

## Decision of the European Ombudsman closing his inquiry into complaint 483/2011/(ANA)CK against the European Commission

Decision

**Case 483/2011/CK - Opened on 15/04/2011 - Decision on 17/07/2012 - Institution concerned** European Commission ( No further inquiries justified ) |

### The background to the complaint

1. The complaint concerns the way the European Commission dealt with an infringement complaint regarding alleged irregularities in five tender procedures for the completion of specific road sections of the Egnatia motorway in Greece.
2. On 2 June 2009, the complainant, a Greek construction company, submitted an infringement complaint to the Commission alleging that the tender procedures for the completion of the motorway infringed EU public procurement law and the principles of equality and non-discrimination. The complaint was based on two main pleas: (a) the compatibility with EU law of a registration class criterion concerning the eligibility of contractors and (b) the compatibility with EU law of the time limit of six months for the execution of the contracts in question.
3. Specifically, as regards (a), the complainant challenged the fact that the call for tenders in question required that Greek constructors should be registered in the highest class (7th class) of the national Constructors Register [1] . The complainant was a 6th class constructor. However, it claimed that it had the ability to carry out the works. It argued that the exclusion of constructors with proven ability to carry out the works in question, on the basis of the formal criterion of registration class, could not be justified by the nature of the works. It argued that Greece had thus infringed Article 48(2) of Directive 2004/18 and the general principles of EU public procurement law.
4. As regards (b), the complainant argued that only constructors who were already established on the construction sites could complete the work in such a short period of time. It therefore alleged that the short time limit constituted a restriction on competition and constituted discriminatory treatment, because it gave a significant advantage to those constructors who were already established on the site.



5. On 2 July 2009, the Commission informed the complainant that its complaint had been registered under reference number 2009/4396.

6. On 30 July 2009, the Commission addressed an administrative letter to the Greek authorities, which replied on 28 September 2009. Since it did not find the Greek authorities' reply to be satisfactory, the Commission decided to initiate infringement proceedings against Greece. To this end, it addressed a letter of formal notice to the Greek authorities on 7 May 2010. The issues raised in the complaint were further discussed in a meeting that took place in Athens on 8 and 9 July 2010. The Greek authorities sent their reply on 30 July 2010.

7. On 7 September 2010, the Commission addressed a pre-closure letter to the complainant. It informed it about the above-mentioned actions and of its intention to close the file. The Commission annexed the Greek authorities' reply and provided a summary of the main issues. In particular, as regards (a), the Greek authorities explained the operation of the Constructors Register and the reasons for which the contracting authority decided, in light of the complexity of the works, to award the tenders to constructors of the 7th class, which possess the required financial and technical qualifications to carry out the works, in compliance with EU public procurement law. As regards (b), the Greek authorities explained that the execution of the contract within the given timeframe was feasible, in light of the fact that these works were a continuation of earlier ones and there was no need for any license or study. To support their explanations in relation to the feasibility of completing the works within six months, the Greek authorities annexed to their reply a "Technical Study" and underlined the fact that all the works in question were actually completed within the timeframe prescribed.

8. The Commission went on to note that, at the time it addressed the first informal letter, the works had already been completed. The Commission concluded that, in light of the information provided by the Greek authorities and bearing in mind that the contracts had already been executed, it did not possess sufficient evidence to establish an infringement of Union law. It informed the complainant of its intention to close the case and invited it to submit any new comments or information as soon as possible and no later than four weeks after the receipt of its letter.

9. The complainant replied to the Commission on 7 October 2010. In its reply, the complainant objected to the Commission's argument that the contracts in question had long been completed as a valid ground for closing an infringement procedure. Regarding the substance of the Commission's assessment, the complainant stated that the alleged "*complexity*" which the contracting authority invoked could not be accepted. He argued that these were supplementary works concerned with the connection of the existing parts of the motorway. It also pointed out that its allegations were proven by the fact that all five tenders were awarded to the constructors who were carrying out the main contracts and were already on the site. The complainant went on to suggest that the above-mentioned situation was symptomatic of systemic practices of the Greek contracting authorities. In view of the above, it asked the Commission to revert to its earlier position adopted in the letter of formal notice, to the effect that Greece had infringed EU public procurement law.



10. On 13 October 2010, the Commission informed the complainant that it did not find new arguments in the latter's reply that could reverse its preliminary conclusion, and that it would shortly close the case. The case was closed on 28 October 2010.

11. On 18 February 2011, the complainant turned to the Ombudsman.

## **The subject matter of the inquiry**

12. The Ombudsman opened an inquiry into the complainant's following allegation and claim:

### **Allegation:**

The Commission failed to provide convincing reasons for closing the complainant's infringement complaint.

### **Claim:**

The Commission should continue investigating the infringement complaint in question.

