Decision of the European Ombudsman on complaint 2677/2004/JMA against the European Commission

Decision
Case 2677/2004/JMA - **Opened on** 28/09/2004 - **Decision on** 26/10/2006

Strasbourg, 26 October 2006
Dear Mr L.,

On 10 August 2004, you lodged a complaint with the European Ombudsman against the European Commission on behalf of the firm HSG Technischer Service GmbH. Your complaint concerns the treatment given to your firm by the European Commission, in particular by its Delegation in Tanzania, as regards the completion of Project 7. ACP.RPR.028 (Tender No. 4319 - Railway Restructuring Programme).

On 28 September 2004, I forwarded the complaint to the President of the European Commission. On 16 December 2004, the Commission sent its opinion, which I forwarded to you with an invitation to make observations. You sent your observations to me on 25 February 2005.

On 3 May 2005 you wrote to me, requesting information on the handling of the case. I replied to your query on 30 May 2005. On 14 October 2005, you sent additional information to me.

On 21 March 2006, I wrote to the President of the European Commission in order to seek a friendly solution to your complaint. The Commission requested extensions to the deadline for reply, which the Ombudsman granted on 3 May and 16 June 2006. On 23 June 2006, the Commission sent its reply to the Ombudsman's proposal for a friendly solution. On 20 July 2006, you sent your observations on the Commission's reply to my proposal for a friendly solution.

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

THE COMPLAINT

The complaint was submitted on behalf of a company, HSG Technischer Service GmbH (HSG). The facts of the case according to the complainant are, in summary, as follows:
Complaint 2004/2004/PB
On 24 June 2004, the complainant lodged a previous complaint with the Ombudsman, which was registered under file number 2004/2004/PB. The complainant explained that, during

1996 and 2000, HSG carried out a project financed by the EU in Tanzania to equip and operate a quarry for the Tanzanian Railway Corporation (TRC). According to the complainant, the project was successfully completed in May 2000, but some financial aspects that remained unsettled, partly as a result of staff changes in the EU-Delegation in Dar-es-Salaam, Tanzania, were handed over by the EU-Delegation to the Tanzanian Ministry of Finance at the end of 2003. Since the staff in the Ministry of Finance appeared to be unaware of the contractual situation and the previous exchanges of correspondence, the problems remained unresolved.

Having carefully examined the complaint, the Ombudsman concluded that its object could not be identified, since it was not possible to establish the institutions or bodies complained against, or the precise allegations and claims. On 30 July 2004, the Ombudsman therefore declared the case inadmissible pursuant to Article 2 (3) of his Statute and invited the complainant to renew the complaint, identifying the Community institution or body concerned, as well as the precise allegations and claims.
Complaint 2677/2004/JMA
On 10 August 2004, the complainant submitted a duly completed complaint form, in which he complained against the unprofessional behaviour of the Commission, in particular of its Delegation in Tanzania, towards his company as regards the implementation of project 7.ACP.RPR.028 (Tender No. 4319-Railway Restructuring Programme). The complainant argued that a number of claims regarding different aspects of the project were still outstanding, including: (i) certificate 33 for EUR 48 479.79 and, in addition, interest amounting to EUR 59 551.12; (ii) claim no. 1 for EUR 336 769; and (iii) claim no. 3 for EUR 1 195 000.

Taking into consideration the new information, the Ombudsman decided to register the complainant with a new reference number (2677/2004/JMA), and to start an inquiry. The allegation and claim on which the Ombudsman asked the Commission to submit an opinion were the following:

The complainant alleges, in summary, that the Commission did not act properly in its dealing with HSG Technischer Service GmbH. The complainant claims that, although an EU-funded project in Tanzania (reference: 7.ACP.RPR.028; tender No. 4319 - Railway Restructuring Programme) was successfully completed in May 2000, there are still a number of outstanding invoices which should have been paid.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission explained that, in May 1997, the company HSG Technischer Service GmbH (HSG) signed a supply contract with the Tanzanian Railway Corporation (TRC), which acted as the Contracting Authority. The contract involved the production of railway ballast and quarry improvements at the Tura quarry, in Tanzania. The project was part of the "Tanzanian Railway Restructuring Programme", an EU initiative funded through the European Development Fund (EDF) (Project 7 ACP RPR 027).

The contract began on 26 July 1997, date at which HSG was required to take over the assets of the quarry that had been used by TRC, and to manage, supervise and maintain all aspects of the quarry's operations during a 39-month period. According to the contract's technical specifications, a survey of condition and valuation of the assets at the commencement and termination of the contract was to form the basis of any financial adjustment on termination of the contract, when assets were to be returned to TRC.

In the course of the contract, HSG made a number of claims, which TRC tried to settle at the end of the contract. In September 2003, however, the Tanzanian Ministry for Finance, acting as the contract's national authorising officer (NAO), refused to make those payments.

