European Ombudsman

Draft recommendation to the European Commission in complaint 444/2000/ME

Recommendation
Case 444/2000/ME - **Opened on** 28/04/2000 - **Recommendation on** 07/02/2002 - **Decision on** 10/09/2002

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

THE COMPLAINT

In March 2000, the complainant wrote to the Ombudsman on behalf of his client, Hunting Technical Service (HTS), to complain against the European Commission. According to the complainant, the facts were as follows. HTS was engaged in 1993 to work on a technical assistance project in Nigeria, the Oban Hills Project, financed by the 7th European Development Fund (EDF). Contracting parties were the government of Nigeria and a consortium led and represented by HTS. In 1996, the Commission unilaterally suspended all aid for projects in Nigeria leaving the Nigerian government no option but to terminate the contract. The complainant stressed that the complaint was directed towards the Commission as it is responsible for payments from the EDF and for the financial consequences arising out of the termination of the contract.

The decision caused extensive financial loss for HTS. From the outset, the Commission implicitly accepted responsibility and HTS was asked to submit a claim for indemnification of losses. A statement setting out the losses was originally submitted to the Commission in August 1996.

Following the initial submission of the statement of costs, a series of correspondence took place with the Commission in 1996 and 1997. As the sum involved was over 1.5 million Euro, and since the Commission did not have any official procedure for addressing the situation, it was not possible to arrive at a rapid solution of the claim. In December 1997, a consulting firm was appointed to evaluate the claim and reported to the Commission in May 1998. From May 1998 to May 1999, it appears that the Commission did not work at all on the dossier. In May 1999, HTS was informed that the newly created Joint Relex Service for the Management of Community Aid to Non-member Countries (SCR) took over the matter. This led to the submission of a final report by the consulting firm in September 1999 after which the Commission said that they would put forward their proposal for a final settlement.

The complainant alleged that, after more than three and a half years, still no proposal for a settlement or any estimated time-frame for such a proposal had been made by the Commission despite numerous requests. The complainant pointed out that an amicable resolution of the matter would be in the best interest of all parties.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission explained that following the adoption by the Commission in 1995 of sanctions against human rights violations by the military regime in Nigeria, the development co-operation between Nigeria and the Commission was suspended. HTS was informed in February 1996 of the suspension and in March 1996 the technical assistance contract with HTS was terminated. In August 1996, HTS submitted a claim for damages. The Commission requested further clarification from HTS who submitted a revised claim in November 1996. HTS claimed compensation for outstanding invoices related to contractual performance, direct costs for winding-up the project and losses following termination of the contract.

As a result of the particularly complex circumstances of the contracts affected and the workload of the units concerned, an external consulting firm was entrusted with the evaluation. In April 1997, the complainant was informed that an external auditor would evaluate five submitted claims, including that of the complainant. The consultant firm performed the evaluation between November 1997 and May 1998, when it submitted a provisional report.

Due to the creation of the SCR and the transfer of files from the former External Relations DG, a significant backlog had to be taken care of before reopening the claims concerning the Nigeria suspension. This was explained to the complainant in December 1998 and in May 1999, the complainant was informed that the file was reopened. Inter-service consultations took place, various observations were made and complementary clarifications were needed. According to the Commission, the complainant was regularly informed thereof.

The Commission stated that it had shown willingness to solve the matter amicably and kept the complainant informed of the progress. It also met with the complainant in June 1999. A second meeting was considered inappropriate and premature before the complementary clarifications from the Commission Delegation in Nigeria had been received. This was stressed to the complainant in faxes in December 1999 and January 2000.

As regards the further clarifications, the Commission received these on 28 February and 25 April 2000 and a meeting took place with HTS on 4 April 2000 during which HTS expressed its concern. The Commission stated that it will take these into consideration in its settlement proposal.

The Commission concluded that there was no maladministration on its part. It also stated it was in the final stages of preparing a proposal for financial settlement and it was looking forward to settle the dispute amicably.

The complainant's observations

In his observations, the complainant maintained the allegation that still no proposal for a settlement had been made and the Commission had not even suggested a date when such a proposal may be forthcoming.

