European Ombudsman

# Decision of the European Ombudsman on complaint 1640/2007/GG against the European Commission

Decision
**Case** 1640/2007/GG - **Opened on** 05/07/2007 - **Decision on** 23/07/2008

Strasbourg, 23 July 2008
Dear Mrs B.,

On 12 June 2007, acting on behalf of B. (a company), you submitted a complaint to the European Ombudsman concerning the European Commission's handling of a competition complaint.

On 5 July 2007, I forwarded the complaint to the President of the Commission. You were informed accordingly the same day.

On 1 October 2007, you provided me with further information. I replied to your letter on 12 October 2007.

The Commission sent its opinion on 6 (English original) and 14 November 2007 (German translation). I forwarded it to you on 16 November 2007 with an invitation to make observations.

On 7 January 2008, you made a number of observations. You also informed me that you wished to await the Commission's reply to a question put to it by a Member of the European Parliament before making further observations. In my reply of 1 February 2008, I asked you to submit to me by 31 March 2008 any further observations you might wish to make.

On 28 February 2008, the Commission informed me that it was waiting for a reply from you on the issue of whether it should proceed to a final decision. The Commission added that you had been invited to provide this information by the end of February 2008.

On 26 March 2008, you informed me that the state of your health did not allow you to make further observations at the time. You added, however, that comments would be made shortly. In my reply of 7 April 2008, I expressed the hope that the health problems to which your letter had referred would soon cease. I also granted you until 31 May 2008 to make further observations.

On 10 April 2008, you submitted further observations.

On 17 April 2008, my Office rang the Commission in order to ascertain what stage the latter's inquiry had reached. On the occasion of this telephone conversation, the Commission pointed out that it had adopted its decision in this case and that a copy would be forwarded to me.

On 7 May 2008, the Commission provided further information and forwarded a copy of its decision of 15 April 2008 on your competition complaint to me.

On 20 May 2008, I drew your attention to this decision and invited you to make observations. You presented observations on 23 June 2008.

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

# THE COMPLAINT

*Background*

The complainant is a German company that used to be active in the commerce of selling bricks.

By a decision adopted on 29 April 1994 (1) (the "Decision"), the Commission granted, subject to several conditions and for a period of five years (1992-1997), an exemption under EU competition rules to an agreement between Dutch brick producers that was meant to reduce production capacities so as to balance the market.

In September 1999, the complainant lodged a complaint with the Commission's Directorate-General Competition ("DG Competition") in which it alleged that the relevant Dutch companies and their association had committed several serious infringements of EU competition rules. According to the complainant, it lost all its assets due to these infringements.

In this complaint, the complainant raised *inter alia* the following issues:
- Point 2 of the Decision was worded as follows (emphasis added): " *The products forming the subject of the agreement are clay construction bricks burnt in kilns,* excluding *more expensive* facing bricks *and engineering bricks. As a general rule, three types of brick can be distinguished on the demand side, namely common bricks, facing bricks and engineering bricks; common bricks are generally used in general building work, facing bricks are more expensive and are specially made or selected to give an attractive appearance to walls, and engineering bricks are more resistant and durable. They can, however, to a very large degree be substituted for one another on the supply side, and the general market for bricks is therefore taken to be the relevant market.* " According to the complainant, however, the agreement had been applied to facing bricks.
- Point 2 of the Decision was worded as follows: " *However, application of the agreement should not give rise to exchanges of information which could lead to concerted practices prohibited by Article 85 of the Treaty; it is therefore necessary to require the undertakings being parties to the agreement to refrain from divulging to the other parties individual data on each party's output and deliveries of bricks, either direct[ly] between themselves or between some of them, or through a fiduciary body or third party.* " The complainant submitted that the undertakings being parties to the agreement exempted by the Commission had engaged in a far-reaching

exchange of information.
- Even though the agreement exempted by the Commission had allegedly served the purpose of reducing production capacity, further production capacity had been created at a site in Belgium that was close to the Dutch border. The complainant added that furthermore, and during the exemption period, new production capacity had been created in the Netherlands in 1996/1997.