The Commission referred in detail to each of the individual claims made by the complainant:
1. Final payment Certificate no. 33 (EUR 48 479.79) plus invoice 12201 0/2003 for interest on late payment (EUR 59 551.12) :
The Commission noted that, as set out in article 29 of the contract's Special conditions, HSG was required to take over all of the stocks of spares and consumables held at the quarry on the date of signing the contract. In addition, the opening and closing stocks should have been determined by a stock check and audit carried out by the Supplier and a representative of the Contracting Authority. The agreed opening and closing stocks had to be valued at current prices, and the difference should have been paid, either to or by the Supplier, depending on which value was higher.

The independent opening stock valuation was made by the firm Carl Bro International at the commencement of the contract, but was not accepted by HSG which claimed that some of the equipment was beyond repair and of no use to them. Only in March 1998, did the Delegation learn that the quarry assets had not been taken over by HSG. In August 1998, HSG and TRC agreed on an opening stock, which greatly differed from the valuation made by Carl Bro. Although the Delegation requested clarification, no explanation was given. In May 2001 the Commission concluded that EDF financing could only be granted if a proper valuation of assets had been conducted. In August 2001, HSG was informed that an independent audit by PriceWaterHouseCooper (PWC) would be carried out for this purpose. The independent closing stock valuation was finalised in May 2002, showing a different value from the previously signed closing stock. The difference was reported to be merely due to an error. In view of the findings, the NAO processed a payment order of the balance between the signed opening stock and the PWC's valuation of the closing stock (EUR 236 504.59), which was approved and paid to the complainant on 13 February 2003.

In September 2003, the contracting parties settled the outstanding balance of certificate 33, concerning HSG's claim for the payment of interest (EUR 48 479.71 plus EUR 59 551.12). The NAO, however, refused the payment on the grounds that the only acceptable final closing stock value was that established in PWC's report. The Commission explained that it found no reason for objecting to the NAO's position since both parties had failed to comply with the contractual clauses. Thus, the Commission noted that TRC failed to hand over the assets to HSG, and to justify the differences between the independent stock valuations and the ones signed by TRC and HSG. As regards HSG, the Commission underlined that the company failed to take over all assets at the quarry as required by the contract.

2. Claim no. 1 (EUR 336 769.00) :
The Commission explained that claim 1 related to the deterioration in the condition of the TRC plant and equipment between the time of the tender site visit and the beginning of the contract. HSG claimed compensation for additional repairs. The tender site visit took place in July 1996. In May 1997, once the contract had been signed, but prior to Carl Bro's independent asset valuation, HSG obtained the authorisation of the Contracting Authority to carry out some repairs and modifications. No cost implications were communicated to TRC and no agreement or contract variation to compensate HSG for additional equipment repair was made at the time.

The Commission noted that, on the basis of the contract's technical specifications, the work should have been included in the Suppliers' work programme. HSG only submitted their claim for compensation on 3 March 1998, when it could no longer be verified. In a letter dated 3 July 2001, the Commission's Delegation informed the Contracting Authority that the contract did not foresee this type of situation. The Commission took the view that there was nothing in the tender or contract document which gave any guarantee about the condition of the equipment or that it should be in the same condition at the commencement of the contract as it was at the time of the site visit. Accordingly, the Commission argued that tenders should have assumed that the equipment would continue to be used in the meantime and that its condition would inevitably deteriorate before the contract started.
3. Claim no. 3 (EUR 1 195 000.00) :
The Commission explained that HSG had claimed compensation for a faster wear and tear of quarry equipment due to a harder mineralogy than expected. It noted that, according to the contract, HSG should have procured a primary crusher suitable for crushing granite stone. As the HSG's geology expert (G.E.O.S. Freiberg) pointed out in 1999, this single information did not indicate what rock hardness could be expected at the quarry. Except for a number of technical specifications, the tender documents made no reference to the type of rock expected to be found in the quarry.

The Commission was of the view that, since HSG had not made any remark in its tender concerning the properties of the rock, this was one of the risks for which the firm should have made allowance in its prices.

In conclusion, the Commission took the view that it acted in accordance with the rules binding upon it, although, it acknowledged and regretted that in some instances its services had not promptly replied to HSG's queries. The Commission agreed that HSG might have endured some contractual difficulties, for which its services could not be held responsible. The Commission underlined that its role in the situation was only that of a funding agency and, therefore, that it had no contractual relationship with the complainant. It explained that its role in this type of situation is to ensure that applicable legal conditions for EDF funding are respected, and that its responsibility consists only in endorsing payment authorisations by the NAO. According to those tasks, the Commission argued that the payments allegedly due to the complainant had been rejected by the NAO on a proper legal basis. The Commission therefore took the view that its services had acted properly, respected the rules and principles binding upon it, and that no instance of maladministration had taken place.

The Commission enclosed with its opinion a large set of annexes which included, among others, the special and technical conditions of the contract, a geological report by G.E.O.S Freiberg, and numerous written exchanges with the complainant.

The complainant's observations

In his observations, the complainant responded to the Commission's arguments as regards each of the claims. His observations were, in summary, as follows:

1. Final payment Certificate no. 33 (EUR 48 479.79) plus invoice 12201 0/2003 for interest on late payment (EUR 59 551.12) :

The complainant explained that, in a meeting on 11 November 2003, TRC agreed to make an additional payment to HSG of EUR 48 479.79, plus interest. In the course of the meeting, TRC informed HSG that the European Union had no objection to such payment. On the basis of the agreement, HSG submitted invoice no. 33 in June 2000. Despite the fact that TRC and the NAO approved the invoice in July 2000, following lengthy discussions with TRC and the Commission, it has not yet been paid.

