European Ombudsman

Decision of the European Ombudsman on complaint 353/99/ME against the European Commission

Decision
Case 353/99/ME - **Opened on** 22/04/1999 - **Decision on** 26/10/2000

Strasbourg, 26 October 2000 Dear Mr E., On 28 September 1998, you made a complaint to the European Ombudsman concerning the European Commission's treatment of two competition cases where the Swedish company Scancem had been subject to investigations (complaint No 1032/98/IJH). On 12 October 1998, I informed you that I was not entitled to deal with your complaint because you had not made any administrative approaches to the Commission as required by Article 2.4 of the Statute of the European Ombudsman. On 25 March 1999, you renewed your complaint to the Ombudsman stating that you had now made administrative approaches to the Commission. On 22 April 1999, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 15 June 1999. I forwarded it to you with an invitation to make observations, which you sent on 23 August 1999. On 20 October 1999, you sent additional observations. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

The complainant, working as a lawyer at the Swedish company Scancem being the object of two competition cases pending before the European Commission DG Competition, complained on a private basis to the European Ombudsman in March 1999, alleging unfair and irregular handling of the cases by the Commission. In his complaint, the complainant made the following allegations: (i) The Commission had on several occasions requested the same information three or four times (in one case eight times); (ii) The Commission requested irrelevant information; (iii) The Commission requested information that was very difficult for the company to supply because it concerned detailed information about other Swedish companies; (iv) The Commission requested a very large amount of information to be presented to the Commission in only a few days time; (v) The way, in which an investigation in accordance with Article 14 of the Regulation 17/62 was performed in Scancem's offices on 23 April 1998, was unacceptable.

THE INQUIRY

The Commission's opinion In its opinion, the Commission explained that in 1995 the ownership of Scancem changed and the companies Skanska and Aker each acquired 33.3 percent of the shares in Scancem. In 1997, Aker increased its shareholdings to 41.2 percent in Scancem while Skanska increased its shareholdings to 48.06 percent of the votes in Scancem. The Commission learned about both transactions through the press and contacted the parties.

The Commission was of the opinion that there were indications that the transactions constituted joint control and sole control respectively. However, the companies maintained that the transactions were not notifiable to the Commission in accordance with Regulation 4064/89 on the control of concentrations between undertakings (1) . According to the Commission the investigation was complicated by the fact that the companies, at least initially, did not co-operate with the Commission. In relation to the allegations put forward by the complainant the Commission in summary stated the following: (i) The Commission was investigating two cases. It follows from Article 17 (1) of Regulation 4064/89 on the control of concentrations between undertakings that the Commission could not use the information collected for the first investigation for the purpose of the second investigation. It is for the protection of undertakings that information may only be used for the purpose for which it was obtained. The occasion in which the information was requested eight times related to information requested from three different companies. In order to obtain a complete picture of the facts, the Commission stated that it is normal practice to ask each of the undertakings involved in the case. (ii) The information requested and the question asked by the Commission, which the complainant found to be irrelevant, refers to a document found by the Commission during its "dawn raid". The question was one of 50 asked by the Commission in order to clarify documents that could shed light on the accusation of joint control in 1995 and sole control in 1997. The Commission considered the question to be indeed relevant. (iii) The information requested about other companies in Sweden was also based on a document found during the "dawn raid". According to a working order, the Board of Scancem had to approve any investment over 50 MSEK. The Commission found this to be relatively low, thus conferring significant influence over Scancem's operation on Skanska and Aker (who shared the majority of the number of Board representatives). Therefore, the Commission requested information as to whether such an investment level could be considered normal for other comparable companies in Sweden. (iv) The Commission notes that the information in question concerned correspondence between the Commission and Skanska. It was not clear to the Commission why the complainant made allegations relating to these documents since in principle, the information requested from Skanska should be of no concern to the complainant. (v) The Commission stated that the investigation was carried out in accordance with Article 13 (3) of Regulation 4064/89 on the control of concentrations between undertakings. According to the Commission, the representatives of the local enforcement district (Lokala kronofogdemyndigheten) took the lead in the process of entering said offices, thus acting in accordance with Swedish law. **The complainants' observations** In his observations, the complainant maintained his complaint. As regards the first allegation, the complainant stated that if the Commission had acted with more co-ordination, structure and professionalism far less requests for information would have been needed. For the second allegation, the complainant wanted further clarification from the Commission as to why it had found two specific questions relevant. As regards the third allegation concerning information about other Swedish companies, the complainant stated that the Commission itself should be able to establish answers to this general, sensible and tendentious question. Regarding the fifth allegation concerning the dawn raid, the complainant stated that the investigators entered a private building in a way that was clearly a punishable offence under Swedish law. Further, the complainant requested an explanation from the Commission as to whether the Commission's own officials did not have any responsibility for their actions during the dawn raid since the Commission stated that "the local enforcement