*Complaint 227/2001/GG*

In a complaint submitted to the Ombudsman in February 2001 (complaint 227/2001/GG), the complainant alleged that the Commission had failed to deal with its complaint within a reasonable period of time. The Ombudsman opened an inquiry, which was closed with a finding of no maladministration in June 2001, on the ground that the Commission had been able to show that it was actively dealing with the case.

*Further correspondence between the Commission and the complainant*

On 24 April 2003, the Commission addressed a detailed letter to the complainant. In its letter, the Commission admitted that the wording of point 2 of its Decision could give rise to misunderstandings and that it could support the complainant's view that no exemption had been granted as regards facing bricks. However, the Commission confirmed that the Dutch brick industry had reduced its capacity with the agreement of the Commission. According to the Commission, this emerged clearly from its file and from its Decision. The Commission further referred to a letter addressed to it in 1992 by the parties involved in the agreement. According to this letter, the proposed restructuring " *exclusively concerned facing bricks ('gevelbakstenen') and no other products or groups of products that were or were not related thereto* ". The Commission further stated that the agreement concerned did not prevent the parties from increasing their production capacities outside the Netherlands, for example in Belgium. It added that the agreement also foresaw that the obligations of the parties adhering to it were to expire "on 30 September 1997 at the latest".

The Commission concluded that there were insufficient grounds to grant the complainant's application but that it would only adopt a definitive decision after having received the complainant's observations.

On 25 June 2003, the complainant submitted its observations on this letter. The complainant reiterated its view that facing bricks had not been covered by the Decision and expressed the view that the Commission's explanations concerning this issue were unworthy of a European executive body. According to the complainant, the agreement, as actually implemented, resulted in losses for consumers amounting to EUR 675 million. The complainant further submitted that the addition of new production capacity during the exemption period, both in the Netherlands and in Belgium, rendered the agreement absurd. It also pointed out that, even though stocks had increased during the period concerned, prices had not come down but increased. According to the complainant, the prices of one of the companies involved had increased by around 71 % in five years and the profit margin had amounted to around 40 %. The complainant also referred to a letter from the lawyers of one of the parties to the agreement dated 22 May 2001. According to the complainant, this letter, which had been submitted to the Commission, showed that the agreement had pursued the aim of causing delivery problems and had thus approvingly accepted that third parties active in the market would be damaged.

According to the complainant, no exemption could be granted in such circumstances. The complainant again pointed to the exchange of information between the undertakings that were parties to the relevant agreement. In the complainant's view, this exchange of information ran manifestly counter to the conditions imposed by the Commission when exempting the agreement. The complainant also submitted that the reduction of production capacity had already been implemented in 1990. The issue had thus long been dealt with when the parties concerned communicated their agreement to the Commission.

In a letter sent on 22 April 2005, the Commission again explained to the complainant why it did not consider that there were grounds to become active. The Commission noted that its letter complemented the letter of 24 April 2003 and dealt with arguments raised in the complainant's letter of 25 June 2003. As regards the complainant's argument that the parties to the relevant agreement had increased their production capacity, contrary to the purpose of the said agreement, the Commission took the view that this was a matter for the parties themselves to solve. As regards the products covered by the agreement, the Commission argued, on the basis of the last sentence of point 2 of its Decision, that the reduction of production capacity for one type of bricks entailed a reduction of production capacity for other bricks as well. As regards the co-operation between the parties to the agreement, the Commission explained that it had not been able to establish that there had been an illegal exchange of information. In the Commission's view, the exchange of information that had taken place was not illegal, since only aggregate figures were exchanged and since this information did not allow the parties to control their mutual behaviour. As regards the increase in prices during the period concerned, the Commission submitted that it could also be explained by the building boom in the new Länder in Germany at that time. As regards the complainant's allegation that it had been the victim of a boycott by the parties to the relevant agreement, the Commission noted that the complainant had already submitted this issue to national courts. In the Commission's view, there was therefore no Community interest in dealing with this matter.

As in its letter of 24 April 2003, the Commission stressed that a definitive decision would only be taken after having taken into account any comments the complainant might have.

