented the Commission with a copy of the relevant invoice for **the main battery**. Consequently, it is clear from the final audit report that the cost for **the main battery** was accepted.

30. *The Ombudsman* wishes to clarify confusion that arose as regards the rejection of the cost of **a different battery**. In the Final Audit Report as well as its opinion sent to the Ombudsman, the Commission referred in fact to **a different battery**, for 629.01 EUR. The cost of that **battery** was rejected since no explanation on its expenditure had been provided by the complainant. In its observations, *the complainant* addressed the cost of the **'main' battery** (for which it provided an invoice in the amount of 38.121.90 HRK), the costs of which **were accepted**. Given the above, the Ombudsman finds no reason to pursue the matter further.

(vi) *Exchange rate difference*

31. As regards the different exchange rate, the *Ombudsman* wishes to point out that, in the course of her inquiry, the Commission successfully **accepted** the complainant's arguments. It also apologised for the mistake in the audits and made appropriate adjustments to the satisfaction of the complainant. Thus, the Ombudsman is satisfied that the Commission **settled** that aspect of the complaint.

(vii) *Timeframe of the audit work*

32. *The Commission* submitted that the audit took place between 21 and 24 January 2013, which comprises 4 audit days, the number similar to audits carried out in relation to other main partners in the project. It considered the timeframe of the audit to be sufficient.

33. *The complainant* put forward an argument that due to the auditors' travel arrangements, the actual audit was conducted in the period of 2 days and several hours. The exit meeting held on 24 January 2013, mentioned by the Commission, took about 20 minutes only. Thus, the complainant believes that there was not enough time to discuss the preliminary findings and



that the audit timeframe was insufficient to properly examine the project's documentation. At the same time, the complainant considers that the subsequent audit-related procedure took considerably longer than necessary or reasonable.

34. In terms of the time devoted to the auditors' field work, *the Ombudsman* does not find any reasons to doubt whether the Commission's services should have used more resources and extended the field work. It must be stressed that the auditors' work does not merely comprise the field work, but also many hours of verification of financial documents and alternative evidence. Therefore, the complainant's argument that the audit's timeframe was not sufficient is not convincing. In light of the above, the Ombudsman notes that the Commission's attribution of resources for the complainant's audit was reasonable.

(viii) *Indirect costs*

35. As regards the applicable rules on indirect costs, they state that if the actual expenditure for indirect costs cannot be established, the beneficiaries should use a flat rate method of either 20% or 60%, depending on the nature of the beneficiary. The latter rate, applicable upon the fulfilment of the relevant eligibility criteria, is solely reserved for non-profit public bodies, secondary and higher education establishments, research organisations and SMEs, without an analytical accounting system and is attributed to funding schemes which include research and technological development. The Ombudsman observes that in principle both the complainant, in its observations, and the Commission, in its opinion, ultimately agree on the applicable rules, therefore, this aspect of the present inquiry appears resolved.

(ix) *Acting with presumption of guilt*

36. In its opinion, *the Commission* noted that all auditors have to respect an ethical code when performing their tasks. It also observed that all of the cost rejections have been done on clear criteria set out in the grant agreement, while the audit results were adjusted, having received additional information from the complainant.

37. In turn, *the complainant* submitted that there were multiple occasions for misinterpretations or misunderstandings due to the time limitations and lack of information about the framework in which the activities were performed.

38. *The Ombudsman* notes that, in its observations, the complainant agreed with the auditors' respect for the ethical code but insisted that ambiguous situations gave an impression of presumption of guilt. In this context, the *Ombudsman* observes that the auditors' statements in the audit reports and the correspondence with the complainant show no evidence of presumption of guilt as regards the complainant or its staff members. The Commission's conduct did not bear any signs of bias or mistreatment as regards the principal investigator or the complainant's services. More importantly, the auditors' work was not designed to identify incidences of fraud, but to verify the eligibility of the costs incurred during the project. In light of the foregoing, the Ombudsman concludes that the complainant's above arguments are ill-founded.



(x) *Equipment and consumables*

39. *The Commission* noted that purchase cost of durable equipment can be regarded as eligible **if depreciation cost is taken into account** . However, the complainant declared **the full purchase costs of the equipment** and **not the depreciation costs recorded** during the implementation of the action. Therefore, the auditors rejected the costs declared as eligible **when they exceeded the depreciation costs** calculated over the duration of the action on the basis of the equipment's useful life. However, *the complainant* disagreed with the Commission's explanation about the application of the depreciation procedure.