The complainant stressed that PWC's report contained a number of inaccuracies, such as major arithmetical mistakes and a failure to reflect the costs of insurance, freight, clearing and handling.

2. Claim no. 1 (EUR 336 769.00) :

The complainant noted that this claim had been thoroughly discussed with TRC since April 1998. In the course of those discussions, HSG proved that the claimed materials and spare parts had been properly purchased, shipped and brought into Tanzania to be used to repair the existing equipment. HSG had formally resubmitted its claim at that time.

On 30 June 2000, the Chairman and Secretary of TRC came to a final agreement with regard to this claim, only after HSG had accepted several deductions. The agreed final amount was Tshs. 272 432 317. The complainant therefore underlined that an agreement had been reached with TRC on the basis of which the contract could be modified in order to compensate HSG for the costs of repairing the quarry's equipment.

The complainant also noted that HSG had informed TRC of the situation. This was clear from a letter from HSG to the European Commission, dated 21 January 2003, in which it was stated that HSG had informed TRC, on 3 June 1997, of the significant deterioration of the plant and equipment and of the additional expenditure, and had also announced its intention to submit a claim on this matter. In the complainant's view, the contract stipulated that HSG had to set the price on the basis of the conditions existing in July 1996. Any deviation from that basis justified, in the complainant's view, a claim for additional costs.

3. Claim no. 3 (EUR 1 195 000.00) :

The complainant argued that, during the tender stage, HSG expressly asked for information about the nature and quality of the rock available. In reply, it was informed that the rock type was granite. The relevant respective tender documentation was forwarded to the EU-Delegation on 1 August 2003. Given the nature of the rock found at the quarry, HSG asked an international expert, G.E.O.S. Freiberg, to submit a report, which concluded that the Tura Railway Quarry comprised rock of different types and categories, and that the hard rock occurrences could not be described as granite. Since HSG had to crash hard rock that was not granite, the complainant considered that additional compensation should be paid.

TRC and HSG agreed to refer the assessment of the type of rock present at the quarry to a neutral geology expert. TRC asked the EU delegation for assistance on 20 March 2002. On 16 December 2002, the Commission accepted the proposal to employ a technical expert. Following a change of staff in its Delegation, however, the institution took a different view on this matter. On 11 November 2003, TRC and HSG reconfirmed their former agreement to consult an expert. On 20 January 2003, TRC made a new request to the Commission through the NAO. No reply was received. The complainant argued that the Commission should adhere to its former agreement and to entrust the evaluation of this claim to an independent expert.

The complainant enclosed with his observations several annexes, including a copy of the contract, and a number of written exchanges with TRC and the Commission services.

Further information

On 14 October 2005, the complainant sent additional information to the Ombudsman. In his letter, the complainant explained that the Commercial Division of the Tanzanian High Court had recently issued a ruling concerning claim no. 1. In its ruling, the Court upheld the claim and ordered TRC to pay EUR 336 379.00, plus interest. The Court found that, by using the equipment and machinery in a manner which required additional repair, TRC had failed to comply with the contract.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The Ombudsman's proposal

After a careful evaluation of the opinion and observations, the Ombudsman took the view that the Commission had not provided a coherent and reasonable account of the legal basis for its action in connection with the third allegation made in the complaint on c laim no. 3 for EUR 1 195 000.00, corresponding to a faster wear and tear of quarry equipment due to a harder mineralogy than expected. This view was based on the following considerations:

In view of the information provided in the course of his inquiry, the Ombudsman noted that, whereas the Commission considered that the contract was silent on this point, and therefore that this was one of the risks for which HSG should have made allowance in its prices, the complainant argued that HSG had been formally informed by the contracting authority that the supply involved granite rock type, and yet the rock actually found in the quarry was of a harder consistency, for which compensation was requested.

Having carefully reviewed the contract between HSG and TRC, the Ombudsman noted that, pursuant to Article 1.1 of the contract, the complainant was required to " *undertake all quarry operations to produce ballast to prescribed specifications as per Clause 6.12 of Technical Specifications* ". This technical clause did not mention by name the rock to be found in the quarry, but rather described its qualities by reference to a technical criterion, namely the rock's abrasion level based on the so-called "Los Angeles" standard (-20 %) (1) .

The Ombudsman noted that, in reply to the complainant's claim that the mineralogical

structure present at the Tura quarry was different from that foreseen in the contract (2) , the Commission insisted that such claim could not be considered as long as the complainant did not show a breach of the contract by proving that the Los Angeles abrasion test of the rock used was below the contractual standard (3) . It appeared, however, that, the complainant did in fact submit evidence on the basis of the Los Angeles test, but that TRC took the view that the selection of the samples was inadequate (4) , and, therefore, that those tests were unrepresentative of the rock structure at the Tura quarry (5) .