On 19 May 2005, the complainant made observations on this letter in which it stressed that it wished to maintain its complaint. The complainant reiterated its view that the reduction of production capacity had been implemented before the agreement had been communicated. It submitted that exemptions under Community law could not have retroactive effect going beyond the day of notification. In the complainant's view, the Decision was therefore void. The complainant also stressed that, in view of the increase in prices, consumers had not received a fair share of the benefits resulting from the relevant agreement, as Article 81(3) of the EC Treaty required.

The complainant requested the Commission to revoke its Decision or, alternatively, to see to it that this Decision and the conditions to which it was subject were implemented. It also claimed that the additional profit that had been achieved by the undertakings concerned should, to the extent that it exceeded the rate of inflation, be returned to consumers.

On 20 September 2005, the complainant turned to the Ombudsman again (complaint 3065/2005/GG). Given that the complainant asked for the Ombudsman's help, the letter was registered as a new complaint. Since the complainant asked the Ombudsman to call on the Commission "to correct the decisions it has taken so far", it appeared that the complainant was unhappy with the substance of the Commission's position rather than the fact that six years had lapsed since it had lodged its complaint.

However, the Commission's letters of 24 April 2003 and 22 April 2005 made it clear that the Commission had not taken a definitive decision on the competition complaint yet. The Ombudsman therefore informed the complainant that there were insufficient grounds for an inquiry.

The complainant was advised that it had the possibility to renew its complaint (1) if the Commission rejected its competition complaint or (2) if it considered that the Commission failed to deal with the matter in a reasonable period of time.

*The present complaint*

On 12 June 2007, the complainant informed the Ombudsman that the Commission had still not replied to its letter of 19 May 2005. The complainant therefore asked the Ombudsman to deal with the case.

*The complainant's further letter*

On 5 July 2007, the Ombudsman asked the Commission for an opinion on the complaint. The Ombudsman pointed out that the complainant alleged in substance that the Commission had failed to deal with its competition complaint within an appropriate period of time, after having received its letter of 19 May 2005. The complainant was informed accordingly the same day.

On 1 October 2007, the complainant informed the Ombudsman that it had received a letter dated 3 September 2007 from the Commission. In this letter, the Commission responded to the arguments that the complainant had put forward in its letter of 19 May 2005 and reiterated its view that there were insufficient grounds to grant the complainant's application or to carry out further inquiries. The Commission therefore asked the complainant to clarify whether it wished to maintain its arguments and whether it insisted on a formal decision on its complaint.

In its letter to the Ombudsman of 1 October 2007, the complainant explained that it did not consider the Commission's position to be satisfactory. Pointing out that the Ombudsman was its last hope, the complainant appealed to the Ombudsman to use all possibilities to influence the Commission's decision. The complainant also suggested a meeting in order to discuss the matter.

In his reply of 12 October 2007, the Ombudsman reminded the complainant that the present case concerned the Commission's failure to deal with the competition complaint within a reasonable period of time and that he would only be able to review the substance of the Commission's position once the latter had decided on the case. The Ombudsman also pointed out that his role is to examine possible instances of maladministration, but not to try and influence decisions that the Commission is in the process of adopting.

The Ombudsman advised the complainant that it could thus be useful for it to ask the Commission to adopt a formal, final decision on the case. He added that the complainant could use this opportunity to submit its arguments to the Commission once more. If the Commission nevertheless decided to reject the competition complaint, this decision could then be challenged in court or made the subject of a further complaint to the Ombudsman.

The Ombudsman added that, in view of the above, he considered that a meeting with the complainant would not appear to be necessary at present.

# THE INQUIRY

**The Commission's opinion**

In its opinion, the Commission made the following comments:

Upon having received the complainant's competition complaint of 17 September 1999, DG Competition consulted the Dutch competition authority and sent formal requests for information to KNB, the Dutch brick producers' association (three times), as well as to individual brick manufacturers in the Netherlands (48), in Belgium (16) and in Germany (55).

On 24 April 2003, the Commission informed the complainant of the findings of its inquiry and of its intention to reject the complaint. The complainant replied on 25 June 2003, contesting the Commission's conclusions.