40. *The Ombudsman* points out that in accordance with the Guide relating to Financial Issues relating to FP7 the Indirect Actions, costs of equipment that were purchased for the projects, in principle, cannot be automatically reclaimed in their entirety. The Commission's acceptance of those costs is approved on the basis of depreciation procedure, which corresponds to the depreciation of the equipment over the part of its useful economic life that falls within the scope of the given project. Against this background, in the final audit report, the auditors established that the complainant works on cash-based accounting of expenditures for the acquisition of non-financial assets. Article II.15.1)c) of the Guide relating to Financial Issues relation to FP7 the Indirect Actions reads that in case of cash-based accounting, if the equipment is usually recorded as an expense in the beneficiary's accounts and this accounting method is in line with the national accounting regulations/laws, it is acceptable to charge the entire purchase cost to the project in the period concerned, subject to certain conditions. One of the conditions is that **only the portion of the equipment used on the project may be charged** . The amount of use, including percentage used and amount of time, will be taken into account. In case some equipment and consumables are shared between the projects, **only the portion used for relevant action can be charged to the respective project** . Thus, the complainant's interpretation of the said provisions on claiming the costs of consumable equipment would only be correct as long as the equipment was **used solely for the duration of the project** . However, the auditors found that the equipment in question lasted longer than the duration of the project and thus the full purchase cost could not be covered.

41. *The Ombudsman* also notes that the complainant mentioned that, in the course of the project, it had consulted the Commission's technical expert as regards the costs claimed for the necessary equipment, as this specific issue was unclear. However, in the documents transmitted to the Ombudsman (Annex 1 of the complaint to the Ombudsman), the complainant stated that the technical expert, who allegedly suggested that the costs could be claimed in full, as long as they were shared between the projects, did not have sufficient expertise in terms of financial issues. The complainant claims in any event that this conclusion was supposed to be verified by the Commission's Project Officer as per the minutes of the project's progress meeting of 17 December 2010. However, the Ombudsman was presented with no confirmation of the verification of the alleged Commission's expert's statement by either the complainant or the Commission.

42. In light of the above considerations, the Ombudsman finds no evidence to substantiate the



complainant's allegation that the auditors erred in applying the depreciation procedure to calculate the portion of the equipment and amount of time used for the project.

(xi) Costs related to conferences

43. *The Commission* put forward that Annex I to the General Agreement clearly states that the dissemination activities cannot commence until 8 months after the start of the project. Consequently, the costs related to dissemination activities carried out before the 8th month were disallowed. The Commission stated that since they were incurred **prior** to the period for implementation of the dissemination activities under the project, they could not be attributed to the project. It thus rejected some of the costs related to dissemination of the project as they had occurred before the determined **actual start date of the project** (this aspect of the complaint will be dealt with below in point (xiii)).

44. The *complainant* in return argued that the start of activities described in the 'Description of Work' estimates the **indicative** dates for planned actions. It was, however, decided within the Consortium that the project would benefit more from the participation at those events than by firmly following the "indicative" activity schedule. As the nature of these minor deviations was purely formal and carried out for the project's benefit, they should not have been considered as significantly affecting the content of the approved General Agreement. The complainant argued that it was well beyond the scope of the financial audit to analyse whether the conference presentations and the results presented were appropriate for the project. It also submitted that, by disallowing costs related to conferences, the Commission put in question the scientific input of the project. It also suggested that the indicative time planning could not have been arranged before the project commenced.

45. *The Ombudsman* notes that the 'Description of Work' forms an integral part of the grant agreement concluded between the complainant and the Commission. All contractual terms are **binding upon both parties and should be performed in accordance with the terms and conditions of the grant agreement unless an amendment is requested**. Any proposed derogation from the agreed terms should be communicated to the Commission and prior authorisation should be sought from its services. In light of the above, the Ombudsman concludes that the complainant's arguments are not convincing.

