Decision of the European Ombudsman closing his inquiry into complaint 47/2012/AN against the European Commission

Decision
Case 47/2012/AN - **Opened on** 31/01/2012 - **Decision on** 26/08/2013 - **Institutions concerned** European Commission (Critical remark) | European Commission (No further inquiries justified) |

The background to the complaint

1. In 2006, the complainant submitted to the European Commission an infringement complaint against the Spanish authorities. The complaint concerned alleged irregularities in the public procurement procedure relating to the construction of a port in A Coruña, Spain (the 'Port'), which was co-financed by the Cohesion Fund [1] . The Commission registered it under reference number ES 2006/4213 and assigned the case to its Directorate-General for Regional Policy (DG REGIO).

2. On several occasions, the complainant requested information about the status of his complaint and was repeatedly told that his infringement complaint was particularly complex and that several Commission Directorates-General were simultaneously dealing with it.

3. On 26 April and 10 July 2010, the complainant wrote to the Commission, providing it with updated information concerning the construction of the Port.

4. The Commission replied to those letters on 8 February 2011 [2] and informed the complainant that it was in the process of assessing whether certain aspects of the Spanish authorities' conduct were compatible with public procurement rules. The Commission further stated that, in order to understand their conduct better, it had requested the Spanish authorities to provide it with their observations. Once it received them, the Commission would decide upon the next step it would take. It added that it would keep the complainant duly informed.

5. Since the Commission did not update the complainant, he submitted a complaint to the European Ombudsman in January 2012.

The subject matter of the inquiry

6. The European Ombudsman opened an inquiry into the following allegation and claim.

Allegation:

The Commission has failed properly to deal with infringement complaint ES 2006/4213.

Claim:

The Commission should (i) explain the reasons for its delay in handling infringement complaint ES 2006/4213 and (ii) take a reasoned decision on it as soon as possible, informing the complainant accordingly.

7. In its opinion, the Commission referred to another infringement case, namely, CHAP (2012)1611, which it had opened in the meantime on the basis of the complainant's initial submissions and its own findings. Since both cases are related, the Ombudsman will also take into account the parties' arguments in respect of infringement case CHAP (2012)1611.

The inquiry

8. On 31 January 2012, the Ombudsman opened an inquiry by forwarding the complaint to the President of the European Commission. He invited the President to submit an opinion on the above allegation and claim by 30 April 2012.

9. On 4 May 2012, the complainant sent further correspondence to the Ombudsman.

10. On 25 May 2012, the Ombudsman reminded the Commission that the deadline for submitting its opinion had expired. The Commission sent the opinion on 31 May 2012.

11. On 1 June 2012, the Ombudsman forwarded the opinion to the complainant with an invitation to submit observations, which he did on 13 and 25 June 2012.

12. On 18 September 2012, the Ombudsman conducted further inquiries into the complaint, by requesting the Commission to reply to an additional question by 31 October 2012.

13. On 1 October 2012, the complainant submitted additional information.

14. On 23 October 2012, the Commission requested that the deadline for replying to the Ombudsman be extended to 30 November 2012. On 30 November 2012, the Commission requested a further extension until 31 December 2012. On both occasions, the complainant was informed accordingly.

15. On 9 November 2012, the complainant submitted additional information.

16. The Commission replied to the further inquiries on 19 December 2012. The reply was sent to the complainant, who submitted observations on it on 17 January 2013.

The Ombudsman's analysis and conclusions

A. Alleged improper handling of the infringement complaint and related claim

Arguments presented to the Ombudsman

17. In his complaint , the complainant essentially argued that four years after he submitted his infringement case, the Commission had still not taken a decision on it.

18. In its opinion , the Commission explained in detail the steps taken in relation to the complainant's infringement case. These may be summarised as follows.