The complainant pointed out that HTS was pleased to note that the Commission acknowledged the very long time-span in this case. The complainant noted that the delays in 1996 and 1997 were due to the internal restructuring of the Commission. Nevertheless, the consultant firm submitted its final report in the second half of 1998, and two years had elapsed since then. According to the complainant, the essence of the maladministration in this case was that between May 1998 and May 1999, there is no evidence that any work or progress was made on this file. Moreover, at present, the Commission appeared to be seeking advice from its legal service on its liability, well after the quantification of damages had been settled. Normally the legal issue of liability is determined prior to quantification matters.

The complainant also pointed out that the complaint was not only relating to the failure to make an amicable settlement but rather that since the time when the Commission was in full possession of the facts, it made no effort to resolve the matter.

As regards the Commission's statement that it kept HTS regularly informed, the complainant underlined that the Commission only replied to HTS upon specific requests from the latter. On several occasions the Commission sent a single fax in response to a number of faxes. Furthermore, although the Commission requested clarifications from its Delegation in Nigeria, the complainant was never informed thereof. Some annexes enclosed to the Commission's opinion on this matter was the first information that was received in this regard.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The Ombudsman's analysis of the issues in dispute

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission has responded adequately to the complainant's claim.

The Ombudsman's provisional conclusion was that the fact that the Commission, for a period of approximately four and a half years, had not been able to propose a settlement could be an instance of maladministration.

The possibility of a friendly solution

On 8 May 2001, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman suggested that the Commission should propose a settlement of the claim for financial losses put forward by HTS, by 30 June 2001 at the latest.

In its reply of 27 September 2001, the Commission initially pointed out that contracts financed by the EDF remain national contracts. When the Council adopted its common position on suspension of co-operation with Nigeria in 1995, it did not necessarily mean that the national contracts, specifically that with HTS, had to be terminated as Nigeria could have continued to finance the contracts with other funds. The Commission considered itself therefore not

responsible for the financial repercussions on HTS's contract with Nigeria. The Commission pointed out that its activities and correspondence with the complainant regarding the claim for damages was based on the brief given to it by Nigeria to examine the claim on its behalf. As regards seeking advice from its legal service as commented on by the complainant, the Commission stated that it was free to consult its legal service at any time. Moreover, the Commission never consulted it with regard to the possible contractual liability in this matter since the Commission had no doubt that it could not be held liable. The Commission apologised to the Ombudsman for not having commented on this point in its first opinion. The Commission however assumed that the complainant understood its position and referred to a fax sent on 27 May 1999 to HTS. The Commission had always considered it obvious that when assessing HTS's claims, it was not acting on its own but on behalf of Nigeria. Moreover, in April 2000, the Commission made it clear to the complainant that the claim should have been addressed to the contractual partner in Nigeria. The Commission concluded by stating that it was in favour of the dispute being settled amicably in accordance with Article 45 of the General Conditions. Since it was not a party to the contract, its role was confined to determining to what extent claims for damages may be covered by the EDF. On 14 May 2001, it therefore sent its views regarding HTS's claims and its proposal for a possible amicable settlement to the national authorising officer of the EDF in Nigeria. The Commission finally regretted the length of time which elapsed between the initial claim and the proposal for a final settlement to Nigeria. According to the Commission it was now up to the Nigerian authorities to propose a settlement to the complainant.

In his observations of 30 November 2001, the complainant underlined that it was advised by the Commission itself to submit the claim for damages in 1996 to the Commission and not to the Nigerian authorities. There were positive discussions between HTS and the Commission on an early settlement and there was no mention at that stage that the Commission did not have competence to settle the matter or that it was not the appropriate addressee of the claim. HTS was at all times led to believe that the Commission was the appropriate authority to which to make the claim. It was only in May 1999 that the Commission first mentioned that it could not be in breach of contract. However, its mention, coming at the end of a letter discussing other issues, seemed more and more like an excuse for inaction and not a substantive bar to the Commission taking action. The Commission's statement that it acted on a brief from the Nigerian authorities, was completely new to the complainant. If it was so, the Commission's delays were even more incomprehensible as it was not only acting inappropriately vis-à-vis HTS but also vis-à-vis the government of Nigeria.