district (Lokala kronofogdemyndigheten) took the lead in the process of entering said offices". Further, the complainant put forward a new allegation concerning the complaint that he submitted to the Commission before the Ombudsman initiated an inquiry, claiming that the Commission dropped the complaint without informing him. As regards this allegation, the Ombudsman in the light of the present inquiry, does not find sufficient grounds to conduct an inquiry into this point. In additional observations sent by the complainant to the Ombudsman, the complainant stated that during the Commission's investigation, some documents on the complainant's desk were sealed in his office since it could not be decided whether these should be classified as "Privileged Legal Advice" or not. After the final decision of the Commission, the complainant had written twice to the Commission asking it to unseal the cabinet. This had been denied by the Commission who stated that it should remain sealed until the Commission had received satisfactory advice of Skanska's compliance with its commitments. The complainant claimed that this behaviour by the Commission constituted an instance of maladministration. As this allegation was not part of the original complaint, the Ombudsman did not find it appropriate to inquire into this point within the scope of the present inquiry. Of course nothing prevents the complainant from lodging a new complaint on this matter, if he so wishes.

THE DECISION

1 Repeated requests for information 1.1 The complainant alleged that the Commission had requested the same information three or four times and on one occasion even eight times. 1.2 The Commission replied that it was investigating two cases and that it could not, according to Article 17 (1) of Regulation 4064/89 on the control of concentrations between undertakings and for reasons of protection of undertakings, use the information collected for the first investigation for the purpose of the second. As regards the occasion on which it requested the same information eight times the Commission was requesting information from three different companies. 1.3 The Ombudsman notes that according to Article 17 (1) of Regulation 4064/89 on the control of concentrations between undertakings (2) , the collected information is to be used only for the purposes of the relevant investigation (3) . The Commission explained that this provision is for the protection of undertakings. The Ombudsman finds that the complainant has not put forward sufficient evidence to the effect that the Commission did, on one or more occasions, without a justified reason, request the same information several times. Further, the Commission has given a reasonable explanation for its practices. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **2 Request for irrelevant information** 2.1 The complainant alleged that the Commission requested irrelevant information. 2.2 The Commission explained that the information requested related to a document found in Scancem's premises and that it found the information to be relevant. The question was one of many asked in order to shed light on the accusations against the company. 2.3 It appears from the complaint and the complainant's observations, that there were two questions included in the Commission's request for information of 6 August 1998, which the complainant found either irrelevant or too broad and general. The first question related to a letter from the complainant sent to the company Aker, which was also subsequently under investigation. Both Scancem and Aker had been requested by the Commission to supply certain information and the letter concerned this information request and possible approach to it by the companies involved. The Commission asked Scancem to explain the concern expressed in the letter. The second question concerned a request for a list of all companies with which

Scancem had had discussions concerning structural transactions. Scancem was asked to supply several details in relation to each such contact. 2.4 As is common in the case of Community competition policy (4) , the Commission is given broad powers to facilitate investigation of mergers. In Regulation 4064/89 on the control of concentrations between undertakings, article 11 enables the Commission to request information and article 13 gives it the power to conduct on-site investigations. Moreover, article 14 gives the Commission the possibility to impose fines. Article 11 (1) states that the Commission may obtain all necessary information from undertakings (5) . As regards the requested information, it is for the Commission to decide whether particular information is necessary to enable it to bring to light an infringement of the competition rules (6) . In the present case, it does not appear that the Commission exceeded its powers in any way by requesting the said information. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **3 Request for information concerning other Swedish companies** 3.1 The complainant alleged that the Commission requested detailed information about other Swedish companies, which was very difficult for Scancem to supply. In his observations, the complainant further stated that the Commission itself should establish the answers to this general, sensible and tendentious question. 3.2 The Commission stated that this request was based on a working order according to which, the Board of Scancem had to approve any investment over 50 MSEK. Since the Commission found this to be relatively low, thus conferring significant influence over Scancem's operation on Skanska and Aker (who shared the majority of the number of Board representatives), it requested information as to whether such an investment level was normal for comparable companies in Sweden. 3.3 On the basis of the provisions and case-law mentioned in point 2.4 above, the Ombudsman does not consider that the Commission exceeded its powers by requesting the said information. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **4 A large amount of information to be presented in only a few days time** 4.1 The complainant claimed that the Commission requested a very large amount of information from his company to be presented to the Commission in only a few days time. 4.2 The Commission replied that the information in question concerned correspondence between the Commission and Skanska, thus not with the complainant's company. Therefore, the Commission considered that in principle, this information request should be of no concern to the complainant. 4.3 In its opinion, the Commission did not reply to the allegation that it requested a large amount of information to be submitted in a few days time. The Commission stated that this request had not been directed towards the complainant's company and it was therefore of no concern to the complainant. The Ombudsman would like to point out that, there is no requirements in the Treaty establishing the European Community (7) or in the Statute of the European Ombudsman (8) stating that a complainant has to have a direct interest in order to be entitled to lodge a complaint with the Ombudsman. Moreover, it is not for the Commission to decide what allegations are of concern to the complainant. In the present case, the Commission was asked to comment on a specific allegation. The Ombudsman notes that the Commission was given the possibility to put forward its views in relation to this specific allegation. The Ombudsman can therefore now deal with it in substance on the basis of the information already supplied to him. 4.4 Article 18 of Regulation 4064/89 on the control of concentrations between undertakings states that, before taking any decision provided for in Article 8 (2) second subparagraph (which appeared to be the Article the decision in the present case was based on), the Commission

