European Ombudsman

REPORT ON MEETING

REPORT ON THE MEETING OF THE EUROPEAN OMBUDSMAN INQUIRY TEAM WITH REPRESENTATIVES OF THE EUROPEAN COMMISSION

COMPLAINT: OI/4/2024/MIK

Case title: How the European Commission dealt with the use and publication of a study produced under an EU-funded contract

Date: Thursday, 05 September 2024

Remote inspection arrangements

Present

European Commission

Legal officer, Unit INTPA.A.6,
Team Leader, Unit INTPA.A.6,
Two legal officers, Unit INTPA.R.4,
Senior Expert - Coordinator for inter-institutional Relations - relations with the European Ombudsman - SG.DSG1.C.2 - Ethics, Good Administration & Relations with the European Ombudsman.

European Ombudsman

Michał Krajewski - inquiries officer,
Amandine Le Bellec - inquiries officer,
Richard More O'Ferrall - inquiries coordinator.

Purpose of the meeting

The purpose of the meeting was for the Ombudsman inquiry team to discuss the factual and legal context of the case and the specific issues raised by the complainant. In particular, the inquiry team wished to discuss the following questions, shared with the Commission before the meeting:

(1) Why did the Commission request the complainant to produce the study through a 'service contract' rather than a research grant contract?

(2) Did the Commission intend to publish the study with an academic publisher or otherwise? Why did it subsequently ask the complainant to halt the printing of the study?

(3) Why does the Commission require the complainant not to allow a potential academic publisher to sell copies of the published study, thereby ensuring it could not make any profit on it? Is this a regular requirement for studies financed with EU funds?

(4) Is this requirement applicable or justified in the specific case of the complainant, given the nature of the underlying contract - a service contract that did not provide for reimbursement of the costs of publishing in 'open access' rather than a research grant contract that might provide for such reimbursement?

(5) Would it be feasible for the Commission to reimburse the costs of publishing the study in question in open access or, alternatively, withdraw the requirement to distribute the published study free of charge?

(6) What would be the specific administrative obstacles, which the Commission has mentioned to the complainant, in the process of transferring the copyright of the study to the complainant?

Introduction and procedural information

The Ombudsman inquiry team introduced themselves, thanked the Commission representatives for meeting with them and set out the purpose of the meeting. They outlined the legal framework that applies to meetings held by the Ombudsman, in particular, that the Ombudsman would not disclose any information identified by the Commission as confidential, neither to the complainant nor to any other person outside the Ombudsman's Office, without the Commission's prior consent.[1]

The inquiry team explained that they would draw up a draft report on the meeting to be sent to the Commission to ensure that the contents were factually accurate and complete. The meeting report would then be finalised, included in the file and provided to the complainant. No confidential information would be included in the report or otherwise provided to the complainant or any third party.

Information exchanged

Background information

The Commission representatives explained the course of events relevant to the case. The complainant signed two contracts with the Delegation of the EU to Guinea-Bissau. The first contract concerned producing a study of the political views of the population of Guinea-Bissau, and the second one concerned an additional study building on the first one. The contracts were concluded in a 'negotiated procedure', in which only the complainant made an offer to the Commission and then both parties negotiated the specific terms of the contracts. The contracts concerned were 'global price contracts', which means that the complainant was paid for providing the outputs specified in the contracts. The second contract was to be executed within 9 months, but its duration was extended and its terms were modified by signing two amendments. The second amendment, requested by the complainant in August 2020, concerned translating the study to English and publishing it with a reputable academic publisher, as well as printing at least 500 copies of the manuscript to be distributed during certain events. The

[1] Article 4.8 of the European Ombudsman's Implementing Provisions.

Commission representatives shared this amendment with the Ombudsman inquiry team after the meeting.

The EU Delegation reviewed the final draft study after it was submitted by the complainant and before its envisaged printing. However, the EU Delegation requested the printing to be put on hold. It considered that some conclusions included in the study were subjective and could undermine the EU's relations with Guinea-Bissau. In this context, the EU Delegation proposed to the complainant another amendment of the contract to withdraw the duty to publish the study without any adverse effect on the payment which the complainant was supposed to receive in full. The complainant delivered the required outputs and was paid in full, but did not sign the amendment. The complainant wished to have the study published as a book with a reputable academic publisher and accused the EU of 'censorship'.

In order to address this issue, the Commission had numerous exchanges with the complainant. An additional 'reading committee' was set up. This committee concluded that the study could be published with a disclaimer that it represents the views of the authors and it cannot be attributed to the EU. In March 2023, the Commission granted to the complainant permission to publish unlimited copies of the study in any language and format. However, it required copies of the volume to be distributed free of charge, which is the point of contention with the complainant. Since the latest email exchanges in April 2023, the Commission has not heard from the complainant.

Specific questions

(1) Why did the Commission request the complainant to produce the study through a 'service contract' rather than a research grant contract?