On 22 April 2005, the Commission sent an additional letter, responding to the complainant's arguments. The Commission again informed the complainant of its intention to reject the complaint. The complainant replied on 19 May 2005.

The Commission regretted that it did not reply to the complainant's letter of 19 May 2005, although the contents of this letter were to a large extent identical to those of its previous letter of 25 June 2003 and the complainant was already fully aware of the Commission's intention to reject the complaint.

On 3 September 2007, the Commission replied to the complainant's letter of 19 May 2005 and asked the complainant whether it insisted on a formal decision on its complaint.

On 20 September 2007, DG Competition had a telephone conference with the complainant. The relevant service explained to the complainant that they envisaged proposing to the Commission a decision rejecting the complaint. On 28 September 2007, the Commission granted the complainant's request for an extension of time until 31 December 2007 to decide whether or not it wished to receive a final decision.

The reason why the Commission first sought a confirmation that the complainant wished a final decision on its complaint was that in many cases complainants actually do not want to receive a formal (rejection) decision, since such a decision could hinder them in civil proceedings. Under Article 16(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation

of the rules on competition laid down in Articles 81 and 82 of the Treaty (2) , national judges cannot take decisions running counter to a decision of the Commission.

Unless the complainant were to inform it by 31 December 2007 that it did not wish to receive a formal decision, the Commission would expect to adopt a final decision and communicated it to the complainant in early 2008.

**The complainant's observations**

On 7 January 2008, the complainant submitted certain observations to the Ombudsman, in which it argued that the Commission had already known since October 1999 that its exemption had been applied abusively to facing bricks. The complainant added that it had already shown in June 2001 that the undertakings that were parties to the relevant agreement only had a very limited production as regards the products covered by the exemption decision, i.e., common bricks. According to the complainant, it had also been shown to the Commission in October 2001 that the agreement had had the purpose of causing delivery problems. In the complainant's view, the sector inquiry carried out by the Commission had thus been unnecessary and had taken up precious resources.

On 10 April 2008, the complainant submitted further observations.

In these observations, the complainant made *inter alia* the following comments:

- The Decision had stated that facing bricks were not covered by it. Point 7 of the Decision, which pointed to the fall in consumption, included the following explanation: " *The trend is still downward, chiefly because alternative materials are cheaper and give better technical results; this explains the growing tendency to replace bearing walls made with bricks by concrete and steel and to use sheet materials instead of other forms of brickwork.* " This clearly referred to common bricks ("Mauerwerksziegel"), since only these bricks are in competition with the aforementioned other building materials.
- If facing bricks had been included in the agreement, the Commission ought to have included in its analysis at least the neighbouring brick markets in Germany and the entire Belgian market, given that facing bricks were offered and traded within a radius of 700 km in the EU. Moreover, common bricks and facing bricks were clearly not substitutable from the point of view of consumers.
- Contrary to what was stated in the Decision, the development of the brick industry in the 1980s had been excellent. Sales of Dutch bricks had increased continually from 1.138 million in 1985 to 1.554 million in 1990. A first price increase, which was implemented at the turn of 1990/1991 and which amounted to 7.1 %, had been justified with reference to the costs of restructuring. A second price increase, which was implemented at the turn of 1991/1992 and which amounted to 7.3 %, had also been justified with reference to the costs of restructuring. From 1990 until 1993, prices had increased by 30.2 %. There had therefore been no need for an agreement restricting competition. The Commission had failed to verify the relevant data.
- The exemption had been requested on 10 September 1992, i.e., two years after the cuts in production capacity had been made.

**Further inquiries** *Request for further information*

On 28 February 2008, the Commission had informed the Ombudsman that it was still waiting for a reply from the complainant on the issue of whether it should proceed to a final decision. The

Commission added that the complainant had been invited to provide this information by the end of February 2008.

On 17 April 2008, and in the absence of any further information on this issue, the Ombudsman's Office rang the Commission in order to ascertain what stage the latter's inquiry had reached. On the occasion of this telephone conversation, the Commission pointed out that it had adopted its decision in this case and that a copy would be forwarded to the Ombudsman.

