

Draft recommendation to the European Commission in complaint 1963/2002/IP

Recommendation

Case 1963/2002/IP - Opened on 10/12/2002 - Recommendation on 05/09/2003 - Decision on 27/02/2004

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

THE COMPLAINT

The complaint, lodged by the legal representative of Willy Kutschera LKW-Vermietung, an Austrian truck rental company, concerns the European Commission's handling of the complaint made by Mr Kutschera (hereinafter Mr K.), owner of this company, on 30 January 1996.

In 1995, Willy Kutschera LKW-Vermietung concluded an agreement for the purchase of 99 lorries with Mr Bellotto (hereinafter Mr B.), an Italian truck dealer. As requested, Mr K. provided to Mr B. bank guarantees corresponding to 10% of the total price. However, on 12 May 1995, Mr K. was informed by Mr B. that he could not supply the 99 lorries as agreed since MAN Veicoli Industriali s.p.a. (MAN V.I.), a daughter company of MAN Nutzfahrzeuge AG (MAN) and importer of MAN trucks for the Italian territory, had refused to deliver them. According to Mr B., the refusal was based on the fact that the lorries were for an Austrian client who had his registered office outside MAN V.I.'s contractual zone in Italy.

In Mr K.'s view, the real reason for the refusal was the fact that at the moment when the agreement was concluded, the price of the lorries was 25-30% less in Italy than in Austria, due to the devaluation of the Italian Lira.

On 30 January 1996, he therefore made a complaint to the European Commission. Mr K. asked the Commission to investigate whether the behaviour of MAN V.I. had been in breach of principles of competition law as laid down in Articles 81 and 82 of the EC Treaty (formerly Articles 85 and 86). The complaint was registered as COMP/35.907/F-2. In the course of the almost seven years between the lodging of the complaint to the Commission and the complaint to the Ombudsman made on 15 November 2002, an intense exchange of correspondence took place between Mr K. and the Commission. From July 1998 to March 2001, Mr K. wrote several letters asking the institution to take a final decision on his case. All the complainant's letters have been replied to by the Commission. However, it appeared that the institution had still not taken a final decision on the case and, since March 2001, had not informed the complainant about the situation of his case.



In his complaint to the Ombudsman, the complainant alleged undue delay and negligence by the Commission in the handling of the case lodged by Mr K. and claimed that a final decision should be taken.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission firstly stressed that one of its main objectives in the application of competition rules in the motor vehicle sector is to ensure that a manufacturer and/or its importer does not restrict the freedom of final consumers to obtain new motor vehicles from whichever authorised dealer they choose within the Common Market who is willing to sell them. In a selective distribution system, a supplier is only entitled to prohibit sales of new vehicles to resellers who are not part of the distribution system. Therefore, the possibility of motor vehicle dealers to sell motor vehicles to any EU citizen has been one of the main topics of the block exemption regulations adopted by the Commission in the car sector (2) . Regulation 1475/95/EC and Regulation 1400/2002/EC specify the rights of dealers in a selective distribution system to sell new vehicles to end-users (which also includes leasing and truck rental companies), but also that sales to independent resellers can be prohibited.

As regards the handling of complaints, when a complaint is submitted to it, the Commission has a general obligation carefully to examine the factual and legal elements brought to its attention by a complainant (3) . In the complainant's case, the Commission took action in order to assess whether a sufficient degree of Community interest existed to pursue the case as a priority.

As regards the complainant's case, the Commission made the following points:

On 30 January 1996, a complaint was received from Mr K. The complaint concerned the behaviour of the company MAN V.I., a daughter company of MAN and importer of MAN trucks for the Italian territory. The complainant took the view that MAN V.I. hampered the sale of 99 lorries to him because they would be exported from Italy to Austria.

