

Decision of the European Ombudsman closing the inquiry into complaint 2521/2011/(MF)JF against the European Commission

Decision

Case 2521/2011/JF - **Opened on** 09/02/2012 - **Recommendation on** 16/12/2013 - **Decision on** 28/07/2014 - **Institution concerned** European Commission (Draft recommendation accepted by the institution) |

The case concerned the handling by the European Commission's Directorate-General Competition ('DG COMP') of a complaint alleging unlawful State Aid to four Spanish football clubs. The complaint was made to the Commission in 2009 by a representative of a number of investors and shareholders in European football clubs. The Ombudsman's inquiry found that DG COMP had failed to comply with the provisions of its own Code of Best Practice by failing to decide on the complaint within the relevant deadline; nor did it properly justify why it had failed to make a decision. The complainant had argued that the Commissioner for Competition supported one of the clubs in question and that this explained why no decision had been taken. The Ombudsman in May 2013 invited the Commission to make a decision on the complaint or to explain why it was not able to do so. The Ombudsman's proposal pointed in particular to the need to avoid giving the impression of a conflict of interest.

DG COMP accepted the Ombudsman's proposal. But after a further two months there was no evidence that the proposal was being acted upon. In the circumstances, the Ombudsman concluded that the Commission had not implemented the proposal. On 16 December 2013 she recommended to the Commission that it make a decision on whether or not to start infringement proceedings as soon as possible and, in any event, not later than 30 June 2014.

On 18 December 2013, more than four years after first receiving the complaint, the Commission decided to open an investigation against Spain. In subsequent correspondence the Commissioner made some critical observations on the Ombudsman's inquiry. The Ombudsman replied to these observations. This exchange of correspondence is published on the Ombudsman's website in conjunction with this decision.

The background

1. The complainant is a representative of a number of investors and shareholders of European



football clubs. In November 2009 he complained to the European Commission's Directorate-General Competition (DG COMP) concerning allegedly unlawful State Aid granted by the Kingdom of Spain to four of its major football and basketball clubs (the 'Complaint'). DG COMP forwarded the Complaint to the Spanish Authorities in February 2010 and received their replies in March and April 2010. The complainant commented on the Spanish Authorities' replies in May and July 2010. In September 2010, DG COMP addressed eight specific questions to the Spanish Authorities, to which the latter replied in December 2010. On 14 March 2011, the complainant commented on the Spanish Authorities' last set of replies.

2. During the above sequence of events, the complainant repeatedly expressed concern about the time DG COMP was taking to investigate a complaint which had received priority status [1] . He argued that it was well known that the Commissioner for Competition ('the Commissioner') had very close ties to one of the clubs allegedly benefitting from unlawful State Aid and expressed the hope that this would not influence the treatment of the Complaint. Not having heard from DG COMP since March 2011, in December 2011, the complainant contacted the European Ombudsman.

3. The Ombudsman decided to investigate the complainant's allegation that DG COMP had failed properly to handle the Complaint and to make a timely decision on it. In its reply to the complaint, the Commission said that the time frames set out in its Code of Best Practice for the conduct of State aid control procedures (the 'Code of Best Practice') are indicative and that specific circumstances allow for deviations from the one year time frame for reaching a decision on a complaint. It referred to the White Paper on Sports [2] and to the European Parliament's resolution of 2 February 2012 on the European dimension in sport [3] and stated that DG COMP had other pending cases and was considering, in general terms, how State Aid rules should be applied to professional football. It also assured the complainant that the Commissioner's decisions in his capacity as Commissioner for Competition were in no way affected by his supporting, as a football enthusiast, one of the clubs mentioned in the Complaint [4] .

Alleged failure properly to handle the Complaint and related claim

The Ombudsman's friendly solution proposal

4. The Code of Best Practice's references to "*specific circumstances*" concern those of the "*individual case* [s]". It is "[t] *he specific features of an individual case* [that] *may however require an adaptation of, or deviation from, this Code*" [5] . DG COMP's consideration of other pending cases, or its reflection as to a general approach to State Aid in football, clearly did not concern the circumstances of the Complaint and therefore did not justify deviating from the Code of Best Practice. In addition, neither the White Paper on Sport nor the European Parliament's resolution of 2 February 2012 had any relevance for the application of the above exception to the Complaint. Furthermore, DG COMP had categorised the Complaint as a "*priority case*". It



should have, in principle, made a decision on the Complaint within one year of receiving the final piece of information of importance to its investigation [6] . The failure to make a timely decision, and the failure to justify why it was unable to reach a decision, may have amounted to maladministration.

