

## **Decision of the European Ombudsman on complaint 1915/2002/BB against the European Commission and the Court of Auditors**

Decision

**Case** 1915/2002/BB - **Opened on** 31/12/2002 - **Decision on** 03/12/2003

Strasbourg, 3 December 2003

Dear Ms G. and Mr P.,

On 24 October 2002, you made a complaint to the European Ombudsman on behalf of the Interdisciplinary Centre for Comparative Research in the Social Sciences (ICCR). This complaint against the European Commission and the Court of Auditors was received on 7 November 2002. The complaint concerns an outstanding final payment of € 80,671.61 for Thematic Network contract No. 1999-TN.10869 "TRANS-TALK" under the Fifth Framework Programme and an audit carried out by the Court of Auditors.

I would like to inform you that Mr Jacob Söderman, with whom you have previously corresponded concerning your complaint, has retired and that, from 1 April 2003, I am his successor as European Ombudsman.

On 31 December 2002, the Ombudsman forwarded the complaint to the President of the European Commission and the President of the Court of Auditors. The Court of Auditors sent its opinion on 7 April 2003 and I forwarded it to you with an invitation to make observations, which you sent on 27 May 2003. The Commission sent its opinion on 27 May 2003 and it was forwarded to you with an invitation to make observations, which you sent on 22 September 2003. On 14 October and 5 November 2003, the European Ombudsman's secretariat contacted you by telephone regarding your observations.

I am writing now to let you know the results of the inquiries that have been made.

## **THE COMPLAINT**

The European Commission and the Interdisciplinary Centre for Comparative Research in the Social Sciences (hereafter: "the ICCR") as one of the principal contractors, signed a contract on 22 December 1999. The contract was called Thematic Network contract No. 1999-TN.10869 "TRANS-TALK" under the Fifth Framework Programme. This contract covered a period of 18



months, from January 2000 until the end of June 2001. The total estimated costs of the project were € 601,015 and the initial advance payment was fixed at € 180,305 to be distributed amongst the five principal contractors. The ICCR submitted cost statements at regular six month intervals.

On 31 October 2001, the ICCR was notified that the Court of Auditors would carry out an audit of the project. The audit took place during 16-18 January 2002. According to the complainants, the auditors stated that they would be submitting their report to the Commission by the end of January 2002.

The ICCR submitted the final cost statement to the Commission in August 2001. On 11 December 2001, the Commission DG TREN approved it. As the ICCR had not heard from the Commission, the project coordinator contacted the financial officer of the Commission on 26 February 2002, via e-mail, to inquire about the status of the final payment. By e-mail of 28 February 2002 she was notified that the final payment could not be made prior to receipt of the Court of Auditors' report.

On 13 June 2002, the financial officer of the Commission forwarded, by e-mail, the report of the auditors with a request for some clarifications. The auditor's report was dated 15 April 2002. The ICCR supplied the Commission with the requested information, via e-mail, on 14 June 2002. On 8 July 2002, the ICCR sent, on its own initiative, a full opinion on the Court of Auditors' report to the financial officer of the Commission.

In a letter addressed to the Commission and dated 12 July 2002, the ICCR requested formal clarification regarding the status of the final payment of the contract. The Commission sent an undated reply in August 2002 stating that the payment would be suspended with reference to Article 3.2 of Annex II of the contract. On 29 August 2002, the ICCR informed the Commission that it could not accept Article 3.2 as a reason for suspension of the final payment. According to the complainants, the Commission did not reply to this letter.

On 24 October 2002, the complainants made a complaint on behalf of the ICCR to the Ombudsman against the European Commission and the Court of Auditors. The complaint concerns the outstanding final payment of € 80,671.61 for Thematic Network contract No. 1999-TN.10869 "TRANS-TALK" and the audit carried out by the Court.

As regards the European Commission, the complainants made the following allegations:

- 1) Lack of information regarding the status of the audit and of the final payment; and
- 2) Non-payment of the outstanding final payment of € 80,671.61.