*The Commission's letter of 7 May 2008*

On 7 May 2008, the Commission informed the Ombudsman that on 20 February 2008 the complainant had confirmed its wish to receive a final decision. The Commission also forwarded a copy of its decision of 15 April 2008 on the complainant's competition complaint to the Ombudsman.

In its decision of 15 April 2008, the Commission informed the complainant that there was no Community interest in further inquiries concerning this case and that it therefore rejected its competition complaint. In its decision, the Commission submitted *inter alia* (i) that the complainant had not put forward evidence to establish its argument that the cuts in production capacity had already been made in 1990, (ii) that the complainant had not taken part in the procedure leading to the Decision of 1994, even though this would have been possible and (iii) that the case concerned an issue dating back to 1994.

On 20 May 2008, the Ombudsman drew the complainant's attention to this decision and invited it to make observations.

*The complainant's observations*

In its observations, the complainant made it clear that it did not agree with the decision adopted by the Commission.

# THE DECISION

**1 The relevant facts**

1.1 The complainant is a German company that used to be active in the commerce of selling bricks.

1.2 By a decision adopted on 29 April 1994 (3) (the "Decision"), the Commission granted, subject to several conditions and for a period of five years (1992-1997), an exemption under EU competition rules to an agreement between Dutch brick producers that was meant to reduce production capacity so as to balance the market.

1.3 In September 1999, the complainant lodged a complaint with the Commission's Directorate-General Competition ("DG Competition"), in which it alleged that the relevant Dutch companies and its association had committed several serious infringements of EU competition rules.

1.4 In a complaint submitted to the Ombudsman in February 2001 (complaint 227/2001/GG), the complainant alleged that the Commission had failed to deal with its competition complaint

within a reasonable period of time. The Ombudsman opened an inquiry which was closed with a finding of no maladministration in June 2001, on the grounds that the Commission had been able to show that it was actively dealing with the case.

1.5 On 24 April 2003, the Commission addressed a detailed letter to the complainant. In its letter, the Commission took the view that there were insufficient grounds to grant the complainant's application but that it would only adopt a definitive decision after having received the complainant's observations.

1.6 On 25 June 2003, the complainant submitted its observations on this letter and reiterated its view that EU competition rules had been infringed.

1.7 In a letter sent on 22 April 2005, the Commission again explained to the complainant that, in its view, there was no Community interest in dealing with this matter. As in its letter of 24 April 2003, the Commission stressed that a definitive decision would only be reached after having taken into account any comments the complainant might have.

1.8 On 19 May 2005, the complainant made observations on this letter in which it stressed that it wished to maintain its complaint.

1.9 On 20 September 2005, the complainant turned to the Ombudsman again (complaint 3065/2005/GG). Since the complainant asked the Ombudsman to call on the Commission "to correct the decisions it has taken so far", it appeared that the complainant was unhappy with the substance of the Commission's position rather than the fact that six years had lapsed since it had lodged its complaint. However, the Commission's letters of 24 April 2003 and 22 April 2005 made it clear that the Commission had not taken a definitive decision on the competition complaint yet. The Ombudsman therefore informed the complainant that there were insufficient grounds for an inquiry. The complainant was advised that it had the possibility to renew its complaint (1) if the Commission rejected its competition complaint or (2) if it considered that the Commission failed to deal with the matter in a reasonable period of time.

1.10 On 12 June 2007, the complainant informed the Ombudsman that the Commission had still not replied to its letter of 19 May 2005. The complainant therefore asked the Ombudsman to deal with the case.

**2 The scope of the present inquiry**

2.1 The Ombudsman understood the complainant as alleging in substance that the Commission had failed to deal with its competition complaint within an appropriate period of time after having received its letter of 19 May 2005. He therefore decided to open an inquiry concerning this allegation. The complainant was informed accordingly the same day.

2.2 On 15 April 2008, the Commission adopted a formal decision rejecting the complainant's competition complaint. In his observations sent on 23 June 2008, the complainant made it clear that it did not agree with the decision adopted by the Commission.

