

Decision of the European Ombudsman on complaint 1241/2001/IJH against the European Commission

Decision

Case 1241/2001/IJH - Opened on 17/09/2001 - Decision on 22/07/2002

Strasbourg, 22 July 2002

Dear Mr L.,

On 21 August 2001, you made a complaint to the European Ombudsman against the European Commission on behalf of P. L. Solicitors. On 17 September 2001, I forwarded the complaint to the President of the European Commission.

On 20 December 2001, the Commission sent its opinion on your complaint. On 21 January 2002, I forwarded the Commission's opinion to you with an invitation to make observations, which you sent on 21 February 2002.

On 5 March 2002, I wrote to the Commission proposing a friendly solution to your complaint and on the same day informed you by letter of this action. On 2 May 2002, the Commission sent a negative reply to the proposal for a friendly solution. I forwarded the Commission's reply to you with an invitation to make observations. You sent observations by letter on 28 June 2002 and a corrected version on 5 July 2002 by e-mail.

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

THE COMPLAINT

The complaint is submitted on behalf of a firm of solicitors, PLS. According to the complainant, the relevant facts are as follows.

In 1999, PLS represented the ACP (1) States in hearings before the WTO Panel in Geneva concerning the European Union banana import regime. PLS was chosen to perform this work through a tender procedure. The contract for the work (8 ACP TPS 31) is between PLS and the ACP secretariat, but was to be funded by the Commission.

The contractual procedure began when terms of reference were sent to tenderers in January 1999. On 19 February 1999, the ACP secretariat wrote to PLS engaging them. The contract



was signed on 11 May 1999. According to Article 6 of the contract it "shall enter into force on 1 March 1999."

Meanwhile the work had already been carried out. The WTO established the Panel on 12 January 1999. On 15 January 1999, the Panel met with the parties and set a timetable for submissions to be made during February 1999 and an oral hearing in the first week of March 1999. On 3 February 1999, the chairman of the ACP bananas group decided that the legal advisers should prepare a preliminary report for 12 February 1999 and that they wished to engage a consortium, including PLS, for this purpose. PLS did the work and the ACP's written submission was delivered to the Panel on 22 February 1999.

The Commission subsequently refused to pay for work carried out before 1 March 1999. The ACP secretariat requested the Commission to amend the contract to provide for an earlier starting date, but the Commission refused. The complainant contacted the Commission directly about the matter on 18 October 1999 and received a negative response on 24 November 1999.

The complainant argues that the provision of the contract stating that the contract enters into force on 1 March 1999 does not mean that work carried out prior to that date cannot be paid for. The complainant argues that it is common practice in many public contracts, both in the Member States and with the Commission, that work is undertaken prior to the formal signing of a contract. If the private sector were to refuse in all cases to begin work on a public contract until a formal contract had been signed the consequences would be catastrophic.

On the basis of the above, the complainant alleges that the Commission had failed to pay for work carried out and claims payment of all sums due under the contract, together with interest.

THE INQUIRY

The Commission's opinion

The Commission's opinion included, in summary, the following points.

Chronology of events

On 17 December 1998, the ACP Chairman of the Committee of Ambassadors wrote to the Commission services asking for financial assistance to hire a legal team for the second WTO Panel discussions on the EC banana import regime. The then Director General for Development, Mr Philip LOWE replied on 15 January 1999 agreeing to the request in principle, but raising some concerns over the terms of reference and proposed budget. The ACP Secretary General replied on 26 January 1999 agreeing to a new budget and proposing new terms of reference which did not, however, respond to all the concerns raised by Mr LOWE.

Mr LOWE replied on 5 February 1999 highlighting the fact that time was running out, since the deadline for the ACP submission to the WTO Panel was 22 February 1999 and the risk that the consultants would either start work before any contract was agreed, or miss an important deadline. In this context, Mr LOWE pointed out that "under our procedures, consultants should not start work on a dossier until a contract has been signed."



The ACP notified the Commission on 18 February 1999 that the complainant's consortium had been chosen. The Commission then launched its internal procedures, which led to the required internal documents being signed on 25 February 1999 and the notification letter to the ACP Secretary General being sent on 3 March 1999.

The complainant's allegation and claim

The Commission denied that there was any delay by its services in concluding the financing decision. Once the required notification was received, the financial decision was taken within five working days (18 to 26 February 1999).

As regards the complainant's claim for payment, the Commission first observed that its role in European Development Fund (EDF) contracts is limited to examination of whether or not the conditions for Community financing are met. The Commission also pointed out that Article 20 of the applicable Financial Regulation (2) requires that "all measures which may give rise to expenditure payable by the EDF must be preceded by a proposal for commitment of expenditure from the chief authorising officer and can create legal obligation vis-à-vis third parties only after approval by the financial controller of the proposal for commitment and after a Commission financing decision." Accordingly, the EC's funding obligation towards the ACP General Secretariat existed only after the Commission took the decision to finance the project.

