

## **Decision of the European Ombudsman on complaint 1678/2002/IP against the European Commission**

Decision

**Case 1678/2002/IP - Opened on 19/11/2002 - Decision on 28/10/2004**

Strasbourg, 28 October 2004

Dear Mr X., Dear Mr Y.,

On 18 September 2002, you lodged a complaint with the European Ombudsman in your capacity as legal representatives of the European company Z. The complaint, made against the European Commission, concerned the execution by Z of a project financed by the European Commission under the European Development Fund.

On 19 November 2002, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 26 February 2003. I forwarded it to you with an invitation to make observations, which you sent on 1 April 2003.

In the light of these observations, it appeared that it was necessary to conduct further inquiries. On 23 April 2004, I therefore wrote to the Commission, asking the institution to comment on your observations. On 8 June 2004, I received the Commission's reply which I forwarded to you with an invitation to make observations. I received your observations on 28 June 2004.

I apologise for the time it has taken to conclude these inquiries.

### **THE COMPLAINT**

According to X and Y, the relevant facts were as follows:

In 1996, a contract was signed between the Ministry of Finance and Development of an African country (hereinafter "the contracting authority") and Z. The contract was endorsed by the Head of Delegation of the European Commission in this African country. Z had in fact succeeded in the call for tender launched by the Government of the African country to execute a short-term programme to aid reconstruction and recovery in the country, financed by the European Commission under the European Development Fund (hereinafter "EDF").

In accordance with the contract's conditions, Z should have supplied 125,000 litres of refracting



paint for road pavement, 1,000 litres of chlorinated rubber paint and two striping machines, for a total value of EUR 386 831,13 . The goods should have been delivered within 150 days after the signing of the contract, i.e. by 8 December 1996. As established in Part A of the Special Conditions of the contract, if Z failed to deliver any or all the goods or to perform the service within the time periods specified in the contract, the contracting authority would be entitled to liquidate damages of 2/1000 per day of the value of the undelivered goods or supplies. These liquidated damages were applicable in the case of delay in delivery of more than 7 days. The maximum amount of liquidated damages would be equivalent to 20 percent of the value of the initial contract price.

In the present case, the paint for the road pavement had been delivered on time. However, the production of the road striping machines was delayed due to the flooding of the manufacturer's factory. The Ministry for Public Works (hereinafter "the Client") in the African country and the Commission Delegation had therefore been notified that it was impossible for the manufacturer to produce the machines within the deadline foreseen.

Since it appeared that the Client had not reacted, Z assumed that the explanation for the delay had been accepted. The striping machines had been delivered with about three months of delay. However, more than 1,5 month was imputable to the Client, who took such time to produce the relevant documents needed for obtaining the import tax exemption as foreseen by the contract. In April 1997, almost one month after the delivering, Z was notified that there were some problems with the striping machines and that one of them did not work. A technician was therefore sent on the spot. On the advice given by the striping machines' manufacturer, a new hydraulic axle was sent free of charge for the Client. The Client informed Z that the reparation of the machine was not urgent because the road painting operations were not expected to start before July 1997. Four technicians, two from Z and two from the manufacturer went on the spot to repair the machines. On 19 June 1997, the machines had been repaired and on 30 July 1997, the Client issued the Provisional Acceptance Certificate for the whole supply. It required, however, the application of liquidated damages for delay in delivering the striping machines of more than six months.

Z did not accept the application of liquidated damages as foreseen by the Client, since it took the view that the delay imputable to Z was only of two months and that it had been caused by *force majeure* . Z had informed the Client about the delay and the latter had accepted it. Furthermore, Z considered that the delay for repairing the machines should not have been taken into account because it had been agreed by the Client. Z therefore asked for the full payment of the 40% balance of the contract price.

On 28 May 1998, Directorate General Development of the European Commission informed Z that on 6 May 1998 it had received a complaint by the government of the African country against Z for breach of contract. The government alleged delay in delivery of the striping machines. Furthermore, it alleged that the road paint which had been delivered was not in compliance with the contractual requirements as regards both resistance to water and abrasion. Consequently, the work had to be redone.



Under those circumstances, the Commission, in its capacity as Chief Authorising Officer, did not authorise the payment in favour of Z.