The Ombudsman noted that, even though the parties did not appear to agree on whether or not the mineralogical standards set out in the contract had been breached, the contracting authority may have created some legitimate expectations on the part of the complainant by inducing him to believe that the specific type of rock to be found at the quarry was granite. The available information showed that, in the course of the complainant's visit to the site on 9-15 July 1996, just before the signature of the contract, TRC formally informed the complainant that the rock-type to be found was granite (6) .

Moreover, the Ombudsman pointed out that one of the conclusions of a report drafted by a geology expert (G.E.O.S. Freiberg) engaged by the complainant stated that " *the rock occurrences at Tura cannot be generally described as granite* " (7) . The Ombudsman noted that the Commission had not disputed the contents of the report, to which it even referred in its opinion.

The Ombudsman therefore considered that the complainant had put forward substantial evidence in support of his claim. Furthermore, the Ombudsman noted that the documentary evidence submitted with the complainant's observations showed that the matter had been in fact reviewed on a number of occasions with a view to reaching a settlement (8) . It appeared from the documentary evidence that, because of the lack of certainty and disagreements between the parties, it was agreed that an independent geologist should be engaged to carry out the necessary tests and evaluate the complainant's claims. Accordingly, in the course of the meeting between the parties held on 13 April 2000, this problem was raised, and TRC informed the HSG's representatives, that it had requested the EU to provide technical assistance, so that an expert could carry out an investigation on the change of mineralogy and submit his findings. As shown by the minutes of that meeting, it was stated that the " *European Union has agreed to engage a Geologist to assess the claimed changes in mineralogy* " (9) . Correspondence from the Commission services appeared to support that view (10) .

The Ombudsman considered it regrettable that the Commission had not referred in its opinion to the fact that recourse to an independent evaluation of the problem had been envisaged and to the reasons why such a solution had not been implemented.

In the light of the above, the Ombudsman took the view that the Commission had not provided a coherent and reasonable account of the legal basis for its action in connection with this aspect of the case, and that this constituted an instance of maladministration.

By letter dated 21 March 2006, the Ombudsman therefore proposed that the Commission should consider accepting the appointment of an independent expert to carry out an

investigation on the type of mineralogy present at the Tura quarry with a view to assessing whether or not the complainant would be entitled to claim compensation for a faster wear and tear of quarry equipment due to a harder mineralogy than expected , and to thereby settling the dispute.

The Commission's reply to the proposal for a friendly solution

In its reply, the Commission regretted not being able to accept the Ombudsman's proposal since the Tanzanian Ministry of Finance, in its role as the NAO, had already taken a negative view on the appointment of an independent expert.

The Commission explained that, on 20 November 2003, TRC addressed a letter to the NAO in which it raised the possibility of appointing an independent expert. In its reply of 17 February 2004, the Tanzanian Ministry of Finance concluded that it did not favour this course of action, and consequently was unwilling to approve or recommend the payment of this claim from EDF funds. The NAO took the view that the hardness of the rock was one of HSG's risks for which the company had been instructed to make allowance in its prices, according to Article 2.14 of the Instructions to Tenderers. The NAO's position was made public in the course of a meeting between representatives of the NAO, TRC and HSG, held on 20 May 2004.

In view of the position taken by the NAO, the Commission argued that, since it is not a party to the contract, it could not endorse the appointment of an independent expert without the Tanzanian Ministry of Finance's prior request and approval. The Commission underlined that it could not overrule the opinion of the NAO, and accordingly, that it was not within its remit to accept the Ombudsman's proposal for a friendly solution.

The Commission also argued that it had not undertaken any commitment towards the complainant. Although its services had attended various meetings held between TRC and HSG, they had never made any formal commitments to finance HSG's claim. The Commission stated that it had not accepted to entrust the matter to a technical expert in the course of a meeting held on 16 December 2002, but instead, the Commission's representative limited himself to giving his opinion regarding the eligibility for EDF funding of an independent evaluation of the project. He merely made clear that the Commission's headquarters should take a stand on the matter once the responsible authorities in the ACP country had endorsed the request. By letter dated 17 January 2003, the Delegation asked the NAO whether or not it was still considering seeking the assistance of an expert to assess the hardness of the rock. This point was further developed in the Commission's letter to HSG of 4 August 2003.

In its opinion, the Commission also referred to the judgment of the Tanzanian High Court of which the complainant had informed the Ombudsman on 14 October 2005.

The complainant's observations

In observations on the Commission’s reply, the complainant repeated the allegations made in his complaint, and underlined that that t he contractual parties were HSG and the Tanzania Railways Corporation, which is defined in Article 2.2 as "the Employer". Accordingly, the opinion of the Tanzanian Ministry of Finance should have no relevance in this context.

The complainant disagreed with the content of the statements made by the Commission during the meeting between representatives of the NAO, TRC and HSG held on 16 December

2002. In his view, the Commission's services had in fact agreed to have recourse to an independent expert who should assess the rock situation of the Tura Quarry. The complainant underlined that, in the course of that meeting, the Commission's representative agreed with TRC on the need to appoint an independent technical expert.

The complainant argued that his company's request should have been decided by the other contractual party, namely TRC, which had in fact had already informed the Commission that it agreed with the initiative. In the complainant's view, the opinion of the Tanzanian Ministry of Finance was ir relevant.