19. In 2006 and 2007, DG REGIO and the Directorate-General for Internal Market and Services (DG MARKT) held consultations in relation to the case. They both requested information and the relevant public procurement documents from the Spanish authorities. After having analysed the complainant's allegations, the Commission initially considered them not to be grounded. Nevertheless, in 2008 and 2009, DG MARKT identified other possible irregularities and requested additional information from the Spanish authorities. DG MARKT examined in detail the relevant documents and procedures, with the aim of determining whether the award sub-criteria used in the relevant public procurement procedure were in breach of Article 34(1)(a) and (2) of Directive 93/38/EEC [3] and the principles of equal treatment of bidders and transparency.

20. On 23 February 2010, the Spanish authorities modified the initial works contract without publishing an open call for tenders. Subsequently, and also taking into account DG MARKT's opinion, DG REGIO requested the Spanish authorities' observations on the main public procurement contract and the modified contract. DG REGIO also envisaged the possibility of carrying out a financial correction procedure under Article H(2) of Annex II to Regulation 1164/94 [4] .

21. In the course of their assessment of the case, the two Directorates-General identified additional potential irregularities not reported by the complainant. These related mainly to the fact that selection criteria had been used as award criteria and had been divided into sub-criteria which were not published in the tender notice. Moreover, they found that the tender documents permitted the modification of the contract after its award if the additional works

amounted to less than 20% of the initial amount. Therefore, the Commission decided to launch a financial correction procedure.

22. The Commission took into account that, for this type of irregularity, the *Guidelines on the principles, criteria and indicative scales to be applied by the Commission departments in determining financial corrections under Article H(2) of Annex II to Regulation 1164/94* suggest a financial correction of 25% of the contract value which may be reduced to 10% or 5%, depending on the seriousness of the irregularity. Following an assessment of the seriousness of the potential irregularities, DG REGIO proposed a financial correction of 10% of the total contract amount and informed the Spanish authorities accordingly on 16 February 2011.

23. Between 23 and 28 May 2011, DG REGIO also carried out an audit mission in order to examine the general issue of the sub-criteria used to award the works contract and the coordination of the two programming periods of the post-construction phase, namely, 2000-2006 and 2007-2013. The Commission's auditors had access to all the files related to the project and the public procurement procedure.

24. On 23 February 2011, while the audit mission was ongoing, the initial works contract was modified for a substantial amount and no open call for tenders was issued. The complainant informed the Commission of this fact on 15 July 2011.

25. In their intermediate audit report, which was sent to the Spanish authorities on 23 September 2011, the auditors made a provisional finding of lack of transparency as regards the use of sub-criteria which had not been published in the call for tenders. They considered that, " *while the final set of evaluated criteria was in line with the set published in the tender specifications, the calculation method used in the step between the initial and final one was unclear and not described in the tender documents* ". This was not transparent to the participants in the tender. Therefore, in accordance with the Guidelines for financial corrections, the Commission finally proposed a correction of 5% of the contract amount, instead of the 10% correction envisaged initially.

26. As regards the contract modification, the auditors ascertained that the modification had no impact on the EU budget, since the Spanish authorities did not claim that the price difference should be regarded as an eligible cost under the Cohesion Fund.

27. On 5 December 2011, the Spanish authorities responded to the intermediate audit mission report.

28. On 11 April 2012, DG REGIO informed the complainant that, in light of the audit findings, it considered that all the award sub-criteria were mentioned in the General Conditions and were in line with the principles of non-discrimination, equal treatment and transparency. Moreover, there was no indication that any of the tenderers might have been unduly favoured. On the other hand, the fact that the Spanish authorities increased the total initial value of the contract did not affect the EU budget. Therefore, DG REGIO could not identify any breach of the rules governing the Cohesion Fund and stated that it would propose that the issues concerning the modification

of the public works contract be assessed by DG MARKT.