(xii) Relevance of previous audits for the current audit

46. In its opinion, *the Commission* recalled that Article II.5.2 of the GC, "*approval of the reports shall not imply recognition of their regularity or of the authenticity of the declarations and information they contain and do not imply exemption from any audit or review*". It is thus explicitly stated that approval of the reports in the duration of the project does not affect the right of the Commission **to perform any financial audits and controls and technical reviews as foreseen under Articles II.22 and 23 of the GG**. Likewise, approval of reports does not mean that no error or breach of contractual obligations may be found during those audits, controls or reviews. Consequently, the Commission put in question the previous audit prepared by a local team of an audit consultancy firm, previously ordered by the Commission itself, and concluded



in May 2011.

47. *The complainant* pointed out that all previously approved technical reports and deliverables (by the Commission's technical expert in the course of the project) clearly show the amount of well-documented work performed during the project and not before its official start date as stated by the auditors. The complainant emphasised that the audit concluded in May 2011 by the consultancy firm confirmed that the project was being managed properly, while the Commission's services accepted the financial reports in the course of the project. Thus, it did not see any evidence that would render the Commission-ordered audit carried out by the consultancy firm, conducted in May 2011, invalid.

48. *The Ombudsman* observes that the acceptance of costs or audits acclaiming the work performed during the project does not preclude the Commission's services from performing financial audits *ex post*. Therefore, the Ombudsman concludes that the Commission's reasoning appears accurate.

PART B (maladministration found)

(xiii) **Starting date of the project** and *the financial vs technical nature of the challenged audit*

49. *The Commission's* auditors discovered that the research work necessary to establish *the proof of principle* of the project, which according to complainant's reports had been carried out from the starting date of the project, namely 1 December 2008 until 11 May 2010, had actually been carried out before 1 December 2008. Auditors discovered that previous research activities and their outcome (developed under another project) were used for tests in this project.

50. The Commission also noted that the use of the results of another project, measurements as well as previously published data for the project were confirmed by another partner in the project. Thus, the auditors established that the *de facto* starting date of the project, initiated with **new tests**, was 11 May 2010, namely the date when the previous project or its developments would have ceased. Therefore, the Commission accepted all costs attributable to the projects **as of that date**. Since the staff costs incurred between 1 December 2008 and 10 May 2010 were in breach of the provisions of the GC, they were rejected.

51. In *the complainant's* view, the auditors contested all costs before 11 May 2010 on technical grounds. The complainant reiterated that all results obtained before the project's official start date had been presented and published. It emphasised that no costs whatsoever were charged to this project for prior results. The complainant repeatedly explained the eligible activities that took place between the start of the contract and the 'arbitrary date' chosen by the auditors. In the course of the inquiry, the complainant acknowledged that the outcome of another project had been mistakenly referred to in the grant proposal and other documents. This oversight contributed to the confusion as regards the determination of the start date of the project by the auditors.

52. Subsequently, according to the complainant, this misleading submission constituted a



source of uncertainty as regard the date when the necessary tests and research for the project started, upon the completion of another project. Several statements made by the complainant's services as well as other partners of the participating Consortium seem to conclude that the results of that another project had been developed while awaiting the grant approval of the project. On the other hand, the complainant insisted that this was a separate and successful project, which met all of its objectives, what was confirmed by the project coordinators, the Commission's project officer and by the technical audit previously ordered by the Commission itself in the course of the project.

53. *The Ombudsman* notes that the auditors found that the result of that another project was used as a base for this project, while the complainant submitted that the two outcomes are fundamentally different and should not be confused, as they serve different purposes. Having considered all information obtained during the checks, the auditors declared 11 May 2010 as the actual start date of the project, which commenced with 'new' tests being performed.

54. However, should any doubts occur as regards the technical performance of the project, the Commission is entitled to order a technical audit under Article II.23 of the GC. Performance of such an audit requires technical expertise relevant to the project and its objectives. In the present case, the Commission, nevertheless, did not avail itself of this possibility. It instead followed the financial audit scheme as foreseen in Article II.22 of the GC. This is the most worrying because **the auditors' comments are not based on facts, but uncertainties and unreasonable assumptions**.