On 14 February 1996, the Commission forwarded a copy of the complaint to MAN, in order to obtain its opinion on the alleged restrictions of competition. By letter of 15 March 1996, MAN explained to the Commission that no contracts had been signed between Mr K. and Mr B. and that therefore there was no obligation to deliver. Furthermore, MAN stated that Mr K. was not acting as a leasing company but as an independent reseller. In these circumstances, supplies could be refused on the basis of Article 3 (10) a) of Regulation 123/85 and Article 3 (10) a) of Regulation 1475/95.

The reply from MAN was then forwarded to Mr K. who transmitted his observations on 3 June 1996. The Commission considered that further information was necessary, and on 10 September 1996 it asked Mr K. to clarify the nature of his activity. In his reply of November 1996, Mr K. explained that the object of his activity was to rent trucks. On 17 December 1996, a formal request for information was sent to MAN to inquire about its market position and to obtain a copy of the contract concluded with its Italian importer and with the Italian distribution network.



The company replied on 30 January 1997.

On the basis of further information obtained in the course of autumn 1998, Directorate General Competition (DG COMP) came to the conclusion that some doubt remained in relation to the quality of Mr K.'s position as an end-user of the trucks for rental purposes.

An intensive exchange of correspondence took place with Mr K. In his first letter of 10 July 1998, he urged a final decision of the Commission on the case since this was essential for the civil proceedings before the Italian court. In all these occasions, the Commission replied that a further evaluation of the case was subject to other priorities of the Unit in charge of the application of competition rules in the car sector and that in any case it was not its intention to influence the proceedings pending before the Italian court.

By letter of 26 March 1999, in reply to the complainant's letter of 3 March 1999, Commissioner Van Miert informed Mr K. that, since there were proceedings pending before the Italian court, the Commission did not want to influence the outcome of these proceedings. Furthermore, its services were assessing the documentation sent by MAN in December 1998 in reply to the letter of 5 November 1998 with which DG COMP had informed MAN about its preliminary view that its dealer agreement contained several restrictions of competition which did not appear to be covered by the relevant legislation.

In its letter of 28 June 1999, in reply to Mr K.'s letter of 8 April 1999, the Commission informed him that, at that stage, it was not possible to reach a final position on the case since new information had been submitted by the parties. The Commission added that, although a final outcome of his case was subject to the other priorities of the Unit responsible to deal with it, the conclusion of the assessment of the case would hopefully be communicated to him before the end of 1999.

On 15 December 1999, a reply was given to Mr K.'s letter of 10 November 1999. In this letter, the Commission informed Mr K. that a conclusion on the case should be reached in the first half of the year 2000. Mr K. was also asked to send information related to the legal proceedings he had started on 17 December 1997 before the Italian civil court against MAN, which were still pending. Mr K. forwarded the relevant information to the Commission on 28 February 2000.

On 26 September 2000, Commissioner Monti replied to a written question which had been presented by MEP Ilgenfritz (4) to him with a view to finding out the reason why the institution had initiated no proceedings regarding the case concerned. Commissioner Monti stated that: "*(...) In carrying out its duties in the field of competition law, the Commission is obliged to set certain priorities. Since Mr K. is seeking legal remedy in Italy and may continue to do so, it has not yet begun work on this case*".

On 8 March 2001, the Commission sent a further letter to Mr K. (in reply to his letter of 25 January 2001). The Director of Directorate F of DG COMP stressed again that his Unit was dealing with other priorities and that a conclusion could be expected within 3 months. He also apologised for the delay.



The approach chosen in the relevant case had been in accordance with the principles sanctioned by the Court of First Instance in case *Automec v. Commission* (5) , where the Court affirmed that the Commission, as an administrative authority, has to act in the public interest. The administrative resources at the Commission's disposal to perform its tasks are limited and cannot be used to deal with all cases brought to its attention. The Commission is entitled to apply different degrees of priority to the cases submitted to it, according to the degree of Community interest involved.