29. In its opinion, the Commission further expressed its regret that it took such a long time to handle the complainant's case. It explained the delay, first, by the fact that the case was particularly complex and required coordination and consultations between several services. Second, in addition to the alleged irregularities to which the complainant drew its attention, the Commission identified several others which it also needed to investigate. Third, the Commission had to analyse a very large number of documents. Fourth, the implementation of co-financed actions falls under the responsibility of the Member States, which meant that, in order to analyse the complaint and to check whether the public procurement procedure complied with the applicable national and EU rules, the Commission had to request information and documents from the Spanish authorities on several occasions. However, they did not cooperate in a satisfactory manner and the Commission had to send them several reminders before receiving the requested documents. Fifth, it had to conduct an audit into the issue of compliance of the initial and modified contract with public procurement rules.

30. In sum, the Commission considered that the delay in handling the infringement complaint was due to the fact that it examined the complainant's concerns in depth and even assessed issues which the complainant had not raised.

31. Before receiving the Commission's opinion, the complainant sent further correspondence to the Ombudsman, in which he challenged DG REGIO's position expressed in its letter dated 11 April 2012. The complainant did not agree with the fact that DG REGIO focused on the issue of the selection criteria and sub-criteria, which he did not consider to be essential to the case. What was essential was the actual content of the General Conditions of the tender, which clearly favoured the winning tenderer at the expense of public money. Moreover, the latter's behaviour was unacceptable, inasmuch as it now requested additional amounts to those foreseen in the initial contract.

32. In the observations which he submitted on 13 June 2012, the complainant disagreed with the Commission's conclusion that the Spanish authorities behaved correctly and highlighted the substantial cost overrun incurred to build the Port. In his view, the Spanish authorities' behaviour breached national law. At the same time, the wining tenderer had not provided some of the outputs foreseen in the General Conditions. All these irregularities required a financial correction of 25% of the contract value, instead of the 5% that the Commission intended to recover.

33. In its pre-closure letter, sent to the complainant on 12 June 2012, DG REGIO reiterated that, in its view, there was no indication that Spain had breached EU law when awarding the works contract for the construction of the Port. DG REGIO expressed its intention to close the infringement procedure and granted the complainant four weeks within which to submit new arguments that could alter its conclusions. It also stated that the modification of the contract budget after the beginning of the execution of the contract was going to be dealt with by DG MARKT and the complainant would be kept informed of the outcome.

34. In further correspondence dated 25 June 2013, the complainant highlighted that DG REGIO's pre-closure letter no longer made reference to the application of the 5% financial recovery.

35. In reply to the Ombudsman's further inquiries concerning this issue [5] , the Commission recalled its conclusion, in the opinion, that an in-depth analysis of the public procurement procedure related to the initial contract had shown no breach of the principle of equal treatment or any sort of discrimination between the tenderers. Moreover, the Commission had concluded that the fact that sub-criteria were subsequently divided into sub-sub-criteria did not lead to any preferential treatment of any of the tenderers. Therefore, there were no grounds for a financial correction as regards the initial contract related to the first phase of the project. This was why the Commission made no reference to the 5% correction in the pre-closure letter.

36. As regards the modification of the contract, the Commission recalled that this was subject to DG MARKT's assessment. It explained that, on 4 June 2012, DG MARKT opened a case bearing reference number CHAP (2012)1611 in order to investigate the facts related to the modification of the public works contract. The Commission's Directorate-General for the Environment was also involved in the investigation in respect of the EU environmental law issues raised by the complainant.

37. The Commission added that, on 16 July 2012, DG MARKT sent the complainant a pre-closure letter concerning case CHAP (2012)1611 stating, among other things, that the modification mentioned by the complainant referred to a contract that had been terminated. According to consistent case-law, an action against a Member State is not admissible before the Court of Justice if the contract in question has been performed completely. On the basis of the information provided by the auditors in DG REGIO, this applied to the public works contract concerning the construction of the first phase of the Port. Furthermore, the information provided by the complainant was not sufficient to determine whether or not the allegations constituted a breach of EU environmental law.