The government of the African country asked for the intervention of the Commission as foreseen by Article 5.1 of the Procedural Rules on conciliation and arbitration of contracts financed by EDF (the so-called "good office procedure"). Since the good office procedure can only be conducted on a voluntary basis, the Commission asked Z to inform it whether or not it accepted such a procedure.

On 4 June 1998 Z sent a letter to the Commission with the acceptance of the good office procedure and asked to receive a copy of the complaint made by the government of the African country. The Commission forwarded the requested documents to Z on 5 June 1998.

On 5 August 1998, Z wrote a letter to the Commission in which it rejected all the claims of the government of the African country, alleging that they were partially unfounded or technically wrong. Z claimed the full payment of the supply, the legal interests and claimed to be indemnified for moral damages.

On 24 November 1998, the Joint Relex Service ("JRS") for the Management of Community Aid to Non-Member Countries of the Commission informed Z that a certain delay in dealing with its case was due to the fact that it had to assume some of the tasks previously carried out by other services. On 12 April 1999, Z wrote to the JRS asking for a final decision on the case. On 21 April 1999, the JRS requested further information from Z, that provided the requested information on 28 April 1999.

On 29 June, 8 July, 2 September, 12 October and 11 November 1999, Z sent further letters to the Commission. In a letter of 14 October 1999, the Commission pointed out *"that the good office procedure is approaching its final stage. Despite staff constraints we hope to be able to inform you of our proposal to solve the issue within a month's time (...)"*.

However, and given that it appeared that the good office procedure was still pending, Z requested on 10 April 2000 a meeting with the responsible officials of the Commission.

On the same date, the Director of JRS informed Z that *"with regard to the assessment of the case (...) I can inform you that the assessment has been finalised by my services and has already been sent to the financial and technical unit of JRS for approval. As the proposal involves payments of the EDF it has to be ensured that Directorate General Financial Control and the Legal Service of the Commission have no objections to the solution proposed, either. I expect to be able to send you the proposal of the Commission services within the next few weeks. (...)"*.

On 13 July 2000, the Commission sent its conclusions about the good office procedure to Z. In order to settle the case, the Commission suggested that Z could receive an amount of EUR 38 257. However, this was not a binding proposal unless both parties agreed on it.

On 25 July 2000, Z expressed its dissatisfaction with the Commission's proposal and rejected it.



According to Z, the Commission's proposal could not be considered as a "fair conclusion" as indicated by the Commission, since what the institution had proposed was almost five times less than what had been indicated in the Provisional Acceptance Certificate issued by the Client on 30 July 1997.

On 18 September 2000, the Commission sent a letter to Z stressing that the aim of a good office procedure was to find a settlement between the parties. The Commission stressed that it appeared that Z refused all responsibility for what had happened and that its attitude had not been conciliatory. As a last attempt to settle the case through the good office procedure, the Commission's services proposed to have a meeting with the representatives of Z, on 21 September 2000, at the Commission's premises in Brussels.

Further exchanges of correspondence took place between the Commission's service and Z during the following months. Nevertheless, it was not possible to achieve a settlement of the case. On 21 March 2001, the Commission therefore decided to declare the good office procedure as concluded and suggested that Z address its concerns to the government of the African country as the contracting party.

The complainants therefore complained to the Ombudsman, on behalf of Z. In their complaint they alleged that: (i) the Delegation of the European Commission in the African country had not acted in accordance with article 317 m) of the 4th Lomé Convention ACP-EEC, and the responsible officials failed to deal diligently, independently and impartially with the dispute between the government of the African country and Z; (ii) the "good office procedure" had been unduly delayed and the European Commission had failed to evaluate Z's arguments in-depth.

The complainants claimed that the Commission should pay the sum of EUR 153 152,45 which corresponds to 40% of the contract fee, plus the interest accrued from 28 October 1997, i.e 90 days after the client issued the Provisional Acceptance Certificate, and the costs assumed by Z during the good office procedure.

## THE INQUIRY

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

In its opinion on the complaint, the Commission stated that, in accordance with the contract signed by Z and the Ministry of Finance and Development of a European country, Z should have supplied road paint and striping machines for an amount of EUR 386 831,13 to the Ministry of Public Works of this country. The contract was financed by the EDF. The Contracting Authority refused to pay the outstanding balance of 40% of the contract price, i.e. EUR 153 152,45 on the grounds that the quality of the paint supplied was not good enough and that the road painting machines had been delivered late. Z contested these arguments.

