

## **Decision of the European Ombudsman closing his inquiry into complaint 2811/2009/(BU)JF against the European Commission**

Decision

**Case 2811/2009/(BU)JF - Opened on 11/01/2010 - Decision on 11/11/2010**

### **The background to the complaint**

1. The complainant is a law firm. It represents a limited liability company which organises cultural events and operates a theatre in Prague [1] . The complainant has repeatedly applied to the city of Prague (the 'Municipality'), for public funding for its projects, but without success.
2. On 11 September 2007, the complainant submitted a complaint to the Commission alleging that the Municipality was unlawfully granting State aid to private Czech companies and other theatre operators.
3. On 27 September 2007, the Commission registered the above complaint, which was given case reference number CP 275/2007.
4. On 12 October 2007, the Commission registered some additional information submitted by the complainant.
5. On 6 December 2007, the Commission forwarded the complaint to the Czech authorities and invited them to comment.
6. On 14 and 15 February 2008, the Commission received the Czech authorities' comments on the complaint.
7. On 18 June 2008, the Commission held a meeting in Brussels with the Municipality and the Czech 'Office for the Protection of Competition' ('the meeting of 18 June 2008').
8. On 16 July 2008, the complainant requested the Commission to provide it with information on the meeting of 18 June 2008.
9. On 26 August 2008, the complainant submitted additional information to the Commission



relating to its complaint. In summary, it stated that the Municipality intended to apply the same grants scheme for the year 2009. The complainant considered that this breached European Union ('EU') law.

**10.** On 18 September 2008, the complainant asked to be informed of how the case was progressing and to be given the e-mail address of the person responsible for handling it.

**11.** On 15 October 2008, the Commission provided the complainant with the Municipality's comments on the complaint, and invited it to submit observations.

**12.** On 17 October 2008, the Commission also provided the complainant with the minutes of the meeting of 18 June 2008.

**13.** On 27 October 2008, the complainant sent the Commission its observations on the Municipality's comments. In summary, the complainant maintained that the Municipality was in breach of EU State aid rules.

**14.** On 4 February 2009, the complainant provided the Commission with some further information and again asked how the case was progressing.

**15.** On 17 December 2009, the complainant submitted further information relating to its complaint to the Commission.

**16.** In the meantime, on 9 November, and 15 and 17 December 2009, the complainant submitted the present complaint to the Ombudsman.

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

**17.** The complainant alleged that there were administrative irregularities and unnecessary delays in the Commission's handling of the State aid complaint.

**18.** The complainant claimed that the Commission should make a decision on the State aid complaint, and inform it of that decision.

## **The inquiry**

**19.** On 11 January 2010, the Ombudsman forwarded the complaint to the President of the European Commission.

**20.** On 11 March 2010, the Ombudsman received the Commission's opinion in English and, on 29 March 2010, its translation into Czech. Both versions were sent to the complainant with an invitation to make observations.



21. On 26 April 2010, the complainant submitted its observations on the Commission's opinion.

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

### **Preliminary remark**

22. The Ombudsman first recalls that he is empowered to receive complaints concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies [2] . He cannot deal with complaints against national authorities.

23. Consequently, the present decision concerns only the actions of the Commission and does not involve an evaluation of the actions of the national authorities.

**A. Allegation of administrative irregularities and unnecessary delays. Claim that a decision should be made.**

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

24. The complainant argued that the Commission's failure to invite it to attend the meeting of 18 June 2008 was, in its view, contrary to the principles of equal defence and fair process.

25. The complainant further argued that it had heard nothing from the Commission since 29 October 2008, the date on which it sent the latter its observations on the Municipality's comments, and that nothing had been done regarding the case since then.

26. In its opinion, the Commission contested the complaint. First, it explained that the meeting of 18 June 2008 was not a hearing within the meaning of EU competition rules. Its purpose was for the Commission to obtain information about the Municipality's cultural aid scheme for theatres.

27. The Commission explained that the Municipality's grants scheme in the field of culture and arts ('the Scheme') had essentially remained the same since 1995, that is, before the accession of the Czech Republic to the EU. The Czech authorities provided the Commission with information about the Scheme and of their intention to review it. They asked for examples of schemes the Commission had approved to help them with the said revision. The Commission provided the Czech authorities with the requested information. The Commission did not take a definitive position on the Scheme, but rather focused on encouraging the Member State to introduce modifications which addressed the complainant's concerns more clearly. It also duly informed the complainant of the Czech authorities' plans to revise the Scheme by forwarding to it the minutes of the meeting of 18 June 2008.