The Commission agreed to fund the project within the limits of the notification letter dated 3 March 1999 and reflected in the contract signed between the complainant and the ACP General Secretariat in May 1999. These limits excluded services rendered or expenditure incurred before 1 March 1999. Moreover, the Commission services expressly warned the ACP Secretary General that the consultant should not start work until a formal agreement had been signed.

In conclusion, the Commission stated that both the complainant and the ACP General Secretariat took important financial risks. The complainant accepted to perform services without a signed contract, on the basis of oral information from the ACP General Secretariat and ACP banana group. The ACP General Secretariat requested the complainant to perform the services although they were clearly aware that the financing decision had not yet been taken. The ACP secretariat took the risk to finance out of their own resources invoices covering the period prior to the entry into force of the Commission's financial agreement as reflected in the contract.

The Commission concluded that its rejection of the complainant's claims constitutes sound financial management of public funds and that the matter has to be settled between the ACP General Secretariat and the complainant.

The Commission annexed to its opinion copies of correspondence between its services and the ACP Secretariat and banana Working Group, as well as other relevant documents.

The complainant's observations

The complainant's observations included, in summary, the following points.

The urgency of the matter

The actions of the Commission in this case must be considered against the background of the extraordinarily tight timetable and complexity of the WTO hearings.



The original request from the ACP was made on 17 December 1998. In view of the obvious and immediate urgency of the request, the subsequent lengthy exchange of correspondence was not an effective or efficient use of resources. The latest date on which the legal consortium had to commence research was 4 February 1999, the date of receipt of the Ecuadorian 50-page detailed submission.

On 5 February 1999, the Chairman of the ACP Working Group on Bananas informed the Commission services that the Working Group had chosen the complainant as the legal consultant. The reply from Mr FEUSTAL, head of unit in DG VIII Development, dated 12 February 1999, shows that the Commission Legal Service and DG Development were clearly aware at this stage that the complainant had commenced work.

As regards the letter dated 3 March 1999 from Mr LOWE to the ACP Secretary approving the budget, the complainant seriously questioned whether at this stage of the correspondence the Commission could have been unaware that the submissions to the WTO Panel had already been made and that the hearings were about to commence in Geneva.

The procedure used by the Commission

The general regulations, conditions and procedural rules for service contracts financed by the EDF are set out in Decision 3/90 of the ACP-EEC. These rules provide for direct agreement contracts in urgent cases, operations assigned to individual experts and operations which are complementary to, or necessary for the completion of, others already in hand. The services required by the ACP comply with these requirements.

For reasons known only to Commission officials, authorisation for this urgent project was mishandled. There was complete disregard for the reality that submissions needed to be worked on, at the latest, from 4 February 1999. It is not good administration to manage an approvals procedure in such a way that it would only allow lawyers to be engaged after the deadline for submissions had expired.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinion and observations, the Ombudsman considered that there could be an instance of maladministration by the Commission. In accordance with Article 3 (5) of the Statute (3), he therefore wrote to the President of the Commission to propose a friendly solution on the basis of the following analysis of the issues in dispute.

The Ombudsman's analysis of the issues in dispute 1 *The allegation that the Commission failed to pay for work carried out.*

1.1 The Commission argues that there was no delay by its services in concluding the financing decision, that the Commission services expressly warned the ACP Secretary General that the consultant should not start work until a formal agreement had been signed and that its rejection of the complainant's claims constitutes sound financial management of public funds.

1.2 The Ombudsman notes that in the letter dated 5 February 1999 from Mr LOWE to the ACP



it is mentioned that "Under our procedures, consultants should not start to work on a dossier until after a contract has been signed. This could mean that the legal team would not officially start working on this dossier until after a major deadline has been missed" (emphasis added). As regards possible future payment problems, the letter merely requests the ACP Secretariat to "make certain that the consultants chosen for this work are fully aware of the budget."

1.3 The Ombudsman also notes that the letter dated 12 February 1999 from Mr FEUSTAL, head of unit in DG Development, to the co-chairman of the Working Group on bananas, refers to a planned EC/ACP co-ordination meeting on 16 February 1999 involving Mr GUSSETTI of the Commission Legal Service and the complainant on behalf of the ACP States. The letter points out "that this does not prejudice the decision to be taken by the ACP Secretariat in relation to the current tendering procedures."

