



EUROPEAN COMMISSION
DIRECTORATE GENERAL FOR RESEARCH & INNOVATION

Directorate M - Management Operational support - Framework Programme

GUIDELINES¹

Subject: Claiming Liquidated Damages from beneficiaries

1. Liquidated damages are due where a beneficiary has **overstated expenses** and has in consequence **received unjustified EC contribution**.

The legal basis for their claim in projects under **FP6** is Article II.30 of Annex II to the FP6 Model Contract and in actions under **FP7** Article II.24 (1) of Annex II to the FP7 Model Grant Agreement.

Liquidated damages as such **do not have a penalising character** in the sense that they may already be claimed when expenses were overclaimed through error or negligence. Their claim does not depend on an intentional or fraudulent overstatement of expenses. They are **independent** from the imposition of **financial penalties**.

2. Liquidated damages shall in principle be **claimed in all instances** where an **ex-post control** (financial audit, technical review, OLAF investigation, audit by the European Court of Auditors, or other) has revealed **overstated expenses** that have effectively led to the payment of unjustified EC contribution.

This is not the case where (as such eligible) expenses have been declared under a wrong cost category (e.g. personnel costs vs. overheads) but leave the overall EC contribution unchanged.

Liquidated damages shall **not be claimed** where overstated expenses have been identified in an **ex-ante control** (e.g. verification of a cost statement by the project officer) and hence the overpayment of EC contribution could be avoided.

3. Where **several participations** of a beneficiary have been audited that have led to **more than one adjustment** in EC contribution, liquidated damages shall be claimed for each adjustment separately.

Where the beneficiary has agreed to the **extrapolation of audit results** to non-

¹ Modifications in comparison with pervious version are highlighted in yellow.

audited participations, no liquidated damages will be claimed for the revised periods onto which extrapolation has been applied. However, if a follow-up audit is carried out on those periods and there is still overstatement, liquidated damages will be claimed.

If a beneficiary **refuses to implement the extrapolation** onto non-audited participations and thus obliges the service to undertake an additional audit, liquidated damages shall be imposed for the adjustments following this additional audit exercise.

Where a **follow-up audit or other control** of already audited participations reveal that the beneficiary has repeated the same type of overclaim in subsequent periods, **new liquidated damages** are imposed (see § 6 below).

4. Liquidated damages will only be applied where the **unjustified contribution exceeds 2%** of the total contribution claimed for the given period (*'de minimis'* rule corresponding to the materiality level of the CoA).
5. The **formula for the calculation** of liquidated damages is identical for FP6² and FP7³:

$$LD = \text{unjustified EC contribution} \times \frac{\text{overstated costs}}{\text{total EC contribution claimed}}$$

Worked example 1 (overstated expenses): A beneficiary on 50 % contribution declares expenses of 900.000 € and consequently receives 450.000 € EC contribution. An audit reveals that the real eligible expenses were of 700.000 € only and that the beneficiary has hence received 100.000 € without justification.

$$LD = 100.000 \times \frac{200.000}{450.000}$$

$$LD = 44.444 \text{ €}$$

Worked example 2 (overstated expenses): A beneficiary on 100 % contribution declares expenses of 500.000 € and consequently receives that same amount as EC contribution. An audit reveals that the real eligible expenses were of 400.000 € only and that the beneficiary has hence received 100.000 € without justification.

$$LD = 100.000 \times \frac{100.000}{500.000}$$

$$LD = 20.000 \text{ €}$$

² Article II.30 (1)

³ Article II.24 (2)

6. The calculation of liquidated damages shall be based on the reporting period(s) relating to the beneficiary's claim for EC contribution for that period, in accordance with the contract FP6 and GA FP7.
7. With the aim to **avoid disproportionate results** through the application of this formula⁴, **a ceiling** shall be applied to the amounts calculated by the formula:

The amount of liquidated damages shall not exceed the **maximum amount of a possible financial penalty**⁵ imposed on the beneficiary, i.e. 10 % or – upon repetition – 20 % of the value of the Community financial contribution received for the period.

Worked example 1: The beneficiary on 50 % contribution declares expenses of 900.000 € and consequently receives 450.000 € EC contribution. An audit reveals that the real eligible expenses were of 700.000 € only and that the beneficiary has hence received 100.000 € without justification.

The maximum financial penalty for this beneficiary would be 10 % of the 450.000 € received, i.e. 45.000 €. As the calculated liquidated damages are inferior, there is no need for capping.

In the event that the same type of excessive declaration of expenses and the unjustified reception of EC contribution occurs for a **second time**, the first ceiling will increase to 20 % of the value of the Community financial contribution received, i.e. 20 % of 450.000 €.

Worked example 2: The beneficiary on 100 % contribution declares expenses of 500.000 € and consequently receives this amount as EC contribution. An audit reveals that the real eligible expenses were of 400.000 € only and that the beneficiary has hence received 100.000 € without justification.

The maximum financial penalty for this beneficiary would be 10 % of the 500.000 € received, i.e. 50.000 €. As the calculated liquidated damages are inferior, there is no need for capping. The beneficiary is obliged to pay liquidated damages of 20.000 €.

In the event that the same type of excessive declaration of expenses and the unjustified reception of EC contribution occurs for a **second time**, the ceiling will increase to 20 % of the value of the Community financial contribution received, i.e. 20 % of 500.000 € or 100.000 €.

8. The amount of liquidated damages is to the **benefit of the general budget** of the Commission. The research budget does not profit from them. The budget line concerned is BGUE-I20XX⁶-9000-IC1-RTD/BRU.
9. The claim for **liquidated damages must not be netted** internally against payments in a running project. They must always be identified as miscellaneous revenue. In consequence, they must be claimed by means of a **recovery order** or as a **negative**

⁴ Note of the Legal Service JUR(2008) 15423 of 10 July 2008

⁵ Article II 30 (6) of the General Conditions to the Model Contract for FP6 and Article II 25 (1) of the General Conditions to the Model Grant Agreement for FP7.

⁶ Adjust to calendar year.

detail line in a payment request when the AOSD intends to compensate the liquidated damages against a payment to the beneficiary.

10. Apart from the cases mentioned under 3 and 4 above, the AOSD may **refrain only in exceptional circumstances** from claiming liquidated damages. Article 87 IR applies by analogy. This case requires prior consultation with [tbd for each of the DGs].