**28.** The Commission went on to explain that, not having received any pre- notification pertaining to the revision of the Scheme, it reminded the Czech authorities on a number of occasions that it wished to be informed about the main characteristics of the revised Scheme ('the Revised Scheme'). Consequently, on 25 August 2009, the Czech authorities addressed a pre-notification to the Commission relating to the Municipality's Revised Scheme for the years 2010-2015, which was registered under reference number PN 239/2009. The Commission examined the relevant documents. On 25 September 2009, the Commission sent its comments and further requests for clarification regarding the Revised Scheme to the Czech authorities. On 26 November 2009, the Czech authorities provided the Commission with a new draft. At the time the Commission sent its opinion to the Ombudsman, the new draft was under preliminary examination.

**29.** In this respect, the Commission explained that, according to the applicable rules, and the case-law of EU courts, a preliminary examination is essentially a procedural step which is characterised by dialogue between the Commission and the Member State concerned. In this process, complainants are an important source of information about possible unlawful State aid. However, they do not play any formal role in the proceedings, nor are they considered a party to them. Although it is true that the Commission may engage in talks with Member States and complainants when seeking to resolve difficulties it encounters during the preliminary examination, this does not imply that it is under an obligation to engage in trilateral talks, nor does it entail any general right for complainants to be heard. The Commission was not obliged to consult, or conduct an exchange of views with a complainant, nor did it need to provide a complainant with any feedback on the case's progress. The Commission stated that its preliminary examination would soon be finalised and, despite all of the foregoing, it would nevertheless inform the complainant in due time of the outcome of its assessment.

**30.** The Commission considered that it had fully respected all the necessary procedural guarantees, and that it had even gone beyond its legal obligations. It provided the complainant with full access to information on the Member State's position regarding the allegations expressed in the original complaint, and it gave the complainant the opportunity to submit observations. This was more than it was obliged to do under the applicable rules and case-law. It further provided the complainant with the minutes of the meeting of 18 June 2008, and kept it regularly informed of how the case was progressing.

**31.** Finally, the Commission stated that it has the right to prioritise complaints it receives, and thus to postpone examining matters which it considers are not a priority. In this particular case, the Commission did not consider the complaint to be a priority because it appeared to have a national dimension with very limited effects on intra-EU trade.

**32.** In its observations, the complainant emphasised that, until it received a copy of the opinion the Commission submitted to the Ombudsman, it had not known of the Czech authorities' pre-notification to the Commission. In this respect, it drew attention to the fact that the above pre-notification dated from August 2009, and at that time the cultural bodies operating in Prague could not have known what the Municipality's new conditions would be for the 2010/2011 theatrical season.



**33.** The complainant further argued that the Commission did not examine the Scheme for the period between 2006 and 2009, nor did it properly inform it of how the case was progressing. It drew attention to the fact that the complaint was submitted three years ago, and that the Commission had not yet concluded its preliminary examination. The Commission, despite its obligation to keep all systems of existing aid under constant review, had, in the present case, simply collected information without proposing any effective measure to remedy the unlawful award of State aid which had occurred. In the complainant's opinion, the Commission should order the Municipality to recover unlawfully awarded aid from beneficiaries for the period between 2006 and 2010.

## **The Ombudsman's assessment**

*The Commission's actions vis-à-vis the complainant (the alleged administrative irregularities)*

**34.** The complainant submitted a complaint to the Commission alleging that the State aid granted by the Municipality was illegal under EU State aid rules [3] . The Ombudsman thus understands that, ultimately, the complainant, as a competitor of the entities that benefited from the Municipality's cultural grant, and, therefore, an interested party [4] , considered such a grant to be illegal because, in its view, it distorts competition in a way which affects trade between Member States, and it is incompatible with the internal market.

**35.** The Ombudsman notes that, after registering the complaint, the Commission exchanged correspondence with the complainant, notably informing it of the different steps taken regarding the complaint.

