

Decision of the European Ombudsman on complaint 817/2003/GG against the European Commission

Decision

Case 817/2003/GG - Opened on 23/05/2003 - Decision on 10/10/2003

Strasbourg, 10 October 2003

Dear Mrs G.,

On 29 April 2003, you lodged, on behalf of Bürgerinitiative Brixlegg, a complaint against the European Commission concerning the latter's handling of complaint 2001/5073 (Montanwerke Brixlegg) that the complainant had lodged with the Commission on 22 October 2001.

On 23 May 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 11 July 2003. I forwarded it to you on 21 July 2003 with an invitation to make observations by 31 August 2003 at the latest.

No observations appear to have been received from you.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

The complainant, an Austrian citizens' association, is concerned about the pollution caused by Montanwerke Brixlegg AG, an Austrian company that manufactures copper products. It appears that the production is to a large extent based on scrap containing copper.

On 22 October 2001, the complainant wrote to the Commission in order to demand that infringement proceedings should be opened against Austria for failing to comply with its duties under Community law regarding the factory in Brixlegg. The letter (which was registered by the Commission under reference 2001/5073) listed in detail all the findings on which the request was based.

According to the complainant, measurements had shown that the limit value concerning copper in dust that was set by Austrian law at 2.5 kilogram per hectare and year had been exceeded in 2000 in and around Brixlegg by up to 75 %. Likewise the limit value for lead that had been set at 0.365 kilogram per hectare and year had been exceeded by up to 160 %. The limit value for



cadmium of 0.002 mg per hectare and day had been exceeded by up to 150 %.

The complainant further alleged that the measured air quality values had shown that the limit values set by national law concerning sulphur dioxide had been exceeded on 12 days in 1997 and twice in 2000. According to the complainant, the pollution by nitrogen dioxide, whilst complying with the relevant limit values, had gone beyond the level recommended by the Austrian Academy of Sciences. Likewise, the limit value recommended by the Austrian Academy of Sciences with regard to ozone had been exceeded on 73 days in 2000, the corresponding indicative value limits for the protection of the flora on 202 days and the target values set by national law for the protection of human health on 13 days.

The complainant further pointed out that in 1995, the soil in the Brixlegg area had been examined in order to ascertain the presence of heavy metals. The results had been classified according to three levels of pollution (I, II and III). Where level III was exceeded, damage to plants, animals or human beings was likely to occur. In 64.2 % of the upper grounds that were examined, level III was exceeded with regard to at least one heavy metal, including two out of ten playgrounds for children and two out of eight sports grounds. The corresponding figure for lower grounds was 43.8 %. According to the complainant, it had been clearly shown that the main reason for this pollution was to be found in emissions from Montanwerke Brixlegg.

The complainant further pointed out that in 1999, the government of Tyrol had initiated a constant supervision of two areas in Brixlegg, one of them an area used for agricultural purposes and the other an area used for forestry. According to the complainant, it had emerged that both areas were heavily contaminated by arsenic, lead, cadmium, copper, quicksilver and zinc. The Report on the State of Forests in 2001 of the competent authority of the government of Tyrol had concluded that the contamination in the Brixlegg area was still such that a constant control of foodstuffs harvested in this area was necessary.

According to the complainant, the study prepared in 1995 had shown high levels of heavy metals in foodstuffs (for example vegetables) and feeding stuffs (grass and maize) produced in the Brixlegg area. The examination launched in 1999 had also shown considerable levels of arsenic, lead and copper in feedings stuffs.

The complainant further submitted data and figures to show that the pollution affected human health.

In its complaint to the Commission, the complainant took the view that Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste (1) was applicable in the present case. According to this provision, Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. The complainant submitted that Austria had failed to take action to prevent the harm to the environment and to human health that was emanating from Montanwerke Brixlegg. In the complainant's view, the heavy metal emissions from the said company had continued for decades. In this context, the complainant referred to the judgement of the Court of Justice in the 'San Rocco' case. (2) There the Court



had held that the fact that a situation was not in conformity with Article 4 of the directive did not directly allow the conclusion that the Member State concerned had failed to comply with its duties under this directive. However, “if that situation persists and leads in particular to a serious deterioration in the environment over a protracted period without any action being taken by the competent authorities, it may be an indication that the Member States have exceeded the discretion conferred on them by that provision”. (3)

On 7 February 2003, the Commission’s services informed the complainant that on the basis of the information it had obtained from the Austrian authorities and the company concerned, it did not intend to start infringement proceedings since it considered that there was not sufficient evidence for an infringement. The letter informed the complainant that before deciding on the matter, the complainant could make further submissions within one month from the dispatch of the letter. The Commission further informed the complainant that it was free to submit a new complaint in the future.

