

## Decision of the European Ombudsman closing the inquiry into complaint 332/2013/AN against the European Commission

Decision

**Case 332/2013/AN - Opened on 13/03/2013 - Decision on 13/01/2014 - Institution concerned** European Commission ( No further inquiries justified ) |

### The background to the complaint

1. The complainant, a Spanish NGO active in the environmental field, submitted an infringement complaint to the Commission in January 2009.
2. The complainant challenged the Spanish authorities' signature of voluntary agreements with the chlor-alkali sector in 2006-2007 and the permits granted to eight chlor-alkali plants allowing the use of mercury cells in the chlor-alkali production process. The complainant considered this to be in breach of Directive 1/2008 [1] (the 'IPPC Directive'), the aim of which is to prevent mercury emissions and which requires Member States to take appropriate preventive measures against pollution.
3. The Commission acknowledged receipt of the complaint on 28 April 2009. It informed the complainant that its services were assessing the facts in order to ascertain whether they demonstrated any breach of EU law.
4. On 31 May 2010, the complainant contacted the Commission regarding the state of its infringement complaint. The Commission did not reply. On 27 September 2010, the complainant sent a reminder and highlighted that the Commission's lack of action was not in line with its 2002 Communication on relations with complainants [2] .
5. On 8 October 2010, the Commission acknowledged receipt of the complainant's correspondence of 27 September 2010, which was registered as an infringement complaint under the reference CHAP(2010)03067. The Commission apologised to the complainant for the delay in handling its infringement complaint, which was due to a restructuring of the service in charge and a reassignment of the case. The Commission stated that it intended to open an investigation into the infringement complaint and inform the complainant about that investigation in good time.



6. The Commission opened the EU Pilot investigation into the complaint in November 2010. In early 2011 the complainant exchanged correspondence with the Commission and met with its services.

7. On 8 July 2011, the Commission informed the complainant that it had ended the assessment of the EU Pilot concerning the infringement complaint. It mentioned the steps it had taken in relation to the infringement complaint and explained in detail the Spanish authorities' replies and the data they had provided. The Commission stated that, on the basis of the information it had gathered, it could not identify any infringement of EU law. It therefore intended to close the infringement procedure and invited the complainant's observations before doing so.

8. The complainant submitted its observations on 8 August 2011. It reiterated its position that Spain was not acting in compliance with EU law. The complainant made a detailed analysis of the applicable EU provisions and the way in which Spain had infringed them.

9. On 20 October 2011, the complainant submitted additional information to the Commission in support of its position.

10. On 27 October 2011, the Commission acknowledged receipt of the new material and informed the complainant that, due to the complexity of the case, it would not be in a position to take a decision on it before the end of 2011.

11. On 25 January 2012, the complainant submitted new information to the Commission.

12. On 5 March 2012, the complainant contacted the Commission regarding the state of its complaint. It complained about the length of time taken to deal with the case.

13. Dissatisfied with the Commission's inaction, the complainant turned to the European Ombudsman in February 2013.

## **The subject matter of the inquiry**

14. The Ombudsman's inquiry referred to the following allegation and claim.

### **Allegation:**

The Commission has failed properly to deal with infringement complaint CHAP(2010)03067.

### **Claim:**

The Commission should: (i) explain the reasons for its delay in handling infringement complaint



CHAP(2010)03067; and (ii) make a reasoned decision on it as soon as possible, informing the complainant accordingly.

**15.** Towards the end of the Ombudsman's inquiry, the Commission decided to close the infringement complaint. The Ombudsman notes the complainant's disagreement with that decision. However, the Commission's substantive assessment of the case was not, and logically could not be, subject to the present inquiry, which took place at a time when no such decision existed. Moreover, in light of the exchanges of correspondence between the complainant and the Commission in this regard, it appears that the substantive debate concerning the infringement case is ongoing between them. For this reason, the Ombudsman will neither refer to, nor adopt a position on, the parties' arguments on the substance of the case as set out in their respective submissions.

## **The inquiry**

**16.** On 13 March 2013, the Ombudsman informed the President of the European Commission about the complaint and requested the Commission to provide an opinion on the above allegation and claim by 30 June 2013.