The complainants claim settlement of the final payment with interest and an official European Commission position on the audit carried out by the Court of Auditors and on the procedures followed by both institutions.



As regards the Court of Auditors, the complainants allege that the report drew false conclusions and ignored the input provided by the Centre, and that there was undue delay in submitting the report to the Commission.

## **THE INQUIRY**

### **The Commission's opinion**

In its opinion, the Commission made the following points:

In the context of the management of indirect RTD actions under the Fifth Framework Programme, the Court of Auditors carried out an audit of the Thematic Network contract No. 1999- TN.10869 "TRANS-TALK" at the ICCR in Vienna. The auditor's report raised certain complex and serious matters which required careful consideration by the financial services of the Commission.

The Court of Auditors came to the conclusion that some declared costs were non-eligible and were without supporting evidence. This included especially: overcharging by the beneficiary for cost statements; non-compliance with the contract by the beneficiary regarding the use of budget rates; subcontracted consultant declared as a permanent employee.

On the basis of the Court of Auditors' report, the Commission decided to suspend payments to the beneficiary until its final examination of additional documents provided by the beneficiary.

On 28 February 2002, the Commission informed the ICCR of the situation regarding the final payment and its examination in the context of this audit. The ongoing discussions with the ICCR started in the summer 2002. In the meantime, discussions between the Commission and the Court of Auditors were completed in the autumn of 2002. While undertaking these additional investigations, the Commission confirmed to the ICCR in August 2002 that all payments were suspended. The Commission requested additional information by letter dated 5 December 2002. The reply from the ICCR dated 24 January 2003 was received and the Commission informed the ICCR that this reply was under examination with a view to an early resolution of the final payment.

On 13 May 2003, the Commission informed the ICCR that the final payment of € 50,821. 03 had been made. According to the Commission, the amount of € 29,799.63 could not be taken into account, since this would involve transfer between cost categories that require prior authorisation.

### **The complainants' observations on the Commission's opinion**

The complainants made, in summary, the following points:

This case raises general issues concerning delays by the Community institutions in responding to repeated requests for information and the length of the process. According to the complainants, the principle of transparency requires that these general issues should be addressed.



Following the complainants' reply to the Commission dated 27 May 2003, the Commission had proceeded to pay the remaining sum of € 20,447.79.

#### **The Court of Auditors' opinion**

The Court of Auditors made, in summary, the following points:

The document at the centre of this complaint is not a report adopted by the Court of Auditors but a sector letter. The objective of a sector letter is to present the preliminary findings obtained in the course of an audit to the auditee, which in the internal policies area, is the Commission. Following further analysis of the Commission's reaction to the factual information and related remarks stated in the sector letter, these findings may then form the basis of observations presented in reports of the Court of Auditors. In some cases, it may also require corrective action by the Commission. Since the findings and observations are preparatory at the stage of a sector letter and are, in principle, subject to further verification work, they remain confidential between the Court and the Commission.

In the present case, the sector letter N° 740/02 reporting the audit findings resulting from the audit of the contract "TRANS-TALK", was addressed to the Commissioner in charge of DG Energy & Transport (TREN). Following normal practice, the electronic version of this sector letter was then dispatched to the liaison officer at DG TREN. It appears, however, that an electronic copy of the confidential sector letter was then forwarded to the ICCR by an official of the Commission.

As regards the allegation of false conclusions, the auditors of the Court follow the Court's Audit Policies and Standards (CAPS) and internationally recognised audit standards, such as those of the International Organization of Supreme Audit Institutions (INTOSAI). Also, the Court's procedures provide for an extensive internal quality control before audit findings and observations are submitted to the auditee. Those standards and procedures were followed in the present case.

As to the allegation that the input provided by the ICCR was ignored, the audit team took all information provided by the complainants into account to the extent considered relevant for the audit. All findings in the sector letter addressed to the Commission are supported by sufficient and appropriate audit evidence, based on information collected and received during and after the audit at the premises of the ICCR, as well as from the Commission.