In the context of the complainant's case, it had to be borne in mind that Mr K. had taken legal action before an Italian civil court for breach of contract and claimed damages. In view of this and of the fact that the proceedings were still pending, there was not a sufficient Community interest in examining the case since the plaintiff, Mr K., was able to secure adequate protection of his rights before national courts. Furthermore, Mr K. could also ask the national judge to assess whether or not the distribution agreement concluded with Mr B. and other dealers in Italy or any action taken by MAN concerning his order infringes Article 81 (1) of the Treaty. National courts and the Commission enjoy concurrent powers for the application of Article 81 (1) and Article 82 of the Treaty. As held by the Court of Justice in the *BRT v. SABAM* case (6) , these articles of the Treaty produce direct effect in relation to individuals and create direct rights in respect of the individual concerned which the national courts must safeguard. The national judge is in a position to decide on the consequences when an infringement of Community law has occurred. It is also for the national court which is entitled, if necessary, to bring the case before the Court of Justice or to ask the Commission's assistance, to order one trader to execute a contract with another or to determine the damages caused by the breach of contractual obligations, in accordance with the rules of national law.

Since the Italian court had all the power to deal with the case efficiently, there was no need for the Commission to intervene in order to secure the rights of Mr K.

As regards the complainant's allegations concerning undue delay and negligence in the handling of Mr K.'s case, the Commission had adopted all necessary measures to investigate the matter and concluded that the case concerned was not among the priority cases. The institution's position had been clearly explained to Mr K. and to his legal representative. Due to a great number of complaints and of *ex officio* procedures which had been undertaken over the past years, and also taking into account the lack of staff, it was regrettable that it had not been possible to deal with the complaint as it had been intended.

As regards the claim for a final decision, the Commission stated that the assessment of the case represented part of the future tasks of DG COMP and that the Commission's services intended to communicate their final decision on the case as soon as possible.

The complainant's observations

In his observations the complainant, who basically maintained his complaint, underlined that there were no doubts as regards the nature of Mr K.'s activity. Since the purpose of the company is to rent vehicles to third parties, Willy Kutschera LKW-Vermietung company was an end-user.



As regards the Commission's statement that since the Italian court has all the power to deal with the case lodged by Mr K. against MAN efficiently, there was no need for it to intervene in order to secure the rights of Mr K., the complainant took note of this position. However, he made it clear that the interest of Mr K. in knowing whether MAN's behaviour was contrary to Community law was not related to the proceedings pending before the Italian court. It was relevant in view of a possible future judicial action against MAN for extra-contractual liability as a consequence of the infringement of Community law.

THE DECISION

1 The European Commission's handling of Mr K.'s case

1.1 The complainant, the legal representative of Willy Kutschera LKW-Vermietung, alleged undue delay and negligence by the Commission in the handling of the case that Mr K., owner of the above-mentioned company, had lodged with the Commission in January 1996. The complainant claimed that a final decision should be taken by the Commission.

1.2 In its opinion, the Commission stated that one of the main objectives of the Commission in the application of competition rules in the motor vehicle sector is to ensure that a manufacturer and/or its importer does not restrict the freedom of final consumers to obtain a new motor vehicle from whichever authorised dealer they choose within the Common Market who is willing to sell to them. It recalled the factual background of the complaint, giving detailed information about the actions which it had taken and about the exchange of correspondence with Mr K. from the lodging of his complaint in January 1996.

The Commission took the view that its approach towards Mr. K's case had been in accordance with the principles established by the Court of First Instance in case *Automec v. Commission*, where the Court affirmed that the Commission, as an administrative authority, has to act in the public interest. When a complaint is submitted to it, the Commission has a general obligation carefully to examine the factual and legal elements brought to its attention by the complainant. In the handling of a complaint it is, however, entitled to apply different degrees of priority to the cases submitted to it, according to the degree of community interest involved.

1.3 In the context of the complainant's case, the Commission took the view that, since Mr K. had taken legal action before an Italian civil court for breach of contract and claimed damages and since the proceedings were still pending, there was not a sufficient Community interest in examining the case, given that the plaintiff was able to secure adequate protection of his rights before national courts.