**17.** On 28 June 2013, the Commission informed the Ombudsman that it would not be able to meet the deadline and that it intended to send its opinion by 31 July 2013. The Commission did so on 12 July 2013.

**18.** The opinion was forwarded to the complainant with an invitation to submit observations, which it did on 30 August 2013.

## **The Ombudsman's analysis and conclusions**

### **A. Allegation of failure properly to deal with infringement complaint CHAP(2010)03067 and related claim**

#### **Arguments presented to the Ombudsman**

**19.** In its complaint, the complainant argued that, four years after it had submitted its infringement complaint, the Commission had still not taken any action. This was in breach of the Commission's obligations and the principles of good administrative behaviour. Meanwhile, Spain continued to permit the use of mercury cells, despite mercury being a toxic, bio-accumulative and "*persistent*" material. This was detrimental to the environment and the health of the population.

**20.** In its opinion, the Commission acknowledged and regretted the delay in handling the



complainant's file, which it considered excessive. The Commission stated that its Directorate-General for Environment was dealing, at the end of 2012, with 1167 files, of which 99 concerned Spain. This was one of the reasons why it took so long to handle the complainant's file. The other reason was the complexity of the case, which included changes to the applicable EU legislation. The Commission apologised for this delay.

**21.** The Commission further explained that, on 6 and 13 May 2013, it had informed the complainant of the progress of its conclusions, in light of the issues the complainant had raised, the position of the Spanish authorities and the actions taken at EU level concerning the sector. The Commission essentially took the view, in those letters, that the IPPC Directive did not provide a sufficient legal basis for launching infringement proceedings in the present case. The Commission thus intended to close the infringement case and granted the complainant four weeks to submit its arguments in that regard. The Commission highlighted, however, that ongoing legislative changes at EU level would provide a clear legal basis for the Commission to ensure that Member States implement the best available techniques in the relevant sector.

**22.** Upon receipt of the Commission's opinion, the complainant informed the Commission and the Ombudsman that it had not received the Commission's letter dated 13 May 2013 setting out the above and granting it four weeks to reply to the Commission's pre-closure letter. The complainant therefore asked the Commission to resend the letter, which it did on 23 July 2013. The Commission also granted the complainant a new deadline to submit its comments on the Commission's intention to close the case.

**23.** In its observations, the complainant reiterated that the Commission's delay in handling its case was not in line with: (i) the right to good administration as enshrined in Article 41 of the Charter of Fundamental Rights of the European Union; and (ii) the right to open, efficient and independent European administration provided for in Article 298(1) of the Treaty on the Functioning of the European Union. Moreover, the complainant highlighted a series of procedural inconsistencies in the Commission's handling of its case. For instance, it did not tell the complainant about the opening of the EU Pilot investigation and, in its letter dated 13 May 2013, it mentioned a different reference number for the complaint. That reference number was at no point notified to the complainant.

**24.** The complainant also put forward its arguments against the Commission's substantive assessment of the infringement case and sent the Ombudsman a copy of its comments on the Commission's pre-closure letter.

**25.** On 15 October 2013, the Commission informed the complainant that it had decided to close the infringement case and explained the reasons behind this decision. The complainant responded to this on 17 October 2013, challenging the Commission's position.

## **The Ombudsman's assessment**

**26.** In substance, the inquiry into the present case concerned the fact that, four years after the



complainant submitted its infringement complaint, the Commission had still not taken a decision on it. The claim, therefore, is twofold. It concerns both the existing delay and the need for the Commission to put an end to it by taking a decision as soon as possible.

**27.** The Ombudsman recalls that, when dealing with infringement complaints, the Commission is under procedural obligations stemming, in particular, from its 2002 and 2012 Communications on relations with complainants [3] . One such obligation is mentioned at point 8 of the 2012 Communication. This provides 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 not more than one year from 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 [4] .

**28.** The Commission explained, in its opinion, that the deadline was not met in the present case for two reasons. First, the relevant service dealing with it was overloaded with a significant number of other cases, many of which concerned Spain. Second, at the time the complainant's infringement case was being assessed, the EU adopted additional legal instruments regulating the relevant sector, and in particular the new Directive 2010/75/EU on industrial emissions [5] . This Directive also provides for the adoption of binding references for permit granting by Member States.