THE DECISION

1 The Commission's alleged failure to act properly towards the contractor of an EU-funded project

1.1 The complainant alleges that the Commission did not act properly in its dealing with HSG Technischer Service GmbH (HSG). The complainant claims that, although an EU-funded project in Tanzania (reference: 7.ACP.RPR.028; tender No. 4319 - Railway Restructuring Programme) was successfully completed in May 2000, there are still a number of outstanding invoices which should have been paid, including: (i) Certificate no. 33 (EUR 48 479.79) and, in addition, interest amounting to EUR 59 551.12, corresponding to a difference in value between the opening and the closing stocks; (ii) c laim no. 1 (EUR 336 769.00) related to the deterioration in the condition of the plant and equipment between the time at which the complainant visited the site and submitted his tender, and the beginning of the contract; (iii) c laim no. 3 (EUR 1 195 000.00), corresponding to a faster wear and tear of quarry equipment due to a harder mineralogy than expected.

1.2 The Commission argues that none of the available evidence shows that its services handled the complainant's claims in an unprofessional manner. The Commission underlines that its role in the situation was only that of a funding agency, and that the only contractual relationship was between the complainant and the Tanzanian Railway Corporation (TRC). The Commission’s task in this type of situation is to ensure that applicable legal conditions for EDF funding are respected and its responsibility consists only in endorsing payment authorisations by the NAO. The Commission takes the view that its services acted in accordance with the applicable rules governing the European Development Fund (EDF).

As regards the amounts claimed by the complainant, the Commission argues as follows:

(i) With respect to c ertificate no. 33 (EUR 48 479.79) plus interest for late payment (EUR 59 551.12), the Commission notes that the complainant was required to take over all of the stocks of spares and consumables held at the quarry on the date of signing the contract. In March 1998, the Commission learnt, however, that the quarry assets had not been taken over by HSG on the grounds that the firm disagreed with the initial assessment of stocks. Accordingly, in May 2001, the Commission requested a proper valuation of assets, which was finalised in May 2002 by PWC, an independent accounting firm. In view of PWC's findings, the national authorising officer (NAO) reimbursed the complainant on 13 February 2003 for the balance between the valuation of stock made at the signature and at the end of the contract.

In September 2003, the contracting parties settled the outstanding balance concerning HSG's claim for interest. The NAO, however, refused the payment on the grounds that the only acceptable final closing stock value was that established in PWC's report. The Commission found no reason to object to the NAO's position, since both parties had failed to comply with the contractual clauses. In particular, TRC had failed to hand over the assets to HSG, and to justify the differences between the independent stock valuations and the ones signed by TRC and HSG, whereas HSG had failed to take over all assets at the quarry as required by the contract.

(ii) Concerning claim no. 1 (EUR 336 769.00), the Commission notes that the complainant requested compensation for the deterioration in the condition of the plant and equipment between the time of the complainant's visit at the site and the beginning of the contract for compensation only on 3 March 1998, when this claim could no longer be physically verified. The Commission takes the view that there was nothing in the tender or contract document which gave any guarantee about the condition of the equipment or that it should be in the same condition at the commencement of the contract as it was at the time of the site visit. Accordingly, the complainant should have assumed that, in the meantime, the equipment would continue to be used, and that its condition would inevitably deteriorate before the contract started.

(iii) Claim no. 3 (EUR 1 195 000.00): As regards the requested compensation for faster wear and tear of quarry equipment due to a harder mineralogy than expected, the Commission argues that the tender documents made no reference to the type and properties of the rock expected to be found in the quarry. Since the complainant did not make any remark concerning the properties of the rock in the tender, the Commission takes the view that this was one of the risks for which the firm should have made allowance in its prices.

1.3 In his observations, the complainant disputes the arguments advanced by the Commission:

(i) With regard to c ertificate no. 33 (EUR 48 479.79) plus interest for late payment (EUR 59 551.12), the complainant argues that, in a meeting on 11 November 2003, his firm and TRC agreed to a settlement, which has not yet been honoured. The complainant also points to a number of inaccuracies in the report submitted at the closing of stocks by the independent accounting firm, which the Commission did not fully take into account.

(ii) Concerning claim no. 1 (EUR 336 769.00), the complainant notes that, on 30 June 2000, an agreement with TRC had been reached concerning the amount which HSG should receive for additional equipment repair, but that NAO has not yet paid that amount.

The complainant also notes that, as shown by a letter from HSG to the Commission dated 21 January 2003, he had in fact informed TRC of the deterioration in the condition of the plant and equipment between the time of the complainant's visit at the site, and the beginning of the contract. In that letter, HSG informed the Commission that, on 3 June 1997, it had notified TRC of the deterioration of the plant and equipment, and of the additional

expenditure, announcing its intention to submit a claim on this matter.

In support of his claims, the complainant explains that the Commercial Division of the Tanzanian High Court has recently issued a ruling in which it upheld the complainant's claim and condemned TRC to pay EUR 336 379.00, plus interest, to him. The complainant notes that, in its ruling, the Court found that, by using the equipment and machinery in a manner which required additional repair, TRC had failed to comply with the contract.