1.4 The Ombudsman's provisional conclusions from the above are as follows:

- (i) The Commission's warning to the ACP secretariat in the letter dated 5 February 1999 refers to the date of signature of the contract. In view of the timetable for the WTO hearings, it should have been obvious to the Commission services that a contract could not possibly be signed before the complainant would need to begin work.
- (ii) The Commission services were, in fact, aware in early February 1999 that the ACP had instructed the complainant to prepare the ACP's submission to the WTO bananas Panel and that the complainant was already working unofficially.
- (iii) The Commission services should, therefore, have known that the funding requested by the ACP Secretariat could only be provided retroactively. Moreover, it appears that the Commission services were in fact willing to approve a retroactive contract, because they did so: the contract was signed on 11 May 1999, retroactive to 1 March 1999.
- (iv) If the Commission had meant seriously its warning that "Under our procedures, consultants should not start to work on a dossier until after a contract has been signed" it should have informed the ACP Secretariat promptly that no EDF funding was possible for representation of the ACP States in the WTO hearings.

These provisional conclusions are subject to the possible taking of testimony from the officials concerned, if a friendly solution to the dispute is not possible.

2 The claim for payment of all sums due under the contract and interest.

2.1 According to the Commission's opinion, the ACP General Secretariat requested the complainant to perform the services and thereby took the risk to finance out of their own resources invoices covering the period prior to the entry into force of the Commission's financial agreement as reflected in the contract. The Commission also stated that the matter has to be settled between the ACP General Secretariat and the complainant.

2.2 The Ombudsman notes the Commission's view that the ACP Secretariat should pay the complainant. The Ombudsman understands that the Commission objects to providing the ACP



Secretariat with the funding with which to do so because the Commission's internal financial control procedures were not completed until the end of February 1999.

2.3 It is not possible to establish in the context of this inquiry whether the ACP Secretariat has complied with its obligations to the Commission.

2.4 The Ombudsman points out that the complainant's relationship with the ACP is contractual. The Ombudsman is not aware that the contract makes the complainant responsible either for the Commission's compliance with its internal financial control procedures, or for the ACP's compliance with its obligations to the Commission.

2.5 The Ombudsman considers that it appears to be unjust that the complainant remains without payment for the work that he carried out for the ACP Secretariat. In view of his provisional conclusions in paragraph 1.4 above, the Ombudsman considers that it would be unfair and an instance of maladministration for the Commission to remain passive towards the complainant's difficult position.

The Ombudsman requested the Commission to consider taking action to ensure that the complainant is paid for the work that he carried out for the ACP Secretariat, together with appropriate interest.

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

In summary, the Commission's reply included the following points.

A clear distinction between the financing agreement (Commission and ACP) and the service contract (ACP and service provider) is at the heart of EDF operations, which are based on the principle of partnership and respect for the prerogatives of both sides. The ACP have the right to decide on any activity which they wish to carry out and to request EDF support. The Commission has the right to decide on EDF support and to determine the conditions for such support. EDF support will only be granted to the extent that the conditions of the financing agreement are met.

However, the above does not diminish the right of the ACP to go further, using partially or totally different financial resources. Indeed, although the EDF is one of the major funding sources for ACP activities, it is not the only one. The fact that the Commission services were aware, in early February 1999, that the complainant was already working to respect the timetable of the WTO hearing is therefore irrelevant. The Commission had neither the right nor the obligation to stop this work. However, the Commission made clear in its correspondence with the ACP that activities carried out prior to the signature of the financing agreement do not qualify for financial support from the EDF. The Commission could therefore legitimately assume that any such activities were financed from different sources. This is even more the case since, at that time, the ACP had not even selected the complainant and other legal advisors (for which EDF support has ultimately never been requested) were equally active for the ACP. Moreover, since the complainant was known to provide legal advice on a regular basis to a major European banana company, with interests in the Caribbean and therefore in the WTO hearing, it could also be believed that this company would support the activities carried out prior to the financing



agreement.

The Commission was indeed aware that EDF procedures could lead to a delay in the establishment of the financing agreement. Therefore, to provide scope for EDF support in all events, it suggested from the very beginning (letter of 15 January 1999, signed by Philip Lowe) to retain "the lawyers beyond the period of the dispute", allowing them to assist the ACP with the implementation of the panel findings and/or the possible appeal to these findings. The ACP agreed with this suggestion.

The conclusion of the Ombudsman, that "if the Commission meant seriously its warning that 'Under our procedures, consultants should not start to work on a dossier until after a contract has been signed' it should have informed the ACP Secretariat promptly that no EDF funding was possible for representation of the ACP States in the WTO hearings", cannot be followed. EDF procedures constitute the basis for ACP-EC development co-operation. These procedures are, as the ACP Secretariat knows by experience, not at the disposal of the Commission. The Commission's warnings therefore primarily served as a reference to these procedures and it would be excessive to request the Commission to state explicitly to the ACP that it intends to respect them.

The conclusions of the Ombudsman "that it would be unfair and an instance of maladministration for the Commission to remain passive towards the complainant's difficult position" is unfounded and would lead to a complete disregard of the principle of partnership underlying ACP-EC co-operation.

