

Decision of the European Ombudsman closing his inquiry into complaint 543/2009/VL against the European Commission

Decision

Case 543/2009/VL - Opened on 06/04/2009 - Decision on 08/02/2010

THE BACKGROUND TO THE COMPLAINT

1. The complainant stated that he had grounds to believe that his name was mentioned in a European Commission decision relating to the 'Marine Hoses' cartel [1] . He argued that the Commission's findings contained several statements which seriously incriminated him, quoting his full name. In this context, the complainant referred to a press release concerning the Marine Hoses cartel [2] . The press release contained an explicit reference to the possibility of obtaining compensation for damage caused by the anti-competitive behaviour involved in that case. It further stated that the Commission's decision was binding proof of the anti-competitive behaviour involved, and its illegality. In addition, the complainant surmised that the Commission's decision could be made available to the Department of Justice (DoJ) of the United States of America within the framework of the co-operation agreements between the two institutions.

2. On 13 February 2009, the complainant requested access to the Commission's file. In particular, he wished to examine its decision. He stressed that the Commission had not respected his right to be heard and that its disregard for his procedural rights could be prejudicial for him in the inquiry carried out by the DoJ.

3. On 16 February 2009, the complainant amended his request for access. He specified that the request was primarily based on the right to a fair hearing. In the alternative, however, he also wished to make an application pursuant to Regulation 1049/2001.

4. On 18 February 2009, the Commission replied that, with regard to access under Regulation 1049/2001, its services were in the process of preparing a non-confidential version of the decision, that is, a version containing no business secrets or other confidential information. The complainant was advised to regularly consult the website of the Commission's Directorate-General for Competition where the non-confidential version would be published. The Commission added that, according to the circumstances known to it, it did not appear that the



complainant had rights other than those laid down by Regulation 1049/2001.

THE SUBJECT MATTER OF THE INQUIRY

5. On 2 March 2009, the complainant turned to the European Ombudsman. In his complaint, he put forward the following allegations and claims:

Allegations:

- The complainant alleged that the Commission, insofar as it made appraisals that explicitly mentioned his name in the 'Marine Hoses' cartel decision (COMP 39.406) without giving him an opportunity to voice his opinion, disregarded essential procedural guarantees, in particular (i) the right to be heard, (ii) the presumption of innocence and (iii) professional secrecy.
- The complainant alleged that the Commission incorrectly refused to grant him access to the file, in particular to its decision mentioning his name, which he had requested primarily on the basis of (i) his right to be heard and, alternatively, on the basis of (ii) Regulation 1049/2001/EC.

Claims:

- The complainant claimed that the Commission should immediately grant him access to the file and provide him, if necessary, with an anonymised version of its decision.
- The complainant claimed that the Commission should remove all the references made to him from the public version of the decision.

6. As regards the first allegation, the Ombudsman noted that the complainant did not provide any arguments in support of its third aspect, namely the infringement of the duty to respect professional secrecy. In addition, it was difficult to see how the Commission could have infringed this obligation, given that its decision was not publicly available at the time the complaint was submitted. Therefore, the Ombudsman concluded that there were insufficient grounds to include this aspect of the complaint in his inquiry.

7. The Ombudsman further noted that the complainant had not submitted a confirmatory application for access to documents under Regulation 1049/2001. Consequently, the second aspect of the second allegation was found to be inadmissible pursuant to Article 2(4) of the Ombudsman's Statute.

8. In his observations, the complainant argued that the second aspect of his second allegation should have been included in the Ombudsman's inquiry. For the reasons set out below (see paragraph 18), the Ombudsman would, in any event, be unable to take up this aspect of the case for inquiry.

THE INQUIRY

9. On 6 April 2009, the Ombudsman opened an inquiry into this complaint and asked the Commission to provide an opinion.



10. The Commission submitted its opinion on 8 July 2009 in English, and a translation of it into German on 29 July 2009. On 31 July 2009, the Ombudsman forwarded the opinion to the complainant with an invitation to submit his comments, which he sent on 24 September 2009.

11. It emerged from these observations that the complainant appeared to have brought a case before the General Court. On 10 October 2009, the complainant confirmed that he had brought Case T-173/09 before the General Court. He provided the Ombudsman with the written pleadings of both parties to that case.

12. On 19 October 2009, the Ombudsman sent a letter to the complainant, drawing his attention to the provisions set out in Articles 1(3) and 2(7) of the Ombudsman's Statute. He invited the complainant to comment on the relevance of these provisions to the present case. The deadline for observations was 30 November 2009.

13. On 10 December 2009, and in the absence of any such observations, the Ombudsman's services contacted the complainant's legal representative. On 17 December 2009, the complainant's legal representatives indicated that the complainant did not intend to submit any further observations at that time.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. The elements of the complainant's allegations and claims into which the Ombudsman opened an inquiry

Arguments presented to the Ombudsman

14. In its opinion, the Commission underlined that Articles 101 and 102 of the TFEU [3] (formerly Articles 81 and 82 of the EC Treaty) applied exclusively to undertakings and associations of undertakings which had a right of access to the file, and the right to be heard under Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ('Regulation 1/2003') [4]. Conversely, the articles could not be infringed by natural persons, insofar as they are not undertakings themselves. Consequently, natural persons did not have the right to be heard, nor any right of access to the file. The Commission stated that a statement of objections or a cartel decision might have to identify natural persons that attended meetings and maintained contacts. It added that it was aware of the negative consequences for the natural persons involved and that it removed the names of natural persons from publicly available versions, unless there was a very serious reason for not doing so. The Commission pointed out that there was no reason to identify the complainant in the public version of its decision on the 'Marine Hoses' cartel case [5]. It added that the agreement in force between the European Union and the United States does not foresee an exchange of confidential versions of statements of objections or decisions. The Commission stressed that there are no circumstances under which it may communicate



information covered by Article 28 of Regulation 1/2003. It explained that it thus had not, and would not, disclose any such information as regards the complainant.

15. In his observations, the complainant maintained his complaint.

The Ombudsman's assessment

16. Article 1(3) of the Statute of the European Ombudsman provides that:

" The Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. "

17. Article 2(7) of the Statute of the European Ombudsman stipulates that:

" When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed definitively. "

18. The Ombudsman notes that the complainant has brought an action against the Commission before the General Court (Case T-173/09). This action concerns the same facts as the present complaint. Furthermore, save for the alleged infringement of the principle of professional secrecy (which was, in any event, not included in the present inquiry), the application in Case C-173/09 essentially raises the same issues and main arguments as the present complaint.

19. Consequently, the Ombudsman is bound, in accordance with Articles 1(3) and 2(7) of the Statute of the European Ombudsman, to terminate his consideration of the present complaint.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

In accordance with Articles 1(3) and 2(7) of his Statute, the European Ombudsman terminated his consideration of the present complaint.

The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 8 February 2010



[1] A non-confidential version of the decision can be accessed under:
<http://ec.europa.eu/competition/antitrust/cases/decisions/39406/en.pdf> [Link].

[2] IP/09/137 of 28 January 2009.

[3] Treaty on the Functioning of the European Union.

[4] *OJ 2003 L 1, p. 1*.

[5] The Commission has, in the meantime, published a non-confidential version of the decision, which does not mention the complainant by name.