**36.** The complainant argued that the Commission failed to invite it to the meeting of 18 June 2008, which meant that there was no input from the complainant to that meeting, and the Commission counter argued that the meeting in question took place outside any formal investigation procedure, which meant that there was no legal obligation for it to invite the complainant [5] . The Ombudsman emphasises that, as a matter of good administration, it might sometimes be appropriate for the Commission to invite a complainant to an informal meeting, even if there is no legal obligation to do so. In the present case, however, the Commission's explanation that it was merely seeking information from the Czech authorities appears to be reasonable.

**37.** Furthermore, the Commission nevertheless made it possible for the complainant to learn what was discussed at the meeting of 18 June 2008, by responding positively to its request for information, and by providing access to the minutes of the meeting.

**38.** In addition, on 15 October 2008, the Commission offered the complainant the possibility of commenting on the Member State's position on its complaint [6] .

**39.** Finally, although the Commission was not legally obliged to inform the complainant about



the Member State's pre-notifications or notifications [7] , in its opinion to the Ombudsman, it committed itself to informing the complainant about the results of its preliminary examination. The Ombudsman considers this commitment not only to be a positive reply to the complainant's claim that the Commission should make a decision and inform the complainant of its decision, but it is also in conformity with principles of good administration [8] .

**40.** In light of the above, the Ombudsman finds no maladministration on the part of the Commission as regards this aspect of the complaint.

*The Commission's actions following the complaint (the alleged delays)*

**41.** After receiving the complaint, the Commission registered it immediately. Within two months of receiving the last information submitted by the complainant, it asked the Czech authorities for their comments. The Commission therefore examined the information pertaining to an allegedly existing State aid without delay, and it requested information from the Member State concerned, which the latter provided [9] .

**42.** Subsequently, the Commission held a meeting with the Czech authorities on 18 June 2008. The latter informed the Commission that they intended to review the existing grants scheme [10] . The Commission then gave the Czech authorities examples of schemes which met its requirements for approval, and requested to be kept informed of developments [11] . The Ombudsman thus understands that, without taking any formal position on the existing cultural aid scheme, ultimately, the Commission intended to contribute to the Czech authorities' plans to establish a scheme that would be compatible with its requirements, and which would thus avoid any possible infringement of EU State aid rules. Such an approach is, in the Ombudsman's view, reasonable and it appears to reflect both the letter and the spirit of the rules on State aid as provided for in the Treaty on the Functioning of the European Union ('TFEU') [12] .

**43.** After receiving a 'pre-notification' pertaining to the Revised Scheme, and after requesting further information from the Czech authorities, the Commission proceeded with its examination. On 26 November 2009, the Czech authorities submitted a " *second draft* " of the notification. On 10 March 2010, the date on which the Commission submitted its opinion to the Ombudsman, the latter stated that the " *examination of the draft notification [was] about to be closed* ", and that the Commission was expecting the Czech authorities to submit a " *notification* " of the Revised Scheme for the years 2010/2015 shortly afterwards.

**44.** The Ombudsman understands 'draft notification' and 'pre-notification' to mean a document that would subsequently form the basis for the final version of the 'notification'. At the time the Commission submitted its opinion to the Ombudsman, that document had still to be formally submitted to the Commission [13] . The Ombudsman therefore notes that, according to the Commission, the analysis of the Municipality's Revised Scheme was, at that time, " *in the phase of preliminary examination* ".

**45.** Consequently, the Ombudsman concludes that, when the Commission sent him its opinion, the Czech authorities and the Commission were still engaged in an ongoing dialogue [14] to



achieve the result outlined in paragraph 42 above, through a complete notification, which had not yet reached the Commission.

**46.** Moreover, he considers that when the Commission decided not to treat the complaint as a priority, it acted within its powers of discretion in defining EU policy in the relevant field. The Commission properly justified its decision by stating that, in summary, the complaint appeared to have a national dimension rather than concerning a matter which would have a potential major impact on the internal market [15] .

**47.** In light of the above, the Ombudsman considers that the Commission took appropriate action to investigate the complaint. Even though, by the time the Commission's opinion reached the Ombudsman, approximately two and a half years had elapsed, the Commission offered a reasonable explanation for such a timeframe by explaining the actions it had taken and by arguing and giving reasons for its discretionary evaluation that the complaint did not require priority treatment.