38. The Commission further stated, in its additional reply, that, on 13 September 2012, DG MARKT decided to close case CHAP (2012)1611 to the extent that the reply to the pre-closure letter sent by the complainant on 30 August 2012 did not change the initial assessment of the services involved. The initial complaint 2006/4213 was closed on 27 September 2012.

39. In his observations, the complainant considered that the Commission's explanations as regards the financial correction were contradictory, if not false. He took the view that the Commission had clearly stated, in its opinion, that it would proceed to a 5% financial correction, and subsequently changed its mind. The complainant submitted no comments about DG MARKT's decision to close case CHAP (2012)1611.

The Ombudsman's assessment

40. The allegation which the complainant made in the present case, and which the

Ombudsman included in his inquiry, only concerns a procedural aspect of the Commission's handling of the complainant's infringement complaint, namely, the duration of the Commission's investigation. The claim, however, also touches on the substantive issue of whether the Commission's assessment was adequately reasoned, since it was foreseeable that during the inquiry, the Commission would take a decision on the infringement complaint. In such a case, the Commission was naturally bound to provide the complainant with a due statement of reasons for its position.

41. The Commission eventually took a final decision on the complaint on 16 July and 27 September 2012. The Ombudsman will therefore assess separately the procedural aspects covered by the allegation and claim and the substantive aspects included in the said claim.

The length of the infringement procedure

42. The Ombudsman recalls that, when dealing with infringement complaints, the Commission is under procedural obligations stemming, in particular, from its 2002 Communication on relations with complainants, which was in force at the time of the relevant facts [6] . One such obligation, mentioned in point 8 of the Communication, is that, as a general rule, Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within no more than one year of the date of registration of the complaint. The Ombudsman has consistently taken the view that good administrative practice requires the Commission to provide valid reasons if it fails to assess an infringement complaint within the one-year deadline [7] .

43. In the present case, the Commission has explained, in sum, that the complexity of the case and the numerous additional possible infringements that its services identified during the investigation made it necessary to extend that deadline.

44. The Ombudsman has no doubt that the case was, indeed, particularly complex. The fist factor indicating that this was so is the fact that at least two Directorates-General had to cooperate closely and over almost the entire duration of the investigation in order fully to assess the project's compliance with EU law. The second factor to take into account is the fact that the Port was a massive infrastructure project, which necessarily raised numerous legal issues and generated significant amounts of documentation which the Commission needed to review in order to perform its assessment. The third relevant factor is that, as the Commission mentioned, the construction of the Port has not been free of legal disputes which reached the Spanish Court of Auditors and the Spanish Supreme Court. The fourth factor is that the Commission needed to perform an audit of the project and even requested, in 2009, the cooperation of the European Court of Auditors. The fifth factor, which stems directly from the previous four, is that the Commission needed to request information from the Spanish authorities on at least four occasions, in addition to the exchange of correspondence concerning the audit and the financial correction procedure, and that the said authorities replied late.

45. Under such specific circumstances, the Ombudsman would normally be receptive to the

Commission's argument that it could not conclude its investigation within the established one-year deadline. Nevertheless, according to the Commission, infringement complaint 2006/4213 was registered in March 2006, and was closed in September 2012. In total, it took the Commission six and a half years of investigations to reach the conclusion that there had been no breach of EU law in the case at hand [8] . No matter how complex the infringement case may have been, the Ombudsman takes the view that such a long period cannot be considered reasonable within the meaning of Article 41 of the Charter of Fundamental Rights of the European Union. Moreover, the Ombudsman notes that the Commission failed to inform the complainant in a timely manner of the steps taken during its investigation. It began doing so on a more regular basis only after the Ombudsman's intervention in the framework of his inquiry 30/2011/AN [9] and the present one. This constitutes maladministration and the Ombudsman will make a corresponding critical remark below.