(iii) Claim no. 3 (EUR 1 195 000.00): The complainant explains that during the tender stage, his company expressly asked for information about the nature and quality of the rock available, and was informed that the rock type was granite. Having requested external advice, an independent expert concluded that the Tura quarry comprised rock of different types and categories, and that the rock occurrences could not be described as granite. The complainant argues that HSG had to crush hard rock which was not granite, for which it should be entitled to compensation.

Both TRC and HSG agreed, however, to settle the matter by referring a final decision to a neutral geology expertise. The complainant notes that the Commission initially accepted the proposal, although it later changed its position. The complainant therefore argued that the Commission should adhere to its former agreement and entrust the evaluation of this claim to an independent expert.

In view of the fact that the Commission, as the funding agency, should have provided the requested funds once the parties to the contract had reached an agreement on the outstanding claims, the complainant restated his allegation that the Commission did not act properly in its dealing with his company.

1.4 The Ombudsman notes that the complaint concerns a project of technical assistance financed by the Commission out of the resources of the 7th European Development Fund (EDF), and hence, pursuant to the IVth ACP (11) -EC Convention of 15 December 1989, the so-called Lomé IV Convention (the Convention) (12) .

Accordingly, the Ombudsman considers it appropriate that, prior to the assessments of the allegations and claims made by the complainant, the scope of the Commission's responsibility in EDF-funded projects be elucidated.

1.5 The Ombudsman notes that Article 222 of the Convention establishes the general criteria for the division of responsibilities between the different actors involved in the ACP-EU co-operation process. It underlines, however, the overreaching principle whereby action financed through the EDF is to be implemented by the ACP States and the Community in close co-operation. That obligation of co-operation places, (i) on the ACP States the responsibility, *inter alia* , for preparing and presenting dossiers for projects and programmes; (ii) on the Community, the responsibility of taking financing decisions for the projects and programmes; and (iii) on the ACP States and the Community, the joint responsibility of ensuring that such projects and programmes are implemented properly, promptly and efficiently.

1.6 As regards the implementation of a specific project, the Community courts have clearly stated that public contracts financed by the EDF remain national contracts which only the representatives of the ACP States have the power to prepare, negotiate and conclude, the involvement of the Commission representatives being confined to establishing whether or not the conditions for Community financing are met (13) . In the discharge of those obligations, the Commission is required to act in accordance with the requirements of sound administration (14) .

1.7 A ccording to Article 195 of the EC Treaty, the European Ombudsman is empowered to receive complaints "concerning instances of maladministration in the activities of the Community institutions or bodies". The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it (15) . Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

1.8 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. The Ombudsman is of the view that he should 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.

1.9 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. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration. This conclusion does not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

1.10 The present case does not involve a contract between the Commission and the complainant. However, the complainant’s allegation of maladministration by the Commission is based, at least in part, on arguments concerning the complainant’s contractual rights and obligations vis-à-vis a third party, the NAO, whose payment authorisations under the contract the Commission is required to endorse in accordance with the applicable legal conditions for EDF funding. In these circumstances, the Ombudsman considers that it is also appropriate in the present case to examine, as regards the complainant’s contractual arguments, whether the Commission has provided 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.

In light of the above considerations, and taking into account the scope of the Commission's responsibility in EDF-funded projects, the Ombudsman will review each of the complainant's

claims.

Certificate no. 33 (EUR 48 479.79) plus interest on late payment (EUR 59 551.12), corresponding to a difference in value between the opening and the closing stocks

1.11 The Ombudsman notes that the claim arises from the decision of the Tanzanian Ministry of Finance, acting in its role of National Authorising Officer (NAO), to refuse payment. The Commission did not object to the NAO's position on the grounds that both parties to the contract had failed to comply with certain of its provisions.

1.12 As part of the evidence furnished in the course of his inquiry, the Ombudsman has carefully examined the legal basis for the Commission's action in this case, namely the Contract Agreement for Production and Application of Ballast signed on 30 April 1997, between the Tanzanian Railways Corporation (TRC), in the role as the employer, and M/S HSG Technischer Service GmbH (HSG), as the contractor, as well as its annexes, which include a set of Special Conditions and Technical Specifications.

The Ombudsman notes that, pursuant to Article 1.1 of the contract, HSG was required to take over consumables and spare parts from TRC at the commencement of the contractual relationship, in the terms set out in Article 29 of the Special Conditions (16) . Those stocks then should have been the object of an audit carried out by the supplier and a duly appointed representative of the contracting authority (17) . The contract also laid down a similar procedure for the closing stocks (18) . In view of the results of these audits, the contracting authority should have determined whether or not the supplier was entitled to any further compensation (19) .

1.13 The Ombudsman is mindful of the fact that the complainant has not advanced any argument to dispute the Commission's position that the complainant had failed to comply with the contract by failing to take over consumables and spare parts from TRC at the commencement of the contract as required by Article 1.1 of the contract and Article 29 of its Special Conditions. Nor has the complainant put forward any argument to demonstrate that the Commission was not entitled to rely on the breach of contract as a reason for not disputing the NAO's refusal to authorise payment. On the basis of the available evidence the Ombudsman therefore finds that the Commission's position appears reasonable.