1.4 As regards the complainant's allegations concerning undue delay and negligence in the handling of his case, the Commission put forward that it had adopted all necessary measures to investigate the matter and concluded that the case concerned was not among the priority cases. The institution's position had been clearly explained to Mr K. and to the complainant. Due to a great number of complaints and of *ex officio* procedures which had been undertaken over the past years, and also taking into account the lack of staff, the Commission regretted that it had



been not possible to deal with the complaint as had been intended.

As regards the claim that a final decision should be taken, the Commission stated that the assessment of the case represented part of the future tasks of DG COMP and that the Commission's services intended to communicate their final decision on the case as soon as possible.

1.5 In his observations, the complainant made it clear that the interest of Mr K. in knowing whether MAN's behaviour is contrary to Community law, was not related to the proceedings pending before the Italian court but was relevant in view of a possible future judicial action against MAN for extra-contractual liability as a consequence of the infringement of Community law.

1.6 The Ombudsman notes that, according to the case-law of the Community Courts, the Commission is entitled to apply different degrees of priority to the cases submitted to it, depending on the Community interest involved by the case concerned (7) . The Commission may thus reject a complaint if it considers that there is no Community interest in pursuing it.

1.7 However, it is good administrative behaviour to take decisions within a reasonable period of time. The present case concerns a complaint that was lodged by Mr K. in January 1996, almost seven and a half years ago.

The Ombudsman notes that on three occasions (letters of 28 June 1999, 15 December 1999 and 8 March 2001) the Commission's services informed Mr K. that a final decision on his case would be taken shortly. He also notes that in its opinion, the Commission regretted that it had not been possible to deal with the concerned case as it was intended and that the Commission's services intended to communicate their final decision on the case as soon as possible.

Even taking into account the difficulties that DG COMP may have faced and that were mentioned by the Commission in its opinion, the Ombudsman considers that the Commission has not provided a satisfactory explanation as to why it has been unable to take a decision on the case even after nearly seven and a half years had lapsed. In this context, regard should also be had to the fact that the last communication from the Commission about Mr K.'s case prior to its opinion on the present complaint was on 8 March 2001, and the Commission has given no reason for its silence during the two years in between.

Besides, the Ombudsman notes that the Commission's position *vis á vis* the complaint appears to be somewhat contradictory. Whereas on the one hand the institution regretted that no decision had been taken on the case and stressed that its services intended to communicate a final decision as soon as possible, on the other hand it stated that there was not a sufficient Community interest in examining the case. This could be understood in the sense that the Commission had already decided not to open an inquiry into the complaint but to reject it.

1.8 Without prejudice to the Commission's discretionary power in the handling of complaints submitted to it, the Ombudsman takes the view that seven and a half years to deal with a case



cannot be considered a reasonable time.

2 Conclusion

2.1 In view of the above, the Ombudsman considers that the fact that after seven and a half years the Commission has still not finalised the assessment of the complaint lodged by Mr K. in January 1996, constitutes an instance of maladministration.

2.2 The Ombudsman therefore makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The draft recommendation

The Commission should finalise the assessment of the case concerned by 30 November 2003 at the latest.

In accordance with Article 3 (6) of the Statute of the Ombudsman, the Council shall send a detailed opinion by 30 November 2003. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

The complainant will be informed of this draft recommendation. A copy of the complainant's observations on the Commission's opinion is enclosed for your information.

Strasbourg, 5 September 2003

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, page 15.

(2) Commission Regulation No 123/85/EEC of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreement, OJ L 15 of 18 January 1985, pp. 16-24.

Commission Regulation No 1475/95/EC of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ L 145 of 29 June 1995, pp. 25-34.

Commission Regulation No 1400/2002/EC of 31 July 2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203 of 1 August 2002, pp. 30-41.

(3) Case T-24/90 *Automec v. Commission* [1992] ECR II-2223.

(4) Written Question E-2674/00 of 1 September 2000, OJ C 103 E of 3 April 2001.



(5) See note 3.

(6) Case 127/73, *BRT v. SABAM* [1974], ECR 313.

(7) See note 3.