46. The Ombudsman has already taken the view that, where, as in the present case, considerable delays occur, principles of good administrative practice require that at least an apology be made to the citizen concerned [10] . Acknowledging mistakes and offering apologies where appropriate brings the EU civil service back into line with the culture of service citizens expect it to be guided by. An apology is a very powerful tool with which to restore confidence in a responsible administration and to satisfy a harmed citizen [11] . In this regard, the Ombudsman is pleased to note that, in its opinion, the Commission expressed its regret for the delay incurred in taking a final decision on the complainant's infringement case.

The statement of reasons

47. The Ombudsman recalls that, according to established case-law, the Commission disposes of a wide margin of discretion to decide whether or not to pursue a Member State for an alleged infringement of EU law [12] . The Ombudsman has consistently adopted the position that a proper exercise of the Commission's discretion requires that complainants be properly informed of the reasons for the relevant decisions. This is all the more so taking into account that Article 41 of the Charter of Fundamental Rights of the European Union enshrines " *the obligation for the administration to give reasons for its decisions* " as an essential aspect of the right to good administration.

48. DG REGIO put forward on three occasions the reasons for its decision to close infringement complaint 2006/4213: in its letter dated 11 April 2012 to the complainant, in the pre-closure letter dated 12 June 2012 and, by reference to the latter, in its closure letter dated 27 September 2012. Those reasons were, essentially, that (i) the award of the works contract had not breached the rules applicable under the Cohesion Fund Regulation, and (ii) the subsequent modification of the contract and its value had no impact on the EU budget, since no expenses resulting from these modifications were declared as eligible costs under the Cohesion Fund financing. As regards the non-budgetary implications of these modifications, DG REGIO transferred the assessment of the case to DG MARKT for further evaluation.

49. The Ombudsman finds no indications in the file which could contradict DG REGIO's

conclusions set out in points (i) and (ii) above. He also notes in this respect, as regards conclusion (i), that the Court of Auditors assessed the issue of the selection criteria and sub-criteria, which was the main issue of concern as regards the tender results, and concluded that, despite some irregularities, the tender results had not been affected.

50. The complainant appears to consider that the above issue concerning the award criteria and sub-criteria was, in fact, irrelevant in this case, and that the Commission should have focused on the fact that the General Conditions of the tender clearly favoured the winning tenderer at the expense of public money. He moreover highlighted as an important factor the fact that the winning tenderer has requested additional amounts to those foreseen in the initial contract.

51. The Ombudsman recalls that the purpose of infringement investigations is, to identify possible breaches of EU law by a Member State and, ideally, to put an end to them at the administrative stage of proceedings. The Commission has thus addressed, from the EU law perspective, the complainant's concern that the winning tenderer was unduly favoured, and has concluded that this was not so. The fact that the winning tenderer's subsequent behaviour appears to be questionable, in that it has claimed additional amounts of money besides those contractually agreed upon, is an internal matter for the national authorities to deal with. As the Commission rightly pointed out in the opinion and the pre-closure letter, the fact that the initial contract amount has been exceeded is irrelevant from the Commission's perspective, as long as the Spanish authorities do not request the additional amount to be financed from EU funds.

52. As regards the financial correction which DG REGIO intended to apply to the contract, but eventually did not, it was not entirely clear from the Commission's opinion that the intention in question had been abandoned and, if so, why. Nevertheless, the Commission clarified in its further reply to the Ombudsman's additional question that the " *final proposal* " to apply a 5% financial correction was sent to the Spanish authorities in September 2011, in light of the intermediate audit findings. However, the final proposal was made before the Spanish authorities replied to the said findings, in December 2011. Finally, in light of the subsequent assessment, DG REGIO eventually abandoned its intention to propose a financial correction, since it concluded that no breach of EU law had taken place. These explanations persuaded the Ombudsman that the contradiction between the Commission's intentions expressed in its opinion and its final position concerning the financial correction expressed in the closure letter was only apparent.

53. The Ombudsman therefore concludes that DG REGIO has provided the complainant with a due statement of reasons for closing infringement case 2006/4213.