shall give the undertakings concerned the opportunity, at every stage of the procedure, of making known their views on the objections against them. Under any circumstances, it is settled case law that observance of the right to be heard constitutes a fundamental principal of Community Law and must be observed prior to a decision likely to have an adverse effect on the undertaking concerned (9) . The right to be heard also implies that the undertaking concerned must be given sufficient time to put forward its views or comments or its right would be deprived. The Court of First Instance has ruled that two days constituted sufficient time for the applicant to present his comments (10) . However, it shall be noted that in that case the applicant was not subject to the Commission's investigations but was a third party under Regulation 4064/89. Following the judgement, third parties cannot be equated with interested persons. 4.5 In the present case, it appears that the proceedings pursuant to Article 6 (1) (c) of the Regulation 4064/89 were initiated on 14 July 1998. Thus following Article 10 (2) and (3) of Regulation 4064/89, the Commission had to make a decision within four months from that date. On 23 July 1998, the Commission put a questionnaire to Skanska to which Skanska replied on 24 August 1998. On 15 September 1998, Scancem received through Skanska's lawyers a draft statement of objections, a document over 40 pages and on 17 September 1998, the Commission issued an additional information request with more than 70 questions and required a reply by 25 September 1998. The Ombudsman notes that Regulation 4064/89 is characterised by urgency and the observation of strict time limits. Moreover, the complainant has not claimed that the time limit set by the Commission had any negative effect on the final decision. Considering all circumstances in the case, the Ombudsman does not find that the time limit given by the Commission could be seen as unreasonable or in breach of the right to be heard. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case. **5 The investigation carried out by the Commission** 5.1 The complainant alleged that the way in which the investigation at the premises of the complainant's company was performed was unacceptable. 5.2 The Commission stated that the investigation was carried out in accordance with Article 13 (3) of Regulation 4064/89 on the control of concentrations between undertakings. Further, the representatives of the local enforcement district (Lokala kronofogdemyndigheten) took the lead in the process of entering said offices, thus acting in accordance with Swedish law. 5.3 As regards the behaviour of the officials during the audit, principles of good administration require that public officials should avoid inappropriate and offensive behaviour. Although the complainant claims that the investigation was performed in an unacceptable way, for reasons of lack of sufficient evidence, it is not possible to assess the allegation further. The Ombudsman will therefore not inquire further as regards this aspect of the complaint. **6 Conclusion** On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case. The President of the European Commission will also be informed of this decision. Yours sincerely Jacob SÖDERMAN

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings; OJ [1989] L 395/1, amended by Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings; OJ [1997] L 180/1.

(2) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings; OJ [1989] L 395/1, amended by Council Regulation (EC)

No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings; OJ [1997] L 180/1.

(3) Article 17 (1) reads: *"1. Information acquired as a result of the application of Articles 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.".*

(4) See EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty; OJ [1962] 13/204.

(5) Article 11(1) reads: *"1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States, from the persons referred to in Article 3 (1) (b), and from undertakings and associations of undertakings."*

(6) C-155/79, *AM & S Europe Limited v. Commission* , ECR [1982] 1575, paragraph 17 and C-374/87, *Orkem v. Commission* , ECR [1989] 3283, paragraph 15.

(7) See article 195 thereof.

(8) Decision No. 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ [1994] L 113/15).

(9) See e.g.: C-85/76, *Hoffmann-La Roche v. Commission* , ECR [1979] 461, paragraphs 9-11, C-234/84, *Belgium v. Commission* , ECR [1986] 2263, paragraph 27, C-40/85, *Belgium v. Commission* , ECR [1986] 2321, paragraph 28, C-48/90 and C-66/90, *Netherlands and others v. Commission* , ECR [1992] I-565, paragraph 44 C-135/92, *Fiskano v. Commission* , ECR [1994] I-2885, paragraph 39 and C-32/95 P, *Commission v. Lisrestal and others* , ECR [1996] I-5373, paragraph 21.

(10) T-290/94, *Kaysersberg SA v. Commission* , ECR [1997] II-2137.