Regarding the allegation of undue delay, the Audit Manual of the Court states that a sector letter should be sent within two months of the completion of the mission. However, this internal rule has no binding character on the Court with regard to the complainants. Furthermore, the fact that the sector letter was sent in the present case with a slight delay, which by no means can be considered as undue, does not affect the interests of the complainants in any way.

#### **The complainants' observations on the Court of Auditors' opinion**

The complainants made, in summary, the following remarks:

According to the complainants, the auditor of the Court of Auditors told the ICCR that it is up to the Commission to decide whether the report (1) is transmitted to the ICCR.



The complainants maintain that the points of view of the ICCR were not taken into account by the auditors.

The complainants stress that the ICCR never claimed that the delay in handling their case was only the fault of the Court of Auditors, but rather the combined effect of the non-transparent procedures of the Commission and the Court of Auditors and their interfaces. The complainants maintain that the delays affected the ICCR's interests as the present case had not been settled more than one year after the audit took place.

### **Further inquiries**

On 14 October and 5 November 2003, the European Ombudsman's secretariat contacted by telephone one of the complainants who spoke on behalf of both complainants regarding the observations received on 29 September 2003. The complainants confirmed that the Commission had proceeded to pay the outstanding final payment. The complainants had accepted the Commission's interpretation of transfers between cost categories which require prior authorisation according to Article 17(4) of the General Conditions (2) . Therefore, the amount of about € 9,000 could not be included in the final payment. The complainants informed the Ombudsman's secretariat that the ICCR had not sent any comments on the Commission's letter of 14 July 2003, in which the Commission offered a settlement and informed that unless it receives comments from the complainants within one month, the project will be officially closed and no further costs can be claimed. The complainants confirmed that by not commenting on the settlement offer made by the Commission, the ICCR had *de facto* accepted that no interest would be paid for the suspended final payment. The complainant was satisfied with the settlement of the final payment.

## **THE DECISION**

### **1 Preliminary remark**

1.1 In their observations, the complainants argue that this case raises general issues concerning delays by two Community institutions in responding to repeated requests for information and the length of the process.

1.2 The Ombudsman understands the complainants to be concerned about the general issue of procedures where two or more Community institutions conduct simultaneous inquiries or processes affecting the handling of a case. The Ombudsman considers that this general issue cannot be dealt with effectively in the framework of the present inquiry. The complainants have the possibility to present a new complaint to the Ombudsman, if they wish to do so.

### **2 Alleged lack of information by the Commission regarding the status of the audit and of the final payment**

2.1 The complainants allege lack of information by the Commission regarding the status of the audit and the final payment.

2.2 According to the Commission, it informed the complainants on 28 February 2002 about the situation regarding the final payment and its examination in the context of this audit after the complainants had sent an e-mail on 26 February 2002. Ongoing discussions with the ICCR



were initiated in the summer 2002. On 12 July 2002, the complainants requested information about the status of the final payment. In August 2002, the Commission confirmed to the complainants that all payments were suspended due to an audit by the Court of Auditors. On 29 August 2002, the complainants made a request to the Commission to reconsider their case. On 5 December 2002, the Commission requested additional information from the complainants. On 11 February 2003, after having received the requested additional information, the Commission sent an acknowledgement of receipt containing a holding letter. On 13 May 2003, the Commission informed the complainants that it had initiated the procedure for the final payment.

2.3 The Ombudsman considers that the Commission has provided the complainants with information about the status of the audit to the extent that the audit affected the Commission's procedure for making the outstanding final payment. Furthermore, the Commission appears to have adequately informed the complainants about the suspension of the final payment. Therefore, there appears to be no instance of maladministration by the Commission as regards this allegation.