This study was procured as part of the budget managed by the Delegation of the EU to Guinea-Bissau and dedicated to supporting democratic processes and civil society [2], under the European Development Fund (EDF). The Commission implements the EDF under the framework of the relevant EDF Financial Regulation, in line with the purposes delineated therein.[3] A service contract was chosen because this type of contract allows the institution to specify the outcome that it seeks. In grant contracts, the beneficiaries have more freedom to decide on the focus and content of final deliverables. However, grant contracts are, as a rule, not financed 100% by the Commission but oblige the beneficiary to provide co-financing. Moreover, a grant contract would imply that the complainant's expenditure would have had to be verified by an independent auditor and that the complainant would have had to report specific cost incurred while producing the study; costs which would only be reimbursed under a grant contract to the extent that they would be eligible under the terms of such a grant contract. However, as mentioned above, the complainant's contract was a service contract, instead of a grant, with a 'global price' foreseeing a global sum to be paid for the complete service provided. According to the rules on grants and

[2] Commission Decision C(2016) 7052 of 31 October 2016 relating to the individual measure in favour of the Republic of Guinea-Bissau to be financed from the 11th European Development Fund and its Annex.
[3] Article 1(2) of Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th European Development Fund.

procurement for EU external action[4], studies like the one in this case should be procured through a service contract.

(2) Did the Commission intend to publish the study with an academic publisher or otherwise? Why did it subsequently ask the complainant to halt the printing of the study?

The modalities of publishing the study were not clear in the initial version of the contract. The contract seems to have foreseen publication but not with an academic publisher.

Subsequently, the complainant requested an extension of the duration of the contract and a possibility to publish the study in English with an academic publisher. The second addendum was signed, as mentioned above, according to which "*to ensure the manuscript's subsequent publication by a reputable academic press, this text will be presented as the Vozes do Povo report, rather than a formal book*" (original underlining). Also, "*an internet publication of the studies generated to produce the Vozes do Povo report*" was added as an indicator of the completion of the contract. Moreover, 500 copies of the manuscript were to be printed and distributed during events in Guinea Bissau. They were supposed to be presented as a report rather than a book "*to ensure the manuscript's availability for subsequent publication by a reputable academic press*". The addendum did not specify *who* was supposed to carry out the overseeing of the whole publication process to an academic publisher: the Commission or the complainant.

(3) Why does the Commission require the complainant not to allow a potential academic publisher to sell copies of the published study, thereby ensuring it could not make any profit on it? Is this a regular requirement for studies financed with EU funds?

The Commission representatives said that, under a service contract, the Commission pays for the service provided and acquires ownership of the output. The output thus becomes a 'public good'. The Commission could be subject to criticism (from the European Court of Auditors, for instance, or EU taxpayers more generally) if it allowed a third party (such as a publishing house or a contractor) to commercialise and make a profit on this 'public good' produced with EU public funds. A transfer of the copyright for this study to the complainant, which the complainant requests, could also be criticized for the same reasons. The main aim of the European Development Fund, from which this contract was financed, is to foster social development in the public interest. Furthermore, in case of EU external action, the Commission is not acting on its own account, but acting as contracting authority for the account of a beneficiary country[5]. The terms of reference of the contract in question reflects this by stipulating that the goal of the contract was generating public awareness and promoting knowledge about Guinea-Bissau.

The complainant has already received the full payment for both contracts, which amounted to more than EUR 154 000. As the printing of 500 copies of the report and publishing it online was mentioned in the contract, this was foreseen in the overall budget (even though the Commission did not ultimately require this). The Commission has no

[4] Section 3.1 of the Practical guide on contract procedures for European Union external action ('PRAG'), available publicly at: https://wikis.ec.europa.eu/display/ExactExternalWiki/3.+Service+Contracts#id-3.ServiceContracts-3.1.Introduction .

[5] Article 178 of the Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

control on how the complainant will use these funds. However, it noted that the complainant could use the funds to pay an 'open access fee' to publish the study with a reputable academic publisher, while respecting the obligation to make the study freely available online.

The Commission representatives also emphasised that the study is already available online in Portuguese and nothing prevents the complainant from publishing the English version too, as long as the published report is then distributed free of charge. In this context, the complainant cannot reasonably argue that the Commission prevents public access to knowledge or 'censors' the study produced by the complainant. The Commission was never contractually obliged to transfer the copyright to the complainant or let the complainant commercialise the study.

The Commission representatives added that the complainant could receive academic recognition for the study, which he seems to be seeking, by publishing the study in open access or by self-publishing it online and sending it to academic institutions, or in other ways.

In light of the answers that the Commission representatives provided to previous questions, the Ombudsman inquiry team skipped questions 4 and 5, and proceeded to the last question directly.

(6) What would be the specific administrative obstacles, which the Commission has mentioned to the complainant, in the process of transferring the copyright of the study to the complainant?

The Commission representatives explained that this process would require a decision by the Commission adopted in an applicable standard procedure involving an inter-service consultation and other mandatory stages. As this situation is highly specific, the Commission could not even use any standard templates, all of which would mean that the procedure would require considerable resources and time. In any case, the Commission considers that the transfer of copyright is not necessary as the complainant is not prevented from publishing the study, as already explained.

Conclusion of the meeting

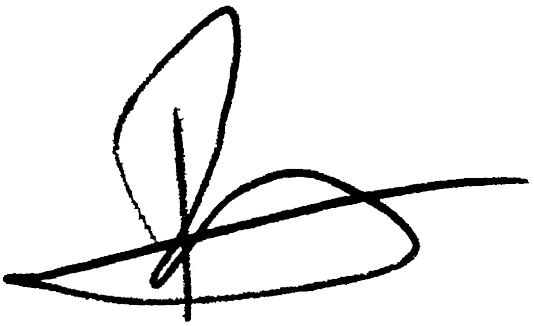
The inquiry team thanked the Commission representatives for their time and for the explanations provided, and the meeting ended.

Documents inspected by the Ombudsman inquiry team after the meeting:

- Addendum 02 to Service contract for European Union external Actions FED/2019/406/596 Financed from the EDF

Brussels, 5 September 2024





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