**29.** In general terms, EU institutions are under an obligation to discharge their duties in a proper and timely manner. The Ombudsman acknowledges that staff shortages, work overload and other staffing issues can sometimes make it difficult to meet this obligation. Nevertheless, it is for the institutions to make the appropriate practical arrangements in order for their services to be as effective as possible in meeting their obligation.

**30.** The Ombudsman understands that the circumstances of the present infringement case may not have allowed the Commission to have dealt with it within the one-year deadline established in its Communications, or within another reasonable deadline. In addition to the factors pointed out by the Commission, the Ombudsman also notes that the complainant has provided the Commission with additional information and documents related to the infringement case on a number of occasions. This may quite reasonably have prolonged the time the Commission needed to assess the case thoroughly in its entirety.

**31.** The Ombudsman welcomes the Commission's willingness to acknowledge the excessively lengthy handling of the case, and the unprompted apologies that the Commission made to the complainant. She also notes that, in its letter dated 17 October 2013 to the Commission, the complainant thanked the Commission for its apologies. In light of the Commission's positive reaction to the Ombudsman's inquiry and bearing in mind that, soon after opening the inquiry, the Commission engaged in dialogue with the complainant with a view to taking a formal decision on the infringement case, the Ombudsman does not consider it appropriate to inquire further into the Commission's delay in handling the procedure.



**32.** In addition to the above, the Ombudsman notes that, following the submission of the complainant's observations, the Commission confirmed its intention to close the infringement procedure. This closure is set to happen during one of the upcoming meetings of the College of Commissioners. The Commission has thus addressed the second aspect of the claim, into which there are no grounds to inquire further.

**33.** In light of the findings in paragraphs 31 and 32, the Ombudsman thus concludes that there are no grounds to conduct further inquiries into the present complaint.

**34.** Having said that, the Ombudsman points out that, in addition to time constraints, the principles of good administrative behaviour and the 2012 Communication also place the Commission under an obligation. This is to keep infringement complainants updated about the significant steps taken in relation to their case throughout its handling. The Ombudsman is pleased to note that, in its recent follow-up to an Ombudsman's decision on a similar case concerning an infringement complaint against Spain [6] , the Commission has acknowledged that *" a complainant has a right to receive information about his complaint, even if no progress has been made as a result of factors beyond the control of the Commission ."*

**35.** In the present case, however, the communication between the Commission and the complainant has not been particularly smooth. Acknowledgements of receipt have taken, at times, weeks or even months. Replies have been sent, in some cases, more than four months after the request and relevant information, such as the opening of the EU Pilot investigation, has reached the complainant belatedly and only when it explicitly requested it. These communication failures have understandably undermined the complainant's trust in the Commission's handling of the case. They have also reduced its willingness to accept the Commission's arguments for overrunning the standard investigation duration. The Ombudsman considers that the present case should serve as a reminder to the Commission of the importance of smooth and regular communication with complainants. This not only enables complainants to follow up on the progress of their complaint, but also legitimises the Commission's role as Guardian of the Treaties and the institution that European citizens are more likely to engage with as regards the application of EU law. In this regard, the Ombudsman will make a further remark below.

## B. Conclusions

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

**There are no grounds to conduct further inquiries into the present case.**

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

## Further remark



**The Commission should keep in mind the importance of smooth and regular communication with complainants. This not only enables complainants to follow up on the progress of their complaint, but also legitimises the Commission's role as Guardian of the Treaties and the institution that European citizens are more likely to engage with concerning the application of EU law.**

Emily O'Reilly

Done in Strasbourg on 13 January 2013

[1] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, OJ 2008 L 24, p. 8.

[2] *Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* (COM(2002) 141 final), in force at the time the infringement complaint was lodged, replaced by *Communication from the Commission to the Council and the European Parliament updating the handling of relations with the complainant in respect of the application of Union law* (COM(2012) 154 final) (the '2012 Communication').

[3] The relevant content of the Communications is similar. The Ombudsman's assessment will refer to the updated text of the 2012 Communication.

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

[5] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast), OJ L 334, p. 17. This Directive has replaced the IPPC Directive as regards existing operators as of 1 January 2014.

[6] Commission's follow-up dated 21 October 2013 to the Ombudsman's critical remark in Case 1146/2012/AN.