1.14 In view of the above, the Ombudsman considers that the Commission has provided a coherent and reasonable account of the legal basis for its action in connection with this aspect of the case, and why it believes that its view of the contractual position is justified.

In these circumstances, the Ombudsman has concluded that the inquiry has not revealed an instance of maladministration as regards this aspect of the case.

Claim no. 1 (EUR 336 769.00) related to the deterioration in the condition of the plant and equipment between the time the complainant visited the site and submitted his tender, and the beginning of the contract

1.15 From the information submitted by the complainant, it appears that the matter constituted the object of a legal action before the Commercial Division of the Tanzanian High Court, which, having reviewed the relevant clauses of the contract, upheld the complainant's claim and recognized his right to obtain compensation.

1.16 As set out in Article 195 EC:

"In accordance with his duties, the European Ombudsman shall conduct inquiries for which he finds grounds [...]."

Taking into consideration that a national court has upheld the complainant's claim, and has therefore recognized his right to obtain compensation, the Ombudsman does not consider it justified to pursue any further inquiries as regards this aspect of the case.

Claim no. 3 (EUR 1 195 000.00), corresponding to a faster wear and tear of quarry equipment due to a harder mineralogy than expected

1.17 The complainant alleged that HSG had been formally informed by the contracting authority that the supply involved granite rock type, and yet the rock actually found in the quarry was of a harder consistency, for which compensation was requested.

1.18 For the reasons explained above, after a careful evaluation of the Commission’s opinion on the complaint and the complainant's observations, the Ombudsman made a proposal for a friendly solution.

1.19 In reply to the proposal, the Commission states that it could not endorse the appointment of an independent expert without the Tanzanian Ministry of Finance's prior request and approval. Since this body, in its role as the NAO, had already taken a negative view on the matter, the Commission underlines that it cannot overrule that decision. The Commission notes that, in its reply of 17 February 2004 to a TRC's letter of 20 November 2003, the NAO refused to have an independent expert appointed, on the grounds that the hardness of the rock was one of HSG's risks for which the supplier was instructed to make allowance in his prices according to Article 2.14 of the Instructions to Tenderers.

The Commission also points out that it had not given assurances to the complainant that an expert shall be appointed, and explains that its services had only expressed an opinion regarding the eligibility of that option for EDF funding. In the Commission's view, its representative made clear that prior authorization by the Commission was needed, which could only be granted once the Contracting Authority had endorsed the initiative.

In his observations on the Commission's reply, the complainant argues that the opinion of the Tanzanian Ministry of Finance was irr elevant for the resolution of the contractual dispute, and that the Commission's services had in fact agreed to have an independent expert engaged in order to check the quality of the rock in the Tura Quarry.

1.20 The Ombudsman takes the view that the Commission’s response to the proposal for a

friendly solution contains relevant new information on how the claim had been dealt with by the parties to the contract, and subsequently reviewed by both the Commission and the responsible national authorities.

1.21 In light of the new evidence submitted by the Commission, the Ombudsman finds it useful to recall the relevant legal provisions in the Convention governing the division of responsibilities among the Commission and the ACP authorities for the implementation of a project of technical assistance financed by the EDF.

The cooperative nature of this process is illustrated by the close relationship which the Convention creates between the Community's representative, known as a delegate, and the ACP country's agent, the so-called, National Authorising Officer (NAO) for the selection and development of individual projects. Thus, pursuant to Articles 312 and 316 of the Convention, the Government of each ACP State should appoint a NAO whose task is to represent his government in all operations financed with EDF resources, whereas the Commission is represented in each ACP State by a delegate whose task is to facilitate and expedite the preparation, appraisal and execution of projects.

The specific role of the NAO is defined in Article 313 of the Convention, which makes him responsible for the preparation, submission and appraisal of projects and programmes, in close cooperation with the delegate. In that capacity, the NAO has the power to decide on technical adjustments and alterations of projects, subject to the requirement to inform the delegate.

The tasks to be pursued by the delegate are laid down in Article 317 of the Convention, which give him responsibility to ensure that the projects and programmes financed by EDF resources are properly executed, and to maintain close and continuous contacts with the NAO for the purpose of analysing and remedying specific problems encountered in the implementation of development finance cooperation.

1.22 The Ombudsman notes that the new evidence shows that the appointment of an independent expert to asses the hardness of the rock found in the quarry had been a matter which TRC formally raised with the Tanzanian Ministry of Finance, in its capacity as the NAO, in a letter dated 20 November 2003. The Ombudsman also notes that, in its reply of 17 February 2004, the NAO opposed the TRC's request, on the grounds that the hardness of the rock was one of the risks HSG should have foreseen. It also appears undisputed that the complainant was informed of the NAO's position in a meeting held between NAO, TRC and HSG on 20 May 2004.

In view of the position taken by the NAO, the Ombudsman has carefully examined the legal basis for the Commission's position. The Ombudsman notes that the appointment of an independent expert as requested by the complainant would have involved an additional expenditure to be paid for with Community funds. Accordingly, it appears reasonable that a decision on this matter should involve not only the parties to the contract (HSG and TRC), but also those parties responsible for the disbursement of EDF funds, namely the NAO and the delegate.