Both parties agreed to ask the Commission to mediate with a view to reaching an amicable settlement of the case. However, it was not possible to reach an agreement within the framework of the EuropeAid Co-operation Office's "good office procedure".



As regards the complainant's allegation that the Delegation of the European Commission Delegation of the African country did not honour its obligations in accordance with Article 317 m) of the 4th Lomé Convention, the Commission stressed that, when assessing claims submitted by contractors, its role was limited to establishing whether or not the conditions for Community financing are met. The Commission also stressed that any claims that contractors might have under EDF contracts must be addressed to the contracting authorities, in the present case the Government of the African country. The Commission merely acts as a financial body and it does not have a direct legal link with the contractors. It is therefore not for the Commission to take a position in its own name on claims raised by the contractors. In accordance with Article 317 of the 4th Lomé Convention, the role of the Commission and its Delegation is to maintain close and continuous contacts with the National Authorising Officer for the purpose of analysing and remedying specific problems encountered in the implementation of development finance co-operation. The Commission took the view that its Delegation had acted in accordance with the rules that were binding upon it on the basis of the 4th Lomé Convention.

As regards the complainant's allegation concerning its attitude during the good office procedure, the Commission stressed that the good office procedure is rather flexible and to a great extent dictated by the case itself. In particular, if at any time the Commission finds that an amicable settlement cannot be reached between the parties, it will communicate this to the parties and the procedure will be ended. Each party is then free to continue the dispute resolution procedure set out in the contract.

As regards the present case, the Commission regretted the time which elapsed between the complainant's acceptance of the starting of the procedure, in June 1998, and the final assessment of July 2000. It furthermore stressed that this lapse of time was caused by the need to obtain an assessment of the quality of the paint furnished by the supplier as well as by a delay due to a reorganisation of the Commission services which were dealing with the case.

In view of the fact that, given the positions adopted by the parties, it appeared that the matter could not be solved within the good office procedure, the Commission closed the procedure even though no agreement had been reached. The dispute between the parties can be solved either in accordance with the national legislation of the African country if the parties so agree, or by arbitration in accordance with the Procedural Rules approved by the ACP-EC Council of Ministers. Although the Commission regretted the fact that no amicable solution could be found, it took the view that its Delegation had acted in accordance with the rules that were binding upon on the basis of the 4th Lomé Convention.

#### **The complainants' observations**

In their observations on the Commission's opinion, the complainants rejected the Commission's view that the role of the Commission and its Delegation was only to maintain close and continuous contacts with the National Authorising Officer for the purpose of analysing and remedying specific problems encountered in the implementation of development finance co-operation. The complainants took the view that the Commission's Delegation should have tried to solve problems which could occur between the contractual parties.

The complainants rejected the Commission's explanations about the length of time of the good



office procedure. Contrary to what had been affirmed by the institution, the complainants pointed out that they were not aware of any assessment of the quality of the paint furnished by the supplier carried out at the request of the Commission. Furthermore, the Commission could not refer to the internal reorganisation of its services to justify this delay. Although the complainants accepted that the good office procedure was a rather flexible procedure, the Commission had to follow principles of good administration.

The complainants also stressed that, contrary to what had been stated by the Commission, it was not feasible to solve the dispute between the parties either in accordance with the national legislation of the African country or by arbitration in accordance with the Procedural Rules approved by the ACP-EC Council of Ministers. At this time, it was not possible anymore to ascertain the quality of the paint, which was at the origin of the dispute.

Furthermore, the complainants considered that the Commission did not duly take into account that the delay in the delivery of the supplies by Z had been caused by *force majeure*.

**Further inquiries** *Request for further information*

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. On 23 April 2004, the Ombudsman therefore wrote to the Commission. In his letter, he asked the institution to comment on the complainant's observations, namely on the complainant's point that they were not aware of any assessment of the quality of the paint furnished by the supplier carried out at the request of the Commission. He also asked the Commission to deal with the complainant's claim that the Commission should pay the legal costs assumed by Z during the good office procedure. A copy of the complainants' observations was forwarded to the Commission.

*The Commission's reply*

As regards the assessment of the paint, the Commission stressed that the parties involved in this case had given contradictory opinions about the quality of the paint already before the starting of the good office procedure.

In late 1997, the contracting authority asked a Belgian laboratory to make some tests on a sample of the paint furnished by the supplier; from the results, it appeared that the paint failed the test for abrasion and water resistance. Z also made some tests on its part and submitted a set of 27 photographs to the Commission's services as evidence of the quality of the paint.