**48.** In light of the above, the Ombudsman finds no maladministration by the Commission in respect of the allegation and, therefore, the related claim cannot be sustained.

## B. Conclusion

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

**The Ombudsman finds no maladministration by the Commission in respect of the allegation, and the complainant's claim cannot be sustained.**

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

P. Nikiforos Diamandouros

Done in Strasbourg on 11 November 2010

[1] The law firm and the company it represents will be referred to as the 'complainant' throughout the decision.

[2] Article 228 of the Treaty on the Functioning of the European Union ('TFEU').

[3] According to Article 107(1) TFEU, "[s]ave otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the





*internal market. "*

[4] Article 1'Definitions', paragraph (h), of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU), OJ 1999 L 83, (the 'Rules') provides that: " *'interested party' shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations. "*

[5] Article 20(1) 'Rights of interested parties' of the Rules provide that "[a] ny interested parties may submit comments ... following a Commission decision to initiate the formal investigation procedure ... ". See also, among others, the Judgment of the Court of First Instance (Second Chamber, extended composition) of 30 April 2002 in Joined Cases T-195/01 and T-207/01, *Government of Gibraltar v Commission of the European Communities* , paragraph 144, ECR [2002], II-2309: " ... it exists no obligation on the Commission to conduct an exchange of views and arguments with a complainant during the preliminary stage of an investigation into State aid ... The parties concerned cannot require that the Commission hear their views so that they can influence the preliminary assessment which leads the Commission to initiate the formal investigation procedure. "

[6] See, among others, the Judgment of the Court of First Instance )Fifth Chamber, extended composition) of 15 March 2001 in Case T-73/98, *Société chimique Prayon-Rupel SA v Commission of the European Communities* , paragraph 45, ECR [2001], II-867: "[i] n accordance with the objective of Article [108] (3) of the Treaty and its duty of good administration, the Commission may, amongst other things, engage in talks with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered. "

[7] See, among others, the Judgment of the Court (Fifth Chamber) of 9 October 1984 in Joined Cases 91 and 127/83, *Heineken Brouwerij BV v Inspecteur der Vennootschapsbelasting, Amsetrdam and Utrecht* , paragraph 15, ECR [1984] 3435: " Article [108] (3) of the Treaty does not require that the notification to the Commission by a Member State of plans to grant or alter aid should be immediately made known to all the interested parties; such an obligation falls upon the Commission alone when it initiates the procedure provided for in Article [108] (2). "

[8] According to Article 22(1) 'Requests for information' of the European Code of Good Administrative Behaviour, "[t] he official shall ... provide members of the public with the information that they request ... "

[9] Article 10(1) and (2) 'Examination, request for information and information injunction' of the Rules: "[w] here the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay. If necessary, it shall request information from the Member State concerned ... "

[10] Article 108(3) TFEU provides that "[t] he Commission shall be informed, in sufficient time to





*enable it to submit its comments, of any plans to grant or alter aid ... "*

[11] Article 2(1) 'Notification of new aid' of the Rules states that "[a] ny plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned. "

[12] Article 107(2)(d) TFEU provides that " *aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest* " shall be compatible with the internal market. Relatedly, according to Article 108(1) TFEU, "[t] he Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market. "

[13] Article 2(2) of the Rules provides that "[i] n a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision ... (hereinafter referred to as 'complete notification'). "

[14] Article 4(5) 'Preliminary examination of the notification and decisions of the Commission' of the Rules states that "[t] he notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. The period can be extended with the consent of both the Commission and the Member State concerned. " Relatedly, Article 5(1) and (2) 'Request for information' of the Rules clarifies further that "[w] here the Commission considers that information provided by the Member State concerned ... is incomplete, it shall request all necessary additional information ... [If necessary] , the Commission shall send a reminder, allowing an appropriate additional period within which the information shall be provided ... ".

[15] See, among others, Judgment of the Court (Fifth Chamber) of 4 March 1999 in Case C-119/97 P, *Union française de l'express (Upex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission of the European Communities and Mat Courier* , ECR [1999], I-1341, paragraph 88: "[t] he Commission, entrusted ... with the task of ensuring application of the [rules on competition] , is responsible for defining and implementing the orientation of Community competition policy ... In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaint brought before it. "