The Ombudsman recalls that, as laid down in the Convention and acknowledged by the Community courts, the responsible ACP State and the Commission, acting respectively though the NAO and the delegate, have joint responsibility for the proper implementation of individual projects. In that endeavour, Article 313 of the Convention empowers the NAO to decide on technical alterations of projects, subject to the requirement to inform the delegate. In this instance, it appears that the complainant's request for the appointment of an independent expert entailed a technical adjustment of the project, and therefore that the NAO was entitled to consider the matter with a view to assessing whether or not it could be acceptable under the terms of the contract, and thereupon to inform the Commission of its position.

The Ombudsman is mindful of the fact that the Commission has justified its position on the basis of the position taken by the NAO, which had refused the request. In view of the above, the Ombudsman considers that the Commission has provided a coherent and reasonable account of the legal basis for its action in connection with this aspect of the case, and why it believes that its view of the contractual position is justified.

1.23 The Ombudsman also notes that the complainant was duly informed of the reasons which led the NAO and the Commission not to accept his proposal. It appears undisputed that the appointment of a geological expert was discussed among HSG, NAO, TRC and the Commission on a number of occasions (20) , and that the Commission indeed exchanged some correspondence with the NAO on this issue (21) .

Having carefully reviewed that information, the Ombudsman finds that the Commission, although receptive to the complainant's request, neither formally endorsed it, nor undertook to carry it out. The Ombudsman has therefore concluded that there is no evidence that the Commission might have misled the complainant in connection with the appointment of an independent expert.

1.24 In these circumstances, the Ombudsman has concluded that the provisional finding of maladministration on which his proposal for a friendly solution was based cannot be sustained and that the inquiry has not revealed an instance of maladministration as regards this aspect of the case.

1.25 The Ombudsman wishes to draw the complainant's attention to the fact that Article 307 of the Convention states that disputes arising between the authorities of an ACP State and a contractor during the performance of a contract financed by the EDF shall be settled in accordance with the national legislation of the ACP State concerned. Accordingly, the Ombudsman notes that, if the complainant feels that his rights under the contract have not been respected, as a result of the position held by the NAO, he has the right to bring a legal action against the responsible party pursuant to the national legislation of the ACP State concerned.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to be no maladministration by the Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Clause 6.12 ("Ballast Specification") of the Technical Specifications of the contract; Clause 6.12.2: *"The material should have a Los Angeles Abrasion value of no greater than 25% and it should be the aim of the Supplier for a Los Angeles Abrasion value of less than 20%"* .

(2) See letter from HSG to TRC dated 10.06.1999.

(3) See Fax from Alfred Lamers (EU Delegation in Tanzania) to HSG dated 13.12.2000.

(4) See letter from HSG to the Head of EU Delegation in Tanzania dated 15.01.01.

(5) See letter from TRC to the Head of Delegation of the EU dated 05.06.2000; letter from TRC to HSG dated 21.08.2000; letter from TRC to HSG dated 03.10.2000.

(6) TRC's letter to HSG dated 19 July 1996, as well as the enclosed annex.

(7) Expertise about Evaluation of the Term "Granite" for rocks of the open pit quarry Tura, Tanzania, and comments on rock hardness; Freiberg, 1999-09-10, page 5.

(8) Minutes of meeting held on 19 October 2000 at the office of CCE, point 4.6; letter from HSG to TRC of 30 July 2001; letter from TRC to the Head of the Commission Delegation of 20 March 2002; minutes of meeting held on 11 November 2003 at TRC headquarters; point 4.

(9) Minutes of meeting held on 13 April 2000, in the headquarter conference room at 10.00 hrs.; point 3.7.

(10) Letter from Mr Hanna, Head of the Commission Delegation to the Deputy NAO of 17 January 2003.

(11) African, Caribbean and Pacific states (ACP).

(12) The Convention was approved by the Council and by the Commission through Decision 91/400/ECSC, EEC of 17 August 1991 [OJ 1991 L 229, p.1].

(13) Case C-257/90, *Italsolar SpA v Commission* [1993] ECR I-0009, par. 22.

(14) Case T-7/96, *Francesco Perillo v Commission* [1997] ECR II-1061, par. 38;. Articles 36, 142 and 144 of the Convention.

(15) See the European Ombudsman's Annual Report 1997, p. 22.

(16) Clause 29.1.1 of the Special Conditions to the contract: *"The Supplier will take over all the stocks of spares and consumables held at the quarry on the date of signing the contract."*

(17) Clause 29.1.2 of the Special Conditions to the contract: *"The extent of these spares and consumables shall be determined by a stock check and audit carried out by the Supplier and a duly appointed representative of the Contracting Authority."*

(18) Clause 29.1.4 of the Special Conditions to the contract: *"On termination of the contract a joint stock check and audit will be carried out by the Supplier and a duly appointed representative of the Contracting Authority."*

(19) Clauses 29.1.6 & 29.1.7 of the Special Conditions to the contract.

(20) See supra the materials referred to in footnote 8.

(21) See supra the materials referred to in footnote 10.