2.3 In light of the evidence that has been submitted to him so far, the Ombudsman considers

that an inquiry into the substance of the Commission's decision would be justified. In the Ombudsman's view, however, it would not be appropriate to deal with this matter in the framework of the present inquiry, which has focused on the time it has taken the Commission to deal with the complainant's competition complaint. The Ombudsman will therefore register the complainant's letter of 23 June 2008 as a new complaint.

2.4 The present inquiry will thus only deal with the allegation on which the Commission was asked to provide an opinion in the Ombudsman's letter opening the inquiry.

**3 Alleged failure to deal with competition complaint within an appropriate period of time**

3.1 In its complaint to the Ombudsman of 12 June 2007, the complainant alleged that the Commission had failed to deal with its competition complaint within an appropriate period of time, after having received its letter of 19 May 2005.

3.2 In its opinion, the Commission regretted that it did not reply to the complainant's letter of 19 May 2005, but pointed out that the contents of this letter were to a large extent identical to those of its previous letter of 25 June 2003 and that the complainant was already fully aware of the Commission's intention to reject the complaint. The Commission went on to say that it had written to the complainant on 3 September 2007 in order to respond to the letter's communication of 19 May 2005 and to ask the complainant whether it insisted on a formal decision on its complaint.

The Commission explained that the reason why it first sought a confirmation that the complainant wished or might wish [would wish] a final decision on its complaint was that in many cases complainants actually do not want to receive a formal (rejection) decision, since such a decision could hinder them in civil proceedings. Under Article 16(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (4) , national judges cannot take decisions running counter to a decision of the Commission.

3.3 On 28 February 2008, the Commission informed the Ombudsman that it was still waiting for a reply from the complainant on the issue of whether it should proceed to a final decision. The Commission added that the complainant had been invited to provide this information by the end of February 2008.

3.4 On 7 May 2008, the Commission informed the Ombudsman that the complainant had, on 20 February 2008, confirmed its wish to receive a final decision. The Commission also forwarded a copy of its decision of 15 April 2008 on the complainant's competition complaint to the Ombudsman.

3.5 In its observations, the complainant did not put forward any specific comments as regards the time that it had taken the Commission to adopt this decision.

3.6 The Ombudsman is pleased to note that the Commission acted rapidly after the present complaint was brought to its attention. It is true that several further months lapsed until the Commission finally, on 15 April 2008, adopted its decision on the complainant's competition

complaint. However, the Commission has explained the reasons on the basis of which it had considered it necessary first of all to ascertain that the complainant indeed wished to receive a formal decision on its competition complaint. The Ombudsman considers the Commission's explanation to be reasonable. He further notes that the complainant did not object to the Commission's approach.

3.7 However, the Ombudsman considers it very difficult to understand why the Commission did not become active much earlier. In its letter to the complainant of 22 April 2005, the Commission stressed that a definitive decision would only reached after having taken into account any comments the complainant might have. The complainant sent its observations on 19 May 2005. As soon as it had received this letter, the Commission was thus in a position to take the necessary steps in order to adopt a final decision on the complainant's competition complaint. However, it appears that no such steps were taken until the Ombudsman brought the present complaint to the Commission's attention.

3.8 The Commission has not put forward any explanation that could justify this delay. The Ombudsman notes that the Commission has expressed its regrets at the delay which occurred. In the Ombudsman's view, however, this cannot be considered as a satisfactory reaction. The Ombudsman considers that where, as in the present case, considerable delays occur, principles of good administrative practice require that at least an apology is made to the citizen concerned.

3.9 The Ombudsman notes, however, that the complainant's concerns appear to focus on the substance of the Commission's decision rather than on procedural aspects. Given that the substance of the Commission's decision will be examined in a separate inquiry, the Ombudsman considers that no further action needs to be taken as regards the present case.

**4 Conclusion**

In view of the above, the Ombudsman considers that no further action needs to be taken as regards the present case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1994 L 131, p.15.

(2) OJ 2003 L 1, p.1.

(3) OJ 1994 L 131, p.15.

(4) OJ 2003 L 1, p.1.