## **The inquiry**

13. On 15 April 2011, the Ombudsman sent a request for an opinion to the Commission. On 27 September 2011, the Commission provided its opinion. The Ombudsman received the complainant's observations thereon on 31 October 2011.

## **The Ombudsman's analysis and conclusions**

### **A. Alleged failure to provide convincing reasons for closing the infringement complaint and related claim**

#### **Arguments presented to the Ombudsman**

14. The complainant argued that its infringement complaint revealed a systematic circumvention of EU public procurement law in Greece. In particular, it stated that the contracting authorities in Greece systematically: (a) exclude economic operators registered in particular classes of the Greek Constructors Register, despite the fact that they have the experience required to participate in the procedures and execute the contracts; (b) extend the



timeframe for the execution of the main works, thereby enabling the bidders to offer unreasonably low prices; (c) award supplementary contracts to the contractors who were awarded the main works contracts in a non-transparent manner.

**15.** The complainant considered that the explanations provided by the Greek authorities were unsatisfactory and that the Commission's reluctance further to investigate the matter was mainly due to the fact that its allegations required a thorough examination of technical facts, which the competent services of the Commission had no intention of carrying out.

**16.** In its opinion, the Commission stated that it thoroughly and diligently investigated the complaint and provided the complainant with adequate and sufficient reasons for its decision to close the infringement procedure. In particular, the Commission addressed two letters to, and held a meeting with, the Greek authorities in relation to the complainant's allegations. On the basis of all the information provided during this investigation, the Commission reached the preliminary conclusion that it was not appropriate to pursue the case. Its conclusion was based on two lines of argument: First and foremost, it became apparent that the contracts in question had been fully executed, which, according to the established case law of the Court, obliges the Commission to end the related infringement procedure. Second, the Commission considered that the Greek authorities provided a detailed and plausible analysis that explained why the contracting authority required a high level of professional qualifications for candidates to execute the tender and why it was important and feasible to execute the relevant works within six months.

**17.** The Commission considered that, in its pre-closure letter, it informed the complainant in a clear and comprehensive manner of the reasons leading to its decision to close the case. With a view to providing further information to the complainant, it also annexed to its pre-closure letter the explanations and studies provided by the Greek authorities.

**18.** The Commission added that the complainant did not provide any new information in its 7 October 2011 letter, which could lead the Commission to revise its conclusion. As for any reference to a horizontal violation of the public procurement rules, other than making general allegations concerning similar practices in other procedures, the complainant did not provide any substantiated information which could have allowed the Commission further to investigate these allegations. In any case, the complainant was informed that, should it decide to follow them up, it could submit a new complaint identifying the particular tender procedures in which the Greek authorities have allegedly violated EU public procurement law.

**19.** In its observations, the complainant argued that the Commission breached its duty to state grounds for its decision pursuant to Article 18 of the Code of Good Administrative Behaviour. The breach derived from the fact that the Commission failed to address the complainant's argument that the tenders in question were "*coincidentally*" assigned to the same constructing companies that had executed the main construction of the motorway. It further noted that, in its letter dated 7 October 2010, it referred to specific tender procedures in which the Greek authorities followed similar practices to those put forward in its complaint. In the complainant's view, the Commission, acting in its role as the EU watchdog, is competent to examine any



information that could lead to an infringement procedure, even if the complainant failed to lodge a separate complaint alleging horizontal violations.

## The Ombudsman's assessment

20. The Ombudsman's investigation on infringement cases does not imply a review of the question as to whether national legislation, decisions or practices may be contrary to EU law and it is not intended to provide a final interpretation of the substantive legal issues at stake [2] . The Ombudsman thus clarifies that he will not seek to determine whether the Greek contracting authorities have acted or systematically act in breach of EU public procurement law. The scope of the Ombudsman's mandate in such complaints is limited to examining whether the Commission acted with diligence in its examination of the infringement complaint submitted to it. Therefore, he will only examine whether the level of care which the Commission exercised when responding to the infringement complaint was appropriate. In particular, he will focus on whether, in determining its position on the complaint at hand, the Commission provided the complainant with adequate, clear and intelligible explanations.

21. In this regard, the Ombudsman underlines that the importance of providing reasons for administrative decisions is recognised throughout EU administrative law. In the context of the Commission's decisions on infringement complaints, the duty to state reasons must be recognised as serving two important objectives. First, providing reasons promotes the degree of transparency which citizens increasingly expect from the Union's institutions. Second, from the Commission's own perspective, the duty to give reasons helps ensure that the rationale for the action has been thought through and that it can be explained and defended [3] . The Ombudsman has further recognised that complainants have the right to be informed of the reasons that led the Commission to close an infringement procedure [4] . Those reasons must not only be correct, but they must also be clearly explained and unequivocal.