According to the complainant, the Commission’s letter was received by it only on 24 February 2003. By fax sent on 4 March 2003, the complainant requested the Commission to give it until 30 April 2003 to make further submissions. The complainant argued that the period from 24 February 2003 until 7 March 2003 was too short to allow it to research and document the relevant facts. It added that in particular the forthcoming new Report on the State of Forests in Tyrol would only become available in the middle of April 2003.

On 13 March 2003, the Commission rejected the request for an extension of time and informed the complainant that it would shortly decide on complaint 2001/5073. The Commission pointed out that it did not grant such extensions in the absence of sufficient indications. It stressed again that the complainant was free to submit a new complaint in the future.

In its complaint to the Ombudsman, the complainant alleged that the period from 24 February until 7 March 2003 was so short that it was in effect impossible for it to provide a substantiated reply to the Commission. Given that the procedure had been pending for a year and a half, the complainant failed to understand why the short extension of time it had asked for could not be granted. The complainant also argued that it had submitted a valid reason for its request by mentioning the forthcoming report that it intended to use.

The complainant furthermore took the view that the appraisal by the Commission had been one-sided, following the opinion of the Austrian government and the submissions of the factory concerned without taking sufficient account of the arguments submitted by the complainant.

The complainant thus in effect made the following two allegations:

- (1) The Commission failed to grant the complainant sufficient time to react to its letter of 7 February 2003
- (2) The Commission’s appraisal set out in its letter of 7 February 2003 was one-sided and failed to take sufficient account of the complainant’s arguments



The complainant asked the Ombudsman to try and ensure that the Commission did not close the file before it had had the opportunity to make further submissions.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

(1) First allegation

The complainant was informed by letter of 7 February 2003 about the intention to propose to the Commission to close the complaint and invited to submit any new or more precise facts pointing to an infringement of Community law within one month. This invitation was supplemented by the information that the complainant could also address itself to the Commission after the expiry of this deadline in case it was of the opinion that Community law had been infringed. In response to the pre-closure letter, the complainant had requested by fax of 4 March 2003 an extension of time. By letter of 13 March 2003, the Commission's services informed the complainant that in the absence of sufficient reasons, an extension of the time-limit could not be granted, but repeated that it was possible for the complainant to put forward at any time new facts indicating an infringement of Community law in relation to the operation of the copper plant in Brixlegg.

After the Commission had decided to close the file 2001/5073 on 2 April 2003, the complainant had been informed accordingly by letter of 14 April 2003. Information on the possibility to address the Commission in case of new grounds was again provided.

The complaint was treated in accordance with the internal procedure established by the Commission and in line with the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law. (4)

(2) Second allegation

After having received the complaint, the Commission's services had scrutinised it before addressing a letter to the Austrian government, on 3 May 2002, requesting observations on the complaint. The response dated 18 July 2002 had been assessed by the competent services of the Commission. Pursuant to the outcome of this assessment, a proposal to close the case had been made as a consequence of finding that an infringement of Community law could not be identified. This result was neither one-sided nor based on superficial or insufficient appraisal of the facts.

A possible breach of Article 4 of Council Directive 75/442/EEC had been investigated, as well as possible infringements of the following other directives: Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (5) in conjunction with Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (6) , Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air (7) in conjunction with Directive 1999/30/EC, Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (8) in conjunction with Directive 1999/30/EC, and Council



Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants.
(9)

According to the available information, Community limit values concerning sulphur dioxide, nitrogen dioxide, lead and suspended particulates in air had been complied with.

National limit values concerning copper in dust according to the Austrian 'Regulation on air pollution detrimental to forests' had been exceeded according to the complainant at two of three measuring points. However, according to the information provided by the Austrian government, the aforementioned Regulation and thus the set national limit values did not apply to these measurement points. It should be added that there are no Community air limit values for copper and cadmium (also mentioned by the complainant) under Community law.

It appeared that several measures had been taken by the authorities during the last decade, which had led to a significant amelioration of the environmental effects of the plant. According to the information provided by the Austrian government, Montanwerke Brixlegg applied BAT ('Best Available Technique') technology in their relevant sector.

As regards the health concerns mentioned by the complainant, the information supplied by the latter was contested in the reply from the Austrian government, according to which the results of the relevant studies were either not clear, or suggested causes for the relevant diseases in this area other than the ones presumed by the complainant.

The Commission concluded by saying that it had thoroughly assessed the available information, concluding that there was no breach of Community law.

The complainant's observations

No observations were received from the complainant.

