

## **“Law Report” on Issue Paper SoE&A**

**by Joseph Dalby, Chief Legal Adviser**

When you relax already defective rules - the whole system collapses...

My main point was that as soon as one withdraws from imposing an absolute requirement to bind the expert, in terms of exclusivity and availability, then any relaxation will ultimately lead to an unravelling of the whole system. I predicted that EuropeAid would discover that any exceptions to the rule introduced now will be “used and abused” to the extent that the Commission will simply have to review the situation in a short period of time and find that there is no basis for using the SoEA.

I added that removal of the SoEA was the only practical and efficient solution, and that anything else would simply fail.

### **The new abuse: in-house experts....**

For example, there was a fair amount of discussion about how the Commission can achieve a situation where contractors use their own in-house experts (who are not required to sign the SoEA) – as opposed to using independent experts. I commented that requiring at least one in-house expert would effectively impose a pre-determined legal structure on the tenderer – which is unlawful. I also observed that there were several ways of overcoming such a requirement in any event, which would result in widespread abuse.

### **The legal vacuum: SoE&A**

The in-house issue also exemplified a more symptomatic problem with the Issue Paper, that the SoEA is treated in a legal vacuum. For instance, I set out a number of areas where the Issue Paper does not address whether the SoEA is compatible with EU Law (see Legal Issues document). EuropeAid did not respond to every point, but they said that they had never considered the free movement of services and competition points, but took the view that they “did not apply”. I report this now because I cannot see how EuropeAid, as a Community institution subject to the Treaty, can retain that view and they will have to deal with the issue in due course.

### **Legal contradictions**

I would expect to see EuropeAid deal with those points during the drafting of the revised Implementation Regulation and PRAG. This instrument will be all the more interesting because of another unsatisfactory aspect of the Issue Paper: some of EuropeAid’s proposals (e.g. substituting experts) will need a legal amendment made to the legislation; whereas EuropeAid relies on the “inability to amend” the legislation and guidelines as a reason not to accept proposals made by others, e.g. removal of the SoEA (N.B. Even though the SoEA is not dealt with in the Implementing Regulations). Apparently, new revisions will be issued over the next six months.

J.D.