

Decision on how the European Commission assessed an infringement complaint alleging breaches of EU procurement procedures by a Swedish state-owned energy company (case 1221/2022/NH)

Decision

Case 1221/2022/NH - Opened on 19/09/2022 - Decision on 19/09/2022 - Institution concerned European Commission (No maladministration found) |

Dear Sir or Madam,

You made a complaint to the European Ombudsman against the European Commission concerning the above issue.

In your infringement complaint to the Commission, you argued that Sweden, Netherlands and Germany violated EU public procurement rules, in particular by allowing a Swedish state-owned company to systematically give preferential treatment to another company. You also said that Sweden and the Netherlands had violated the rights of whistleblowers who reported the alleged violations of EU law.

In your complaint to the Ombudsman, you argue that the Commission was wrong to close your infringement complaint, both on procedural grounds and due to the substance of the case.

As regards procedural aspects, you argue that the Commission took too long (six months) to respond to your complaint, only to inform you that it intended to close it. After your meeting with Commission representatives, the Commission took an additional ten months to take its final decision. You say that the Commission asked you to submit additional evidence that was often difficult to obtain, when it should have carried out an investigation on its own.

On the substance, you argue that the Commission was wrong to conclude that effective judicial protection exists at national level, which was part of the reasoning it gave for not launching an infringement procedure based on your complaint. You insist that there is no effective judicial protection at national level, as evidenced by the opinions of independent experts and academics mentioned throughout your exchanges with the Commission. In your opinion, the Commission has ignored your arguments concerning this matter. You also argue that the Commission failed to explain to you how it took into account the evidence you submitted with your complaint.



After careful analysis of all the information submitted to us, we have decided to close our inquiry with the following conclusion [1] :

There was no maladministration by the Commission in this case.

I will explain the reasoning behind our decision in the next paragraphs.

Regarding procedural aspects

The Commission follows specific guidelines for handling infringement complaints and its relations with complainants. Those are set out in the Commission's Communication *EU law, better results through better application* . [2] The guidelines explain clearly that the Commission may ask complainants for any additional evidence if necessary. The purpose of the procedure for infringement complaints, as set out in the document, is to enable citizens to contact the Commission about any measure, absence of measure or practice by an EU Member State that they believe is at odds with EU law. It is not a "whistleblower mechanism" in the way that you understand it in a national context.

The guidelines also state that: "*As a general rule, the Commission will investigate complaints (...) within not more than 1 year from the date of registration of the complaint, provided that all required information has been submitted by the complainant .*" We note that, in your case, the Commission sent its pre-closure letter within six months of having received your complaint. The Commission then invited you to a meeting in order to obtain additional information on your case. As a follow up to that meeting, you were asked to provide additional information. The Commission subsequently closed your case within ten months of having received the information. We believe that the Commission acted within reasonable timeframes in this case, the only exception being the postponement of your meeting due to the COVID-19 pandemic, which was unfortunate but outside the Commission's control.

Regarding the substance

The Commission enjoys wide discretion in deciding whether and when to open an infringement procedure, as confirmed by EU case-law. [3] In this context, the Commission informed you that its objective is to open infringement procedures only into significant breaches of EU law that reveal a general, persistent and systematic non-compliance by a Member State. The Commission has sufficiently explained why it does not consider your infringement complaint to reveal general, persistent and systematic non-compliance.

When it comes to infringement complaints, the Ombudsman's role is limited. The Ombudsman may examine whether the Commission has clearly explained its position and whether it has given the complainant the opportunity to provide comments before it closes a case. Regarding the substance of an infringement complaint, the Ombudsman may only intervene in case there



is an indication that the Commission was manifestly wrong in its presentation of the facts or law.

After having examined the Commission's decision to close your infringement complaint, and the arguments you presented in your complaint to the Ombudsman, we do not find anything that could indicate that the Commission made a manifest error in its decision. The Commission decided to close the infringement complaint because it considered that it did not reveal a wider systemic breach of EU law. As explained above, the Commission has the discretion to take this view.

We note that the Commission gave you the opportunity to comment on its position before it closed the case. It also invited you to a meeting to discuss certain aspects of your case. We also consider that the Commission provided you with clear information as regards why it closed the infringement complaint.

You argue that the Commission wrongly referred you to existing national judicial redress mechanisms when, in your opinion, there are no such mechanisms in place, in particular in the Netherlands. However, there is nothing in your complaint that would show that you are prevented from going to court on the issues you raised.

I note that you argue that the Commission, when communicating with you, has not dealt with each argument that you have raised to it. The Commission is not obliged to engage with a complainant on every issue or argument raised on the alleged issue of non-compliance. Rather, it suffices that the Commission explains clearly why it has taken the position it has taken, which it has done in this case.

Therefore, we conclude that there was no maladministration in how the Commission dealt with your infringement complaint.

I understand that this may not be your desired outcome, but I hope that the above information will be helpful.

Yours sincerely,

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 19/09/2022

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

[2] Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN)
[Link]



[3] For example, see the judgment of the Court of 14 February 1989, *Starfruit v Commission* , 247/87 (<https://eurlex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61987CJ0247&from=EN> [Link]).