55. *The Ombudsman* points out that in the final audit report, the auditors on several occasions relied upon the following wording: *'as we do not have assurance that the test performed at the beginning of the (...) project (was) actually done within the term of the project and not (...) before, we have to disallow these costs'*. It is evident from this statement that the auditors were not certain as regards the findings on the actual length of the project. Having said that, the Ombudsman believes that, by leaving this uncertainty in place in the final audit report, the Commission is **denying justice to the complainant**. Given the amount of disallowed costs and implicit denial of attribution of numerous actions to the project, the *Ombudsman* notes that the auditors should present their findings with certainty and "assurance" so that the statements in the final audit report are not ambiguous or open to misinterpretation. What is more, the auditors' final report reads that *'(w)e concluded our audit taking into account the provisions of the audited grant agreement under the 7th Research and Technological Development Framework Programme and in accordance with International Standards on Assurance and Audit Engagements as they are applicable solely in relation to the special scope of this engagement only. Those standards require that we comply with ethical requirements and and perform an audit to obtain reasonable assurance [emphasis added] that the financial statements are free of material misstatements (...)'*.

56. Consequently, the *Ombudsman* finds that, as the Commission's financial, rather than technical, auditors remained uncertain about several findings in the audit, the Commission could and should have verified the above mentioned uncertainties using the tools at its disposal, especially in light of the requirements of **lawfulness and fairness** as respectively stipulated in



Articles 4 and 11 of the European Code of Good Administrative Behaviour. Moreover, the *Ombudsman* is not satisfied that the Commission's stance is reasonable or based on precise or strong evidence.

57. Since this crucial aspect of the present complaint requires certain technical expertise and understanding of the project, rather than pure financial knowledge, the *Ombudsman* considers that the Commission's failure to consult technical auditors/experts *ex post* could amount to an instance of maladministration. She therefore **encourages** the Commission to consult an independent expert to verify the auditors' findings. She also suggests that the cost of contracting the expert could be borne jointly by the Commission and the complainant, if this solution is accepted by both parties. She will therefore propose a corresponding suggestion below.

(xiv) New findings of the final audit report

58. Lastly, in its opinion, *the Commission* noted that all of the findings contained in the final audit report were already listed in the draft audit report. Moreover, all comments submitted by the complainant were taken into account when the amount of ineligible costs was adjusted in the final audit report.

59. On the contrary, *the complainant* argued that it had not been given a chance to comment on the arguments and applicable rules related to the depreciation method used for the reimbursement of costs for equipment, which appeared for the first time in the final audit report.

60. The Ombudsman concludes that the available evidence confirms the complainant's view.

Proposal for a solution

Taking into account her above findings, the Ombudsman considers that the issue of pivotal importance in the present inquiry is the determination of the *actual start date* of the project. She: **proposes that the European Commission uses its powers, pursuant to Article II.23 of the General Conditions to the FP7 Grant Agreement, to consult an independent expert to determine the actual start date of the project or to order a technical audit; the cost of contracting the expert could be borne jointly by the Commission and the complainant. This proposal applies without prejudice to the principle that the burden of proof, to demonstrate that the start date of the project in fact predates 11 May 2010, rests with the complainant.**

Emily O'Reilly

European Ombudsman

Strasbourg, 22/05/2017



[1] Decision of the European Ombudsman closing the inquiry into complaint 2431/2011/MMN against the European Commission; Decision of the European Ombudsman closing the inquiry into complaint 1325/2008/(BEH)VL against the European Commission

[2] *II.15. Identification of direct and indirect costs*

1. Direct costs are all those eligible costs which can be attributed directly to the project and are identified by the beneficiary as such, in accordance with its accounting principles and its usual internal rules.

With regard to personnel costs, only the costs of the actual hours worked by the persons directly carrying out work under the project may be charged. Such persons must:

- be directly hired by the beneficiary in accordance with its national legislation,*
- work under the sole technical supervision and responsibility of the latter, and*
- be remunerated in accordance with the normal practices of the beneficiary (...).*

[3] *Article II.15.1 of ECGA – Identification of direct and indirect costs*

(w)orking time to be charged must be recorded throughout the duration of the project by timesheets, adequately supported by evidence of their reality and reliability. In the absence of timesheets, the contractor must substantiate the cost claimed by reasonable means (alternative evidence) giving an equivalent level of assurance, to be assessed by the auditor. Employees have to record their time on a daily, weekly, or monthly basis using a paper or a computer-based system. The time-records have to be authorised by the project manager or other superior (...).

[4] One of the conditions is that in-house consultants' remuneration is based on working hours rather than on the delivering of specific outputs/products.

[5] The complainant relied upon Article 5.2 of the General Agreement.