

Decision of the European Ombudsman on complaint 353/2007/(BM)FOR against the European Commission

Decision

Case 353/2007/(BM)FOR - Opened on 13/04/2007 - Decision on 22/07/2008

Strasbourg, 22 July 2008

Dear Mr X,

On 31 January 2007, you submitted a complaint to the European Ombudsman against the European Commission alleging that the Commission failed to register your correspondence of 13 November 2006 as a "competition complaint". On 30 March 2007, you sent me additional information.

On 13 April 2007, I forwarded the complaint to the President of the Commission and requested it to provide me with its opinion in relation thereto by 31 July 2007.

On 30 July 2007, the Commission sent me its opinion in English. On 3 September 2007, the Commission sent me its opinion in Spanish, which I forwarded to you on 6 September 2007 with an invitation to make observations.

You sent me your observations in relation to the Commission's opinion on 10 September 2007.

On 11 October 2007 I informed you that, for reasons of internal organisation, the legal officer dealing with your case had been changed.

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

THE COMPLAINT

The relevant facts according to the complainant can be summarised as follows:

The complainant is a Spanish pharmacist. On 13 November 2006, he submitted a complaint to the Directorate-General for competition (DG COMP). His complaint to DG COMP concerned the alleged existence of an anti-competitive cartel in the Spanish pharmaceutical sector. Specifically, he alleged that the Spanish authorities, namely, the Spanish State, the Autonomous Community of Madrid and the Tribunal for the Protection of Competition, along



with the Official College of Pharmacists of Madrid and the General Council of Pharmacists of Spain, had violated several articles of the EC Treaty (including Articles 10 EC, 43 EC, 81 EC and 82 EC) as a result of not allowing pharmacists the right to open premises where they wished. He alleged that this had been achieved through Spanish legislation prohibiting the freedom of establishment. He stated that the Spanish pharmaceutical sector should be liberalised and that an infringement procedure should be opened against the Spanish authorities.

On 23 November 2006, DG COMP informed the complainant that Article 81 EC and Article 82 EC were addressed to private companies, rather than to Member States, and that, as a consequence, DG COMP had no power to act in relation to the allegations submitted to it by the complainant. Therefore, DG COMP decided not to register the letter as a "competition complaint".

The Commission informed the complainant that his complaint had been registered as a complaint in the Commission's internal market registry and that the Commission had recently started infringement proceedings against Spain under the internal market rules. In this respect, he was advised to contact the internal market directorate general of the Commission (DG MARKT) for more information. A specific contact person in DG MARKT was identified by DG COMP.

By letter of 27 November 2006, the complainant contested DG COMP's refusal to deal with his letter as a "competition complaint". On 8 December 2006, DG COMP confirmed its position and advised the complainant, once more, to turn to DG MARKT.

The Ombudsman understood the complainant to allege that the Commission failed to register his correspondence of 13 November 2006 as a "competition complaint". The Ombudsman understood the complainant to claim that his correspondence of 13 November 2006 should be registered and dealt with as a "competition complaint".

On 17 April 2007, the complainant sent additional information to the Ombudsman (namely, a letter from the Spanish Pharmaceutical Professional Association). On the same date, the Ombudsman forwarded the additional information to the Commission to allow it to take the information into account in its opinion.

THE INQUIRY

The Commission's opinion

The Commission's opinion can be summarised as follows:

By e-mails dated 23 November 2006 and 8 December 2006, the complainant was informed as to the reasons why the Commission had not registered his complaint as a formal "competition complaint". The Commission stated in those e-mails that the complainant's allegations did not give rise to any concerns within the meaning of Article 81 EC and Article 82 EC.



The Commission also stated that the internal market issues raised by the complainant had already been communicated to DG MARKT by the complainant himself. DG MARKT had informed the complainant, during a telephone call, that an infringement procedure was already open under Article 226 EC in relation to the Spanish legislation governing the activities of pharmacies. The infringement procedure related to compliance with Article 43 of the EC Treaty (1) .

The Commission also informed the complainant that the various communications between the complainant and DG MARKT had not been registered by the Secretariat-General of the Commission as a formal individual complaint. They were instead considered as part of the collective complaint number 2006/4712, which was based on Article 43 EC. A collective acknowledgment of receipt was published in the Official Journal of 9 September 2006, in accordance with the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of community law.

The complainant's observations

The observations of the complainant can be summarised as follows:

The complainant stated that DG COMP's refusal to register his complaint was not logical given that, in his view, the role of DG COMP is to combat cartels and to apply Article 81 EC and Article 82 EC.

THE DECISION

1 The allegation that the European Commission failed to deal properly with the letter dated 13 November 2006

1.1 The complainant alleges that the European Commission refused to register the complainant's letter of 13 November 2006 as a "competition complaint". The complainant's letter concerned the alleged existence of an anti-competitive cartel in the Spanish pharmaceutical sector. Specifically, he alleged that the Spanish authorities, namely, the Spanish State, the Autonomous Community of Madrid and the Tribunal for the Protection of Competition, along with the Official College of Pharmacists of Madrid and the General Council of Pharmacists of Spain, had violated several articles of the EC Treaty (including Articles 10 EC, 43 EC, 81 EC and 82 EC) as a result of not allowing pharmacists the right to open premises where they wished. This was achieved through legislation prohibiting the freedom of establishment. He stated that the Spanish pharmaceutical sector should be liberalised and that an infringement procedure should be opened against the Spanish authorities.