### **3 Alleged non-payment of the outstanding final payment with interest and the claim for settlement**

3.1 The complainants alleged that the Commission has not made the outstanding final payment of € 80,671.61 for Thematic Network contract No. 1999-TN.10869 "TRANS-TALK" under the Fifth Framework Programme.

3.2 The Commission states that the final payment of € 50,821. 03 was made on 13 May 2003. According to the Commission, the amount of € 29,799.63 could not be taken into account since this would involve transfer between cost categories, which requires prior authorisation.

3.3 In the observations, the complainants inform the Ombudsman that, following their reply to the Commission dated 27 May 2003, the Commission had proceeded to pay the sum of € 20,447.79.

3.4 The European Ombudsman's secretariat contacted by telephone one of the complainants who spoke on behalf of both complainants regarding the observations. The complainants had accepted the Commission's interpretation of transfers between cost categories which require prior authorisation according to Article 17(4) of the General Conditions. Therefore, the amount of about € 9,000 could not be included in the final payment. The complainants informed the Ombudsman that by not sending any comments to the Commission regarding the settlement offer, the ICCR had *de facto* accepted that no interest would be paid on the suspended final payment. The complainants were satisfied with the settlement.

3.5 Based on the information provided by the European Commission and the complainants, the Ombudsman finds that the Commission has settled the matter and has thereby satisfied the complaint.

### **4 Claim for an official Commission position on the audit and the procedures followed**

4.1 The complainants claim that the Commission should take an official position on the audit and the procedures followed.



4.2 The European Ombudsman considers that this aspect of the case is covered by the settlement reported in part 3 of the decision.

### **5 The allegations against the report (3) of the Court of Auditors**

5.1 The complainants allege that the report of the Court of Auditors drew false conclusions and ignored the input provided by the ICCR.

5.2 The Court of Auditors argues that it took into account all information provided by the complainants to the extent considered relevant for the audit and that all findings in the sector letter are supported by sufficient and appropriate audit evidence. The Court of Auditors also argues that it did not reach false conclusions.

5.3 The Ombudsman considers that there appears to be no evidence to suggest that the Court of Auditors ignored the input of the complainant. Furthermore, there is nothing to suggest that the conclusions of the Court were wrong or unreasonable. Therefore, there appears to be no maladministration regarding these aspects of the case.

### **6 Alleged undue delay by the Court of Auditors**

6.1 The complainants allege undue delay in submitting the Court of Auditors' report (4) to the Commission. According to the complainant, the audit mission was completed on 18 January 2002 and the auditor's report was dated 15 April 2002.

6.2 In its opinion, the Court of Auditors states that its Audit Manual provides that a sector letter should be sent within two months of the completion of the mission. The Court acknowledges that the sector letter was sent in the present case with a slight delay, but that the delay could not be considered as excessive.

6.3 The Ombudsman notes that the Audit Manual of the Court of Auditors is an unpublished internal guide, which is not intended to establish any entitlements for third parties. In these circumstances, the Ombudsman does not consider the slight delay acknowledged by the Court of Auditors to constitute maladministration.

6.4 The Ombudsman therefore finds no maladministration regarding this aspect of the case.

### **7 Conclusions**

The Ombudsman finds no maladministration in relation to the complainants' first allegation against the European Commission. As regards the complainants' second allegation and their claim, it appears from information provided by the European Commission and the complainants that the Commission has settled the matter and has thereby satisfied the complaint. Furthermore, the Ombudsman finds no maladministration by the Court of Auditors. The Ombudsman therefore closes the case.

The Presidents of the European Commission and the Court of Auditors will also be informed of this decision.

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) The European Ombudsman notes that the complainants use the term "report" to what the Court of Auditors refers to as a sector letter.

(2) According to Article 17(4) of the General Conditions, principal contractors may transfer between themselves as well as between cost categories up to 20 % of their total amount, without prior approval of the European Commission.

(3) In its opinion, the Court of Auditors pointed out that the document concerned is a sector letter.

(4) In its opinion, the Court of Auditors pointed out that the document concerned is a sector letter.