During the good office procedure, the Commission's technical services took the view that they could not assess the quality of the paint on the basis of a set of photographs and considered that they would need objective criteria in order to propose a settlement of the case. However, the Commission then reached the conclusion that appropriate tests to ascertain the quality of the paint appeared to be far too expensive in relation to the results expected at that time. The Commission recognised that it had lost time in seeking ways of carrying out the assessment and that the assessment to which it referred in its opinion was not undertaken. What the Commission meant in its opinion by "[t]his lapse of time was caused by the need to obtain an assessment of the quality of the paint (...)" was that it had lost time in order to find a way to carry out the assessment. The Commission apologised for making this statement which appeared to be misleading.



As regards the payment of the legal costs assumed by Z during the good office procedure, the Commission underlined that this is a procedure offered by the Commission to the contracting parties in order to help settle disputes. The parties involved asked for the Commission's intervention in order to start the procedure and were free to withdraw from the procedure at any time and to accept the Commission's proposal or not, as it happened in the present case, when the complainants had not accepted the Commission's proposal. The Commission and the parties bear their own costs related to the procedure.

The Commission furthermore took the view that a number of circumstances may have contributed to the negative outcome of this case, including the question of the assessment of the quality of the paint. However, the Commission could not be held responsible in any case for the legal costs assumed by the complainants during this procedure.

*The complainants' further observations*

In their observations received on 28 June 2004 on the Commission's reply, the complainants made in summary the following points:

As regards the assessment of the paint which the Commission, in its opinion, stressed had been made, the complainants underlined that now the institution declared that such an assessment had never been made and recognised that the content of its opinion had been misleading regarding this point. The complainants took the view that on the basis of the Commission's declarations made in its reply to the Ombudsman's letter of 23 June 2004, the main reason alleged by the institution to justify the delay of the good office procedure become untenable.

The complainants also pointed out that the object of their complaint was not the outcome of the good office procedure itself but the length of time taken by the Commission to carry out this procedure and the negligence of the Commission's officials who proposed a settlement of the concerned case without carrying out any technical investigation.

Furthermore, the complainants clarified that they did not claim that the Commission should reimburse the legal costs assumed by Z during the good office procedure, but should reimburse the legal costs assumed after its conclusion, since in order to solve the case Z had to ask for legal assistance.

## THE DECISION

### **1 Preliminary remarks: the scope of the Ombudsman's inquiry**

1.1 The Ombudsman considers that the scope of the review that he can carry out in contractual cases is necessarily limited. The Ombudsman does not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

1.2 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is





justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified.

## **2 The behaviour of the Commission's delegation**

2.1 In their complaint, the complainants alleged that the Delegation of the Commission in an African country had not acted in accordance with article 317 m) of the 4th Lomé Convention ACP-EEC, and that the responsible officials had failed to deal diligently, independently and impartially with the dispute between the government of the African country and Z.

2.2 The Commission took the view that, in accordance with the 4th Lomé Convention, the role of the Commission and its Delegations was to maintain close and continuous contacts with the National Authorising Officer for the purpose of analysing and remedying specific problems encountered in the implementation of development finance co-operation. As regards the complainants' allegation that the Delegation of the European Commission did not honour its obligations in accordance with the 4th Lomé Convention, the Commission explained that its role when assessing claims submitted by contractors was limited to establishing whether or not the conditions for Community financing are met.

2.3 In their observations, the complainants maintained their position and rejected the Commission's view that, in accordance with the 4th Lomé Convention, the role of the Commission and its Delegation was only to maintain close and continuous contacts with the National Authorising Officer for the purpose of analysing and remedying specific problems encountered in the implementation of development finance co-operation. The complainants took the view that the Commission's Delegation has to contribute actively in order to try to solve problems which can occur between the parties.

2.4 The complaint concerns a project financed by the Commission under the European Development Fund in the framework of the 4th Lomé Convention (1) .

2.5 According to Article 222 of the Convention, actions financed under the Convention are to be implemented by the ACP States and the Community in close co-operation. This obligation of co-operation places on the ACP States the responsibility of preparing and presenting dossiers for projects and programmes, on the Community the responsibility of taking financing decisions for the projects and programmes and on the ACP States and the Community the joint responsibility of ensuring that such projects and programmes are implemented properly, promptly and efficiently.