As regards the fact that the Commission was not a contracting party, the complainant pointed out that he is aware of the principle of privity of contract. It was however flippant to hind behind this legal doctrine in order to attempt to justify its failure to deal adequately with HTS's claim, or at all. To the complainant, it was clear that the termination of the Oban Hills Project was a direct result of the decision to cut off funding from the EDF. If Nigeria had other funds at its disposal, it would not have needed the EDF. Regarding the fact that the Commission was not a contracting party, the complainant pointed out that the Commission was indeed involved in the contract and referred to the following: The contract between HTS and the Nigerian government came into force only after the Commission's Delegation endorsed it; The Commission never hesitated to

intervene in negotiations between the contracting parties; In the present contract, HTS had agreed a payment schedule with the national authorising officer which the Commission later overturned; And, any payments under the contract were only made after the detailed review of the Commission. In addition, it was clear to all parties that the contract would not have been entered into if the Commission had not wished it.

The complainant also put forward that the Commission had power to act in this matter. He stated that the chief authorising officer had power to "take all appropriate measures to resolve difficulties" and that he can use his powers to "remedy, where necessary, the financial consequences of the resultant situation and, more generally, to enable the project, projects or programmes to be completed under the best economic conditions". Moreover the chief authorising officer has power to get the Commission to make payments directly to the service provider, and where such payments are made directly by the Commission to the beneficiary of the contract, the Community automatically acquires that beneficiary's right as creditor vis-à-vis the national authorities. The complainant concluded that there was nothing that prevented the Commission from making a settlement directly with HTS and then take up HTS's right as beneficiary under the contract, thereby overcoming the technical obstacle that the Commission was not the contracting party. The complainant also stated that the instructions to assist project management in the case of suspension of projects financed by the EDF in Nigeria was revealing. They are based on the EU Common Position of November 1995 to which the Commission refers in its reply. The instructions state: "Staff employed under long term TA contracts shall be terminated after agreement has been reached between the national authorising officer and the Commission on the basis of requirements. A phase out of TA will be determined by the scale of activities. It must be agreed by the national authorising officer and the Delegation. Project management will not be involved in the legal aspects of this exercise which will be dealt with by the Commission Services in Brussels and the Consultancy Companies directly".

The complainant did not consider the Commission's reply to respond adequately to the proposal for a friendly solution as it did not propose a settlement but rather left it up to Nigeria to make the proposal.

In these circumstances, the Ombudsman considers that a friendly solution has not been achieved.

THE DECISION

1 Alleged undue delay and failure to propose a settlement

1.1 The complainant alleged that, after more than three and a half years, still no proposal for a settlement or any estimated time-frame for such a proposal had been made by the Commission despite numerous requests. The complainant pointed out that an amicable resolution of the matter would be in the best interest of all parties.

1.2 In its first opinion, the Commission explained the different stages of the procedure in this matter and concluded that in its view there was no maladministration on its part. It also stated it

was in the final stages of preparing a proposal for financial settlement and it was looking forward to settle the dispute amicably. In its reply to the proposal for a friendly solution, the Commission in summary pointed out the following: EDF contracts remain national contracts; Its activities and correspondence with the complainant regarding the claim was based on the brief given to it by Nigeria to examine the claim on its behalf; The Commission had no contractual liability in this case and had informed the complainant thereof in May 1999; The claim should have been addressed to the Nigerian authorities and that was made clear to HTS in April 2000; And further, its views regarding the claim and its proposal for a possible amicable settlement had been sent to the national authorising officer of the EDF in Nigeria and it was now up to the Nigerian authorities to propose a settlement to the complainant.

1.3 The complainant pointed out that the Commission was hiding behind the legal doctrine of privity of contract in order to attempt to justify its failure to deal adequately with HTS's claim. HTS had been told to submit the claim to the Commission and it was led to believe that the Commission was the appropriate authority to which to make the claim. It was not informed that the Commission was acting on a brief from the Nigerian authorities. The complainant stated that the Commission was indeed involved in the contract and further that it had power to act in this matter. The complainant concluded that the Commission's reply failed to respond adequately to the proposal for a friendly solution.