54. Finally, as regards the fact that DG MARKT eventually closed infringement case CHAP(2012)1611, thus ruling out the remainder of the complainant's concerns, the Ombudsman notes that the complainant did not raise any arguments against DG MARKT's decision. Therefore, the Ombudsman will not take a stance on this aspect.

55. In light of the above, the Ombudsman considers that no further inquiries are justified into

the Commission's substantive decision to close the infringement complaints.

B. Conclusions

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

The Commission has provided the complainant with a due statement of reasons for its decision to close infringement complaint 2006/4213.

However, the length of its investigation, which lasted for six and a half years, cannot be considered reasonable within the meaning of Article 41 of the Charter of Fundamental Rights of the European Union. Moreover, the Commission failed to inform the complainant in a timely manner of the steps taken during its investigation, and began doing so on a more regular basis only after the Ombudsman's intervention. This constitutes an instance of maladministration.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 26 August 2013

[1] Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund, OJ 1994 L 130, p. 1.

[2] The Commission sent that reply after the Ombudsman opened another inquiry (30/2011/AN) into the complainant's allegations concerning the Commission's failure to reply to his correspondence.

[3] Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199, p. 84.

[4] Article H provides as follows: " *1. If, after completing the necessary verifications, the Commission concludes that: (a) the implementation of a project does not justify either part or the whole of the assistance granted to it, including a failure to comply with one of the conditions in the decision to grant assistance and in particular any significant change affecting the nature or conditions of implementation of the project for which the Commission's approval has not been sought, or (b) there is an irregularity with regard to assistance from the Fund and that the*

Member State concerned has not taken the necessary corrective measures, the Commission shall suspend the assistance in respect of the project concerned and stating its reason, request that the Member State submits its comments within a specified period of time... 2. At the end of the period set by the Commission, the Commission shall, subject to the respect of due procedure, if no agreement has been reached within three months, taking into account any comments made by the Member State, decide to: ... (b) make the financial corrections required. This shall mean cancelling all or part of the assistance granted to the project.

These decisions shall respect the principle of proportionality. The Commission shall, when deciding the amount of a correction, take account of the type of irregularity or change and the extent of the potential financial impact of any shortcomings in the management or control systems. Any reduction or cancellation

shall give rise to recovery of the sums paid. "

[5] In his further inquiries, the Ombudsman requested the Commission to inform him " *whether it still intend* [ed] *to effect the 5% financial correction of the total budget of the contract, as announced in its opinion* ".

[6] Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM/2002/0141 final), OJ 2002 C 244, p. 5. This Communication was replaced in 2012. The content of the new Communication is nevertheless similar.

[7] Decision on complaint 706/2007/(WP)BEH, paragraph 34, available at: www.ombudsman.europa.eu [Link]

[8] As regards CHAP (2012)1611, the relevant information regarding the modification of the works contract and of the contract value was handed over to DG MARKT for formal investigation in June 2012. The case was subsequently closed in September 2012. Since this case was thus closed within the deadline envisaged in the 2002 Communication on relations with complainants, the Ombudsman will not refer to its procedural handling in the present decision.

[9] Mentioned in footnote 2 above.

[10] The Ombudsman's decision on complaint 3004/2007/BEH, paragraph 26, available at: http://www.ombudsman.europa.eu [Link]

[11] The Ombudsman's decision on complaint 3800/2006/JF, paragraph 74, available at: http://www.ombudsman.europa.eu [Link]

[12] Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 46; Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case C-87/89 *Société nationale interprofessionnelle de la tomate and others v Commission* [1990] ECR I-1981; Case T-182/97 *Ségaud v*

Commission [1998] ECR II-271. See also the Ombudsman's decisions on complaints 962/2006/OV, 3453/2005/GG, 3125/2005/BB, 995/98/OV, 480/2004/TN, 493/2000/ME and 489/2011/MHZ, available at: http://www.ombudsman.europa.eu [Link]