2.6 On the basis of the evidence in his possession, the Ombudsman considers that the complainants have not showed that the Commission Delegation failed to comply with the Commission's obligations which arise from the 4th Lomé Convention.

2.7 The Ombudsman therefore considers that no instance of maladministration by the Commission's Delegation as regards this aspect of the case has been established.

## **3 The good office procedure**

3.1 In their complaint, the complainants alleged that the good office procedure carried out by the





Commission was unduly delayed and that the Commission failed to evaluate Z's arguments in adequate depth.

3.2 In its opinion, the Commission stressed that the good office procedure is rather flexible and to a great extent dictated by the case itself. In particular, if at any time the Commission finds that an amicable settlement cannot be reached between the parties, it will communicate this to the parties and the procedure will end. Each party is then free to continue the dispute resolution procedure set out in the contract. The Commission regretted the time elapsed between the acceptance by the parties of the good office procedure in June 1998 and the final assessment made in July 2000.

In its opinion, the institution further stressed that this delay was caused by the need to obtain an assessment of the quality of the paint furnished by Z and by a reorganisation of the Commission services which were dealing with the case.

The Commission furthermore added that the dispute between the parties could be solved either in accordance with the national legislation of the African country or by arbitration in accordance with the Procedural Rules approved by the ACP-EC Council of Ministers.

3.3 In their observations, the complainants put forward that, although they accepted that the good office procedure was a rather flexible procedure, the Commission had to follow principles of good administration. The complainants rejected the Commission's explanations that the good office procedure had been delayed due to an internal reorganisation of its services. The complainants furthermore argued that they were not aware of any assessment of the quality of the paint furnished by the supplier carried out at the request of the Commission.

Furthermore, the complainants stressed that, contrary to what had been stated by the Commission, it was not feasible to solve the dispute between the parties either in accordance with the national legislation of the African country or by arbitration, since it was not possible anymore to ascertain the quality of the paint.

Finally, the complainants took the view that the Commission did not duly take into account that the delay in the delivery of the supplies by Z had been caused by *force majeure*.

3.4 In order to pursue his inquiry in the present case, the Ombudsman asked the Commission to comment on the point made by the complainants in their observations that they were not aware of any assessment of the quality of the paint that had been carried out at the request of the Commission.

3.5 In its reply, the Commission stressed that, during the good office procedure, its technical services took the view that they would need objective criteria in order to propose a settlement of the case. However, the Commission then reached the conclusion that appropriate tests to ascertain the quality of the paint appeared to be far too expensive in relation to the results expected at that time. The Commission recognised that it lost time in seeking ways of carrying out the assessment and that the assessment to which it referred in its opinion was not



undertaken. What the Commission meant in its opinion by "[t]his lapse of time was caused by the need to obtain an assessment of the quality of the paint (...)" was that it had lost time in order to find a way to carry out the assessment. The Commission apologised for making this statement which appeared to be misleading.

3.6 In their observations on the Commission's reply, the complainants argued that the main reason alleged by the Commission to justify the delay of the good office procedure, i.e. the assessment of the paint supplied by Z, had become untenable since such an assessment had never been carried out.

3.7 The Ombudsman notes that the good office procedure is an informal procedure which can be started by the Commission only after the acceptance by all the parties involved. He also takes note that, as indicated by the Commission, it is a rather flexible procedure and to a great extent dictated by the case itself and that, if at any time the Commission finds that an amicable settlement cannot be reached between the parties, it communicates its conclusions to the parties and closes the procedure.

The Ombudsman considers, however, that during this procedure the Commission has to follow principles of good administration.

3.8 Principles of good administration require that the administration should take its decision in a reasonable period of time. In the present case, the Ombudsman notes that in its opinion the Commission invoked the assessment of the paint supplied by Z as the main reason for the length of time of the good office procedure. However, in the course of the inquiry it emerged that such an assessment had never been carried out.

The Ombudsman also notes that from the correspondence which took place between Z and the Commission it appears that by letter of 14 October 1999, the Commission indicated that "[t]he good office procedure is approaching its final stage. Despite staff constraints we hope to be able to inform you of our proposal to solve the issue within a month's time (...)". However, it appears that the Commission made its proposal for a settlement of the case only in July 2000.