22. In the present case, it transpires from the Commission's pre-closure letter, as well as from its reply to the Ombudsman's inquiry, that its decision not to pursue further the infringement proceedings that it had initiated in response to the complainant's infringement complaint was based on three grounds: (a) the fact that any further action would be devoid of purpose, since the works in question had already been performed; (b) the explanations provided by the Greek authorities during the meeting held in Athens and further elaborated in their letter dated 30 July 2010; and (c) the general and unsubstantiated nature of the allegations regarding a systematic violation of EU public procurement law by Greek contracting authorities.

23. Regarding the first ground, the Court of the European Union has constantly held that "*an action for failure to fulfil obligations is inadmissible if, when the period prescribed in the reasoned opinion expired, the contract in question had already been completely performed*" [5] . It is clear from the case file that the construction works in question were completed between April and May 2009 and that the relevant parts of the motorway were delivered for public use between 7 April and 7 July 2009, almost at the same time the infringement complaint was submitted and, in any event, long before the Commission sent a formal letter to the Greek



authorities in this regard. In addition, the complainant did not produce any evidence that could support the view that the contracts at issue had not run their full course. The alleged infringement had, therefore, produced all its legal effects by the time the Commission sent its formal notice. The Ombudsman considers, therefore, that, in light of the relevant case law, the Commission's position that any further step regarding the infringement proceedings at issue would be devoid of purpose is correct.

**24.** The Ombudsman notes, nevertheless, that in its pre-closure letter to the complainant, the Commission did not explain in a clear and unequivocal manner the above-mentioned case-law and its consequences for the outcome of the infringement proceedings. It merely stated that, at the time when it addressed the first informal letter, the works had already been completed. Such a statement was not sufficient to enable the complainant to understand the reasons underpinning the Commission's decision. However, despite its initial failure, the Commission clarified its position during the course of the Ombudsman's inquiry. In fact, in its opinion to the Ombudsman, it provided additional explanations, which were thoroughly reasoned. The Ombudsman is, therefore, satisfied with the quality of the explanations which the Commission provided the complainant with in this respect.

**25.** Regarding the second ground, the Ombudsman notes that, although solely invoking the first ground would have provided sufficient justification for its decision, the Commission provided the complainant with further information regarding the substance of its allegations. It thus showed its willingness to convey its position and its reasons to the complainant in the best possible manner. The Commission explained the reasons it considered the Greek authorities' reply satisfactory and provided the complainant with the explanations provided by the Greek authorities during the meeting of 9 July 2010 and in their letter dated 30 July 2010. It also invited the complainant to submit its comments before closing the case, in line with Point 10(1) of the 2002 Communication [6] .

**26.** Regarding the complainant's allegations of horizontal violations of EU public procurement law, the Commission decided not to pursue the matter on the grounds that the complainant did not provide any substantiated information which could have allowed it further to investigate these allegations. The Ombudsman shares the Commission's view that the complainant's allegations were general and were not supported by evidence. Although the complainant expressed its grievances about systematic breaches of EU law on public procurement, it only referred to several tender procedures by way of example, without providing any further information and without specifying the alleged irregularities relating to those procedures. In the Ombudsman's view, the Commission's decision not to pursue the matter further seems to be reasonable.

**27.** In light of the above, the Ombudsman considers that the Commission provided a correct and adequate explanation for its decision not to pursue further the infringement procedure in question. He therefore concludes that there are no grounds for him to conduct further inquiries into this complaint.



## B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**No further inquiries are justified.**

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 17 July 2012

[1] Constructors based in Member States of the EU, the EEA or the WTO Government Procurement Agreement should be registered in an equivalent class in those Member States which maintain a Register or, in the absence thereof, are able to prove that they possess equivalent experience in works that are qualitatively and quantitatively similar.

[2] Decision of the European Ombudsman closing his inquiry into complaint 2410/2009/(CH)KM against the European Commission; Decision of the European Ombudsman closing his inquiry into complaint 2711/2009/PB against the European Commission; Decision of the European Ombudsman closing his inquiry into complaint 1827/2009/(ANA)CK against the European Commission.

[3] Decision of the European Ombudsman closing his inquiry into complaint 1827/2009/(ANA)CK against the European Commission, paragraphs 19-22.

[4] Decision of the European Ombudsman closing his inquiry into complaint 1528/2006/(GG)(WP)VL, paragraph 120.

[5] Case C 362/90 *Commission v Italy* [1992] ECR I-2353, paragraphs 11 and 13, Case C 394/02 *Commission v Greece* [2005] ECR I-4713, paragraph 18, Case C-237/05 *Commission v Greece* [2007] ECR I-8203, paragraph 29, and Case C-199/07 *Commission v Greece* [2009] ECR I-10669, paragraph 26.

[6] Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community Law, OJ 2002 C 244, p. 5.