The complainant's observations on the Commission's reply

In summary, the complainant's observations included the following points.

It is inefficient or bad management for the Commission to provide in the Financing Agreement with the ACP that the financing was only to cover a period of 3 months from 1 March 1999, since by that date the majority of the work had to have been completed. It is bizarre for the Commission to suggest that the ACP might retain lawyers beyond the period of the dispute. There was no need to have substantial legal advice after the dispute. The ACP were not responsible for the implementation of the panel findings and the WTO disputes settlement system does not provide for an appeal in such cases. This suggests that the Commission were prepared to waste substantial Community funds in paying for lawyers to undertake a task from 1 March 1999 for an amount which would be excessive in view of the actual work that would be required to be undertaken after that date.

The suggestion that an individual banana company might have paid for the legal advice provided by the complainant is quite serious, as it would compromise the integrity and independence of the advice sought. Should the Commission care to identify the banana company referred to, the complainant offered to supply a sworn affidavit confirming that no financial support has been offered or received. The complainant considers the Commission's statement defamatory.



THE DECISION

1 Failure to pay for representation of the ACP States in hearings before the WTO Panel concerning the European Union banana import regime.

1.1 In 1999, the complainant represented the ACP States in hearings before the WTO Panel in Geneva concerning the European Union banana import regime. The contract for the work is between the complainant and the ACP secretariat, but was to be funded by the Commission under the European Development Fund (EDF). The complainant alleges that the Commission failed to pay for work carried out and claims payment of all sums due under the contract, together with interest.

1.2 The Commission argued that there was no delay by its services in concluding the financing decision, that the Commission services expressly warned the ACP Secretary General that the consultant should not start work until a formal agreement had been signed and that its rejection of the complainant's claims constitutes sound financial management of public funds.

1.3 During his inquiry, the Ombudsman informed the Commission of his provisional conclusions that (i) it should have been obvious to the Commission that a contract could not possibly be signed before the complainant would need to begin work; (ii) the Commission was aware in early February 1999 that the ACP had instructed the complainant to prepare its submission to the WTO bananas Panel and that the complainant was already working unofficially; (iii) the Commission should, therefore, have known that the funding requested by the ACP Secretariat could only be provided retroactively and (iv) that if the Commission had meant seriously its warning to the ACP that consultants should not start to work on a dossier until after a contract has been signed it should have informed the ACP promptly that no EDF funding was possible. The Ombudsman therefore considered that it would be unfair and an instance of maladministration for the Commission to remain passive towards the complainant's difficult position and proposed as a friendly solution that the Commission consider taking action to ensure that the complainant is paid for the work that he carried out for the ACP, together with appropriate interest.

1.4 In its reply, the Commission argued that EDF is not the only funding source for ACP activities. Therefore, although the Commission was aware in early February 1999 that the complainant was already working to respect the timetable of the WTO hearing, it could legitimately assume that the ACP would finance the activity from sources other than the EDF.

The Commission was indeed aware that EDF procedures could lead to a delay in the establishment of the financing agreement. Therefore, to provide scope for EDF support in all events, it suggested from the very beginning to retain the lawyers beyond the period of the dispute, allowing them to assist the ACP with the implementation of the panel findings and/or the possible appeal to these findings. The ACP agreed with this suggestion.

According to the complainant, the ACP was not responsible for the implementation of the panel findings and the WTO disputes settlement system does not provide for an appeal in such cases.

1.5 As regards, the Commission's awareness that the complainant was working for the ACP



before the funding agreement between the ACP and the Commission was signed, the Ombudsman's inquiry has revealed no evidence that could cast doubt on the Commission's explanation that it believed that the ACP would finance the complainant's work from sources other than the EDF.

1.6 The Ombudsman notes that the complainant contests the Commission's explanation of why, in the above circumstances, the Commission continued the procedure to provide EDF funding. The Ombudsman considers that, even if the complainant is correct, his argument could not lead to the conclusion that the Commission is responsible for ensuring that the complainant is paid. No further inquiries in relation to this issue therefore seem justified.

1.7 In view of the above, the Ombudsman finds no maladministration by the Commission as regards the failure to pay the complainant for the work that he carried out.

The Ombudsman points out that this finding does not prejudice any possibility the complainant may have to bring legal proceedings against the ACP for breach of the service contract. The Ombudsman notes that the Commission has not contested the complainant's argument that the ACP is contractually liable to pay for work that the complainant carried out even before 1 March 1999. However, the Ombudsman expresses no view on the ACP's possible contractual liability to the complainant, since the ACP has not been heard in the framework of present inquiry.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission as regards the failure to pay the complainant for the work that he carried out. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN

(1) African, Caribbean and Pacific.

(2) Financial Regulation of 16 June 1998 applicable to development finance co-operation under the Fourth ACP-EEC Convention (98/430/EC).

(3) *"As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint."*