On this basis, the Ombudsman takes the view that the Commission has not provided a convincing explanation for the duration of the good office procedure.

3.9 As regards the complainants' point that the Commission failed to evaluate Z's arguments in adequate depth, the Ombudsman considers that, on the basis of the evidence in his possession, it appears that the Commission has not given a clear explanation as to how it had reached, in the absence of a technical assessment of the quality of the paint supplied by Z, the conclusion to propose to Z the acceptance of EUR 38 257 as a settlement of the case. He furthermore notes that the Commission failed to comment on the complainants' point that the delay of two months imputed to Z for the supplying of the road paint had been caused by *force majeure*.

3.10 This constitutes an instance of maladministration. The Ombudsman will therefore make a



critical remark to the Commission as regards this aspect of the case.

#### **4 The complainants' claims**

4.1 In his letter opening the present inquiry, the Ombudsman asked the Commission to comment on the complainants' claims that the Commission should pay the sum of EUR 153 152,45 which corresponds to 40% of the contract fee, plus the interest accrued from 28 October 1997, i.e. 90 days after the client issued the Provisional Acceptance Certificate, and the costs assumed by Z during the good office procedure.

4.2 Since it appeared that the Commission had not dealt with the point concerning the complainants' claim for the reimbursement of the costs assumed by Z during the good office procedure, the Ombudsman specifically asked the institution to comment on it in his letter of 23 April 2004.

4.3 In its reply, the Commission underlined that the good office procedure is a procedure offered by the Commission to contracting parties in order to help them to settle disputes and that each party bears its own costs.

The Commission submitted that it could not be held responsible in any case for the legal costs assumed by the complainants during this procedure.

4.4 In their observations on the Commission's reply, the complainants clarified that they did not claim that the Commission should reimburse the legal costs assumed by Z during the good office procedure, but that it should reimburse the legal costs assumed after its conclusion, since in order to solve the case Z had to ask for legal assistance.

4.5 The Ombudsman takes note of the clarification made by the complainants on this aspect of the case. However, in the letter opening the present inquiry the Commission had not been asked to comment on this specific point. In view of the fact that it appears that the complainants did not object to this interpretation of their complaint, and given that the present case is ready for decision and that the complaint was already lodged in September 2002, the Ombudsman does not consider it appropriate to deal with this new claim in the present decision. The complainants are however free to lodge a new complaint regarding this point, if they so wish.

4.6 As regards the complainants' claim that the Commission should pay the sum of EUR 153 152,45 plus the interest accrued from 28 October 1997, in view of the contractual nature of the case and the limited scope of the Ombudsman's review, he is not in the position to support the complainants' claim.

#### **Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remarks:

Principles of good administration require that the administration should take its decision in a reasonable period of time. In the present case, the Ombudsman notes that in its opinion the Commission invoked the assessment of the paint supplied by Z as the main reason for the length of time of the good office procedure. However, in the course of the inquiry it emerged that



such an assessment had never been carried out. The Ombudsman also notes that in its letter of 14 October 1999, the Commission indicated that "[t]he good office procedure is approaching its final stage. Despite staff constraints we hope to be able to inform you of our proposal to solve the issue within a month's time (...)". However, it appears that the Commission made its proposal for a settlement of the case only in July 2000. On this basis, the Ombudsman takes the view that the Commission has not provided a convincing explanation for the duration of the good office procedure. This constitutes an instance of maladministration.

As regards the complainants' point that the Commission failed to evaluate Z's arguments in adequate depth, the Ombudsman considers that, on the basis of the evidence in his possession, it appears that the Commission has not given a clear explanation as to how it had reached, in the absence of a technical assessment of the quality of the paint supplied by Z, the conclusion to propose to Z the acceptance of EUR 38 257 as a settlement of the case. He furthermore notes that the Commission failed to comment on the complainants' point that the delay of two months imputed to Z for the supplying of the road paint had been caused by *force majeure*. This constitutes an instance of maladministration.

Given that the aspect of the case concerning the good office procedure relates to specific events in the past, the Ombudsman considers that it is not appropriate to pursue a friendly settlement of the matter. As regards the complainants' claim that the Commission should reimburse the legal costs assumed by Z after the conclusion of the good office procedure, the complainants have been informed that, since this aspect of the case has not been the object of the present inquiry, they are free to lodge a new complaint regarding this point, if they so wish.

On this basis, the Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1991 L 229, p.1.