1.2 By e-mail of 23 November 2006, DG COMP informed the complainant that Article 81 EC only applied where private companies coordinated their behaviour in order to restrict free competition and that Article 82 EC only applied where private companies abused their dominant position. DG COMP clarified that Articles 81 and 82 EC were not applicable to national legislation regulating goods and service markets. In view of the fact that the complainant referred to the legislation regulating the pharmaceutical profession in Spain, the Commission was of the view that it had no power to apply Article 81 EC or Article 82 EC in that case. The



Commission therefore decided not to register the letter as a "competition complaint". He was instructed to contact a specific person (Ms L) within the Commission's internal market Directorate-General (DG MARKT) for more information concerning internal market issues.

1.3 In its opinion to the Ombudsman, the Commission explained that the internal market issues raised by the complainant in his letter to DG COMP had already been communicated to DG MARKT by him. The Commission also stressed that DG MARKT informed the complainant orally of the infringement procedure opened under Article 226 EC against the Spanish legislation on pharmacies and the fact the correspondence between the complainant and DG MARKT was not registered by the Secretariat-General of the Commission as a formal individual complaint. They were instead considered as part of collective complaint based on Article 43 EC (that is complaint number 2006/4712).

1.4 The Ombudsman first of all notes the arguments put forward in the complainant's letter to the Commission of 13 November 2006 concerning Spain's legislative choices relating to the regulation of the Spanish pharmaceutical market. The Ombudsman also observes that Articles 81 EC and Article 82 EC, as interpreted by the Community Courts, apply only to anti-competitive conduct engaged in by undertakings *on their own initiative* (2) . If *conduct is required of undertakings by national legislation* , or if *national legislation creates a legal framework which itself eliminates any possibility of competitive activity on their part* , Article 81 EC and Article 82 EC do not apply (3) .

1.5 Having carefully examined all the documents in the file, the Ombudsman is therefore of the view that the Commission has provided the complainant with a sufficient and coherent explanation as regards the reasons why it refused to register the complaint as a "competition complaint".

1.6 Given that the Commission did, however, consider the correspondence to constitute a "complaint in relation to the functioning of the internal market", it remains to be determined if the Commission was correct as regards the manner in which it dealt with that complaint.

1.7 The complainant was informed by DG COMP that the Commission had recently started infringement proceedings against Spain under the internal market provisions regarding the establishment of pharmacies. The complainant was advised to contact DG MARKT in order to get further information as regards the infringement proceedings against Spain. The name of a specific contact person in DG MARKT was provided to the complainant.

1.8 The Ombudsman underlines that principles of good administration, and specifically Article 15 of the European Code of Good Administrative Behaviour, require that, in case a letter or complaint is addressed to an institution's service which is not competent to deal with it, and another service within that same institution is competent to deal with it, the letter or complaint should be transferred without delay to the competent service within the institution.

1.9 DG COMP did not transfer the complainant's letter to DG MARKT, but rather asked the complainant to address himself to DG MARKT. The Ombudsman thus considers that the



Commission did not, strictly speaking, act in accordance with Article 15 of the European Code of Good Administrative Behaviour in the present case. However, the Ombudsman takes into account the fact that, in the present case, the complainant had specifically communicated to DG COMP his unwillingness for his complaint relating to an (alleged) infringement of Article 81 EC and Article 82 EC to be treated as anything other than a "competition complaint". In such circumstances, it was reasonable for the Commission to respond to the complainant informing him that he could, if he so wished, address his complaint to DG MARKT. The Ombudsman also notes that DG COMP facilitated this contact by providing the complainant with the name of a contact person in DG COMP.

1.10 In light of the above, the Ombudsman considers that no further inquiries are justified in relation to the complainant's allegation.

1.11 The Ombudsman underlines that the present inquiry only concerns the issue of how DG COMP acted in relation to the complainant's correspondence with it. The present inquiry does not concern how DG MARKT dealt with the separate correspondence the complainant had with DG MARKT.

2 The complainant's claim

2.1 The complainant claims that the Commission should register his correspondence as a "competition complaint" and deal with it as such.

2.2 In light of the Ombudsman's findings in Points 1.9 and 1.10 above, the Ombudsman considers that no further inquiries are justified into the complainant's claim.

3 Conclusion

In light of the above, the Ombudsman finds that no further inquiries are justified in relation to the complainant's allegation and claim. Therefore, the Ombudsman decides to close the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Article 43 EC relates to the prohibition on restrictions imposed by Member States on the freedom of establishment.

(2) See *Commission and France v. Ladbroke Racing*, Joined Cases C-359/95 P and C-379/95 P, [1997] ECR I-6265, at paragraphs 33 and 34.

(3) *Idem*.