

How the 'artificial graphite; colloidal or semi-colloidal graphite' sub-sector was assessed in the context of the European Commission's revision of the 'State Aid Guidelines' for the EU's Emissions Trading Scheme

Decision

Case 1006/2021/SF - **Opened on** 21/07/2021 - **Decision on** 15/07/2022 - **Institution concerned** European Commission (Dealt with by a Court) |

Dear Mr X,

In May 2021, you submitted a complaint on behalf of the European Carbon and Graphite Association asbl ('ECGA') to the European Ombudsman against the European Commission. Your complaint concerned the Commission's procedure for revising the EU Emission Trading Scheme State aid Guidelines ('ETS Guidelines'), which no longer include the 'Artificial graphite; colloidal or semi-colloidal graphite' sub-sector.

The Ombudsman opened an inquiry into the lack of transparency of the revision process of the ETS Guidelines and into the steps the Commission took to allow for a meaningful participation of the public and the stakeholders concerned. In this context, she noted that her role as Ombudsman is not to question the Commission's policy choices or to evaluate scientific studies. Rather, the Ombudsman can inquire only into the administrative activities of EU institutions. She can look at the procedural aspects of the revision of the guidelines and whether and how the Commission considered the data submitted by the stakeholders during the public consultation.

In September 2021, we informed you that there were two actions for annulment pending before the General Court in relation to Annex I to the Communication from the Commission - Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021. [1]

As it is our practice to discontinue an inquiry if other bodies better placed to look into the matter are doing so, we asked you for your comments on our intention to discontinue our inquiry into your complaint. [2] In October 2021, you requested that the Ombudsman continue her inquiry. You argued that the General Court will likely dismiss the two actions as inadmissible. Further, you contended that the parties and issues before the court are not the same as in your complaint. In particular, you claimed that the concerns raised by your specific sub-sector in your complaint to the Ombudsman are not before the Court.



When the General Court dismissed the two actions for annulment as inadmissible in November 2021, the Ombudsman continued her inquiry and asked the Commission for its written reply to your complaint. In May 2022, the Commission sent its written reply. In it, it informed us that the General Court's orders to dismiss the actions as inadmissible have been appealed to the European Court of Justice. [3] As before, taking into consideration Article 228 TFEU and Articles 1(5) and 2(9) of the Ombudsman's Statute, we asked for your comments on our intention to terminate the inquiry.

In June 2022, you replied and requested again the Ombudsman continue her inquiry into your complaint. You pointed out that the European Court of Justice will likely confirm the inadmissibility of the two actions for annulment. You argued that neither the issues nor the parties of your complaint are identical with the court cases. [4] In this context, you contend that your sub-sector has been "*uniquely ill-treated*" by the Commission and that your situation is unique and particular and has not been raised before the Court. You point out that the actions before the Court are limited to the treatment of the applicants' specific sectors and that they do not address the unique situation of the **sub** sectors. Further, you consider that the Commission's methodology used to distinguish between the sectors and subsectors has not been brought before the Court and that the criterion used leads to discrimination of subsectors, which have already transitioned to carbon neutrality based on an arbitrary and irrelevant criterion.

After a careful analysis of all the information submitted to us, I am sorry to have to tell you that the Ombudsman cannot continue her inquiry into your complaint.

In accordance with Article 228 TFEU and Articles 1(5) and 2(9) of the Ombudsman's statute, the Ombudsman may not examine complaints where the alleged facts are or have been the subject of legal proceedings. In this regard, we note that the two actions for annulment against Annex I to the Commission's ETS Guidelines are based, in part, on the same grounds. While the two actions ask for annulment to Annex I to the extent that their sectors are concerned, the pleas before the Court concern, *inter alia*, the lack of transparency in the revision process and the Commission's alleged disregard of the data provided during the public consultation. In particular, the applicants argue that the Commission failed to take into account and examine all relevant data and evidence provided without stating reasons. Further, they argue that the Commission failed to disclose the data used in its calculations and failed to provide explanations substantiating its assessment. Both applicants also argue that adopting a pre-selected list with eligible (sub)sectors violates the principle of proportionality. While the Court cases do not explicitly claim that the methodology used is discriminatory, both court cases raise the issue of fuel and electricity exchangeability.

Thus, we consider that the issues of this inquiry, namely the lack of transparency and how the Commission considered data provided during the public consultation, are before the Court. There are therefore no grounds for the Ombudsman to continue with her inquiry at this point. [5]

I have therefore closed the case.



I appreciate this may not be your desired outcome but I hope you find these explanations useful. Thank you for having contacted the European Ombudsman.

Yours sincerely,

Rosita Hickey

Director of Inquiries

Strasbourg, 15/07/2022

[1] Cases T-726/20 *Grupa Axoty and Others v Commission* and T-741/20: <https://curia.europa.eu/juris/liste.jsf?num=T-726/20&language=en> [Link], *Advansa manufacturing and Others v Commission*: <https://curia.europa.eu/juris/liste.jsf?num=T-741/20&language=en> [Link]

[2] Article 228 TFEU: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> [Link] and Articles 1(5) and 2(9) of the Ombudsman's Statute: <https://www.ombudsman.europa.eu/en/legal-basis/statute/en> [Link]

[3] Cases C-73/22 P, *Grupa Azoty and Others v Commission*: <https://curia.europa.eu/juris/liste.jsf?num=C-73/22&language=en> , C-77/22 P, *Advansa Manufacturing and Others v Commission and Dralon*: <https://curia.europa.eu/juris/liste.jsf?num=C-77/22&language=en>

[4] In this context, you refer to cases 3486/2006/RT, 1289/2008/MHZ, 515/2004/JMA and 2006/2017/CEC.

[5] Full information on the procedure and rights pertaining to complaints can be found at <https://www.ombudsman.europa.eu/en/document/70707> [Link]