1.4 The Ombudsman notes that there is common ground between the complainant and the Commission as to the time-span of the events surrounding the complaint, meaning in summary the following. In 1996, the complainant's contract was terminated due to the suspension by the Commission of its co-operation with Nigeria. In August and November 1996, HTS submitted a claim for financial losses to the Commission. An external consulting firm performed an evaluation of this and four other claims between November 1997 and May 1998. In May 1999, the file was reopened. When the Commission submitted its reply on the proposal for a friendly solution in September 2001, no proposal for a settlement had yet been made to HTS.

1.5 The following explanations were given for the time-span. From November 1996 to April 1997, the Commission explained that because of the particular complex circumstances of the matter and the overload of work of the units concerned, it was decided in April 1997 that an external auditor should evaluate the claim. That evaluation took place between November 1997 and May 1998. No specific explanation was given for the period from April to November 1997. Between May 1998 and May 1999, the Commission explained that because of internal restructuring and backlog, it could not work on the file. From May 1999 the Commission was dealing with the file thus requesting further clarifications from its Delegation in Nigeria. It is not clear when such a request was made but the Commission received the requested information in February and April 2000. In April 2000, the Commission met with HTS. From April 2000 to May 2001, the Ombudsman has no information regarding reasons for the delay. On 14 May 2001, the Commission sent its views and proposal for a possible amicable settlement to the national authorising officer of the EDF in Nigeria. It appears that the Commission had the intention at the end of 2001 to address the national authorising officer about lack of response to the May communication.

1.6 It is good administrative behaviour to take decisions and act upon requests within a reasonable period of time. In the present case, HTS's revised claim for financial losses was submitted to the Commission in November 1996. The complainant claimed that the Commission should propose a settlement. In February 2002, more than five years later, still no such proposal has been made. The Ombudsman accepts that the matter is of a complex nature and therefore requires some time to deal with. Further, the Ombudsman notes that during six months an external consulting firm was evaluating the claim. However, for most of the delay, the Commission has no valid justification.

1.7 As regards the Commission's statement that it was acting on a brief from the Nigerian authorities and that the Commission was not the correct addressee for the claim, the Ombudsman is not convinced by the arguments put forward by the Commission. First in a meeting in April 2000, did the Commission mention that any claim should be made to the government of Nigeria. The statement that it acted on a brief from Nigeria was referred to for the first time in the Commission's reply of September 2001 to the Ombudsman's proposal for a friendly solution. The correspondence between the Commission and the complainant does not support the Commission's view. On the contrary, the Commission's letters gives the impression that it is the correct addressee and that the proposal will be made directly to HTS.

1.8 The Commission further put forward that it was not a contracting party and that it is therefore not liable. The Commission first mentions this in its letter of 27 May 1999. Even if the Commission formally was not a contracting party, it does not prevent the Commission from proposing a settlement with the complainant. In addition, in the present case, the Commission already in 1996 undertook to deal with the claim and the correspondence shows that its intention was indeed to make such a proposal. Moreover, the Commission seems to have advised the complainant on how to structure the claim to be submitted to the Commission (2) . Naturally, such a proposal has to be in line with the Commission's legal and financial obligations, which has never been disputed by the complainant (3) .

2 Conclusion

2.1 On the basis of the inquiries into this complaint, the Ombudsman considers that the Commission has not put forward any proof to convince him that it is not capable of proposing a settlement to HTS which it constantly promised to do since 1996, until it changed its standpoint in September 2001. The Ombudsman's conclusion, therefore, is that the fact that the Commission has not proposed such a settlement constitutes an instance of maladministration.

2.2 The Ombudsman therefore makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The draft recommendation

The Commission should propose a settlement of the claim for financial losses put forward by HTS, by 31 May 2002 at the latest.

The Commission will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 31 May 2002. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the recommendation.

Strasbourg, 7 February 2002

Jacob SÖDERMAN

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/15.

(2) See letter of 15 August 1996 from HTS to the Commission referring to the meeting of 17 July 1996.

(3) See letter of 17 April 2000 from HTS to the Commission.