THE DECISION

1 Failure to grant sufficient time to react to pre-closure letter

1.1 The complainant, an Austrian citizens' association that is concerned about the pollution caused by Montanwerke Brixlegg AG, an Austrian company that manufactures copper products, wrote to the European Commission in order to demand that infringement proceedings should be opened against Austria for failing to comply with its duties under Community law (complaint 2001/5073). On 7 February 2003, the Commission's services informed the complainant that they intended to propose to the Commission to close the file but that before deciding on the matter, the complainant could make further submissions within one month from the dispatch of the letter. According to the complainant, the Commission's letter was received by it only on 24 February 2003. By fax sent on 4 March 2003, the complainant requested the Commission to give it until 30 April 2003 to make further submissions. This request was turned down by the Commission on 13 March 2003. The complainant alleges that the period from 24 February until 7 March 2003 was so short that it was in effect impossible for it to provide a substantiated reply to the Commission.



1.2 In its opinion, the Commission takes the view that the complaint was treated in accordance with the internal procedure established by the Commission and in line with the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law. (10) The Commission points out that the complainant's request for an extension of time was rejected in the absence of sufficient reasons and that the complainant was repeatedly informed that it could put forward, at any time, new facts indicating an infringement of Community law in relation to the operation of the copper plant in Brixlegg.

1.3 Point 10 of the above-mentioned Commission Communication provides that where a Commission department intends to propose that no further action be taken on a complaint, it will (unless there are exceptional circumstances requiring urgent measures), "give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within a period of four weeks". It is regrettable that in the present case the Commission's pre-closure letter dated 7 February 2003 appears to have reached the complainant only on 24 February 2003. The Ombudsman considers that the commitment the Commission has entered into in the said Communication to give the complainant the possibility to make comments before the Commission closes the case would not be respected if, for reasons beyond its own responsibility, the complainant is not in a position to submit these comments "within a period of four weeks". However, the Commission's reply to the complainant's request for an extension of time would appear to show that the Commission was ready to grant an extension of time if sufficient reasons for such an extension were put forward. The Ombudsman considers that the Commission's view that the complainant had not put forward sufficient reasons for its request is reasonable, particularly in view of the fact that the Commission repeatedly informed the complainant that it could put forward, at any time, new facts indicating an infringement of Community law in relation to the operation of the copper plant in Brixlegg. It should also be noted that the Commission closed the case on 2 April 2003, that is to say more than four weeks after the complainant received the Commission's pre-closure letter.

1.4 In these circumstances, there appears to be no maladministration on the part of the European Commission in so far as the first allegation is concerned.

2 Failure to carry out thorough appraisal

2.1 The complainant alleges that the Commission's appraisal set out in its letter of 7 February 2003 was one-sided and failed to take sufficient account of the complainant's arguments.

2.2 The Commission takes the view that it thoroughly assessed the available information, concluding that there was no breach of Community law. It notes that it did not only examine whether Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste had been complied with, but considered other relevant EU legislation as well. The Commission points out that according to the available information, Community limit values concerning sulphur dioxide, nitrogen dioxide, lead and suspended particulates in air were complied with and that there are no Community air limit values for copper and cadmium (also mentioned by the complainant) under Community law. It further observes that several measures appear to have been taken by the Austrian authorities during the last decade, which led to a significant amelioration of the



environmental effects of the plant. As regards the health concerns mentioned by the complainant, the information was contested in the reply from the Austrian government, according to which the results of the relevant studies were not clear or suggested other causes for the relevant diseases in this area than the ones presumed by the complainant.

2.3 Upon a careful examination of the evidence submitted to him, the Ombudsman considers that the Commission appears to have examined all the arguments put forward by the complainant and provided a detailed opinion thereon in its letter of 7 February 2003. The Ombudsman takes the view that the conclusions at which the Commission arrives appear to be reasonable. In these circumstances, the Ombudsman concludes that the complainant has not established its allegation according to which the Commission's appraisal was one-sided and failed to take sufficient account of the complainant's arguments.

2.4 In these circumstances, there appears to be no maladministration on the part of the European Commission in so far as the second allegation is concerned.

3 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,

P. Nikiforos DIAMANDOUROS

(1) OJ 1975 194, page 39, as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, page 32).

(2) Case C-365/97 *Commission v. Italy* [ECR] 1999, I-7773.

(3) Loc. cit., paragraph 68.

(4) COM(2002) 141 final, OJ 2002 C 244, page 5.

(5) OJ 1980 L 229, page 30.

(6) OJ 1999 L 163, page 41.

(7) OJ 1982 L 378, page 15.

(8) OJ 1985 L 87, page 1.

(9) OJ 1984 L 188, page 20.



(10) COM(2002) 141 final, OJ 2002 C 244, page 5.