5. The Ombudsman observed that, in such circumstances, the Commissioner's support, even if only as a football enthusiast, of one of the clubs mentioned in the Complaint, could indeed create the impression that no decision had been taken precisely because of that support, an argument repeatedly raised by the complainant. While the Ombudsman agreed with the Commission that the Commissioner's affiliation to one of the clubs did not provide solid evidence that the Commission's decision-making was affected, the Ombudsman nevertheless emphasised the great importance of dispelling any suspicion of potential conflicts of interest. The Commission's reply to the complaint did not provide any explanation capable of dispelling such a suspicion.

6. In light of the above, on 30 May 2013, the Ombudsman made a proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman, that:

"[DG COMP] could adopt a decision on the Complaint or properly explain why it is not yet able to do so, in accordance with the Code of Best Practice, and paying particular regard to the need to avoid giving the impression of a conflict of interest. "

7. On 26 September 2013, the Commission replied [<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54600/html.bookmark>] that it " *welcome[d] the Ombudsman's proposal and [wa] s pleased to ... accept this proposal* ". It explained that it had limited experience in matters of State Aid to professional sports and that, in October 2012, it had sent a letter to all Member States enquiring about their financial relations with professional football [7] . As a result, DG COMP had opened formal investigations regarding possible State Aid to various Dutch football clubs [8] . The Commission further referred to a joint statement issued by the Commissioner and the President of UEFA in March 2012 on Financial Fair Play rules and State aid control in professional football (the 'Joint Statement') [9] . It regretted the delay in taking a decision on the Complaint and stated that DG COMP would prepare a Commission decision shortly.

8. In his extensive and detailed observations of 11 October and 1 November 2013, the complainant contested the Commission's arguments, noted DG COMP's opening of formal investigations against the Netherlands for issues similar to those set out in his Complaint, and took the view that the Commission's reply to the Ombudsman's friendly solution proposal actually reinforced the impression of a conflict of interest.

The Ombudsman's draft recommendation

9. The Commission's reply of 26 September 2013 to the friendly solution proposal came nearly two months after the deadline specified by the Ombudsman. The reply stated that the



Commission accepted the proposal and that " *DG Competition will propose a Commission decision shortly* ". Over two months later, and more than six months since the friendly solution had been proposed, the Ombudsman had heard nothing further, either formally or informally. In these circumstances, she considered that the Commission had failed to implement the friendly solution. This was an instance of maladministration. Therefore, on 16 December 2013, the Ombudsman made a draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman, that:

"[t] he Commission should undertake to make a decision on whether or not to start infringement proceedings as soon as possible and, in any event, not later than 30 June 2014. "

10. On 20 December 2013, the Commissioner replied to the Ombudsman [<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54541/html.bookmark>] saying that, on 18 December 2013, the Commission had decided to open an in-depth investigation of the compatibility with the State Aid rules of certain tax privileges granted to four Spanish football clubs. In his letter, the Commissioner made a number of critical observations regarding the Ombudsman's inquiry. In particular, the Commissioner asserted (a) that the Ombudsman had overturned the friendly solution " *agreed with your predecessor* "; (b) had breached confidentiality by publicising the Commission's intention to launch an investigation before it had taken the formal decision to do so; and (c) had represented the Commission's decision, to start an investigation of the Spanish case, as being in response to the Ombudsman's recommendation. The Commissioner described this last imputed action of the Ombudsman as being " *intentionally misleading* ".

11. On 17 January 2014, the Ombudsman replied to the Commissioner's letter [<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54542/html.bookmark>]. She explained that she had not, in fact, overturned the friendly solution proposal of May 2013; rather, she had concluded that the Commission had failed to implement that proposal. She observed that this was a reasonable conclusion to reach, four years following the making of the original complaint and six months after the friendly solution proposal, where there was nothing to indicate that the Commission was about to act. As regards the claimed breach of confidentiality, the Ombudsman pointed out that her first public statement on the Commission's proposed investigation was made on 17 December 2013 by which date the Commission's proposed investigation was already in the public domain. The Spanish foreign minister had announced this investigation on the previous day (16 December) and the matter was being covered extensively in the media. Clearly, on 17 December 2013 the matter of the Commission's investigation was no longer confidential. On the final issue, the Ombudsman made clear, by reference to her published communications that she had never sought to link the Commission's decision to launch an investigation with her own recommendation to the Commission.

12. On 25 March 2014, the Commission confirmed [<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54601/html.bookmark>] that, on 18 December 2013, it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (the 'Decision'). It included a copy of the



Decision with its reply, which the Ombudsman forwarded to the complainant for his observations.

13. In his observations, the complainant reiterated his criticism of the Commission's handling of the Complaint. He went on to criticise the remarks about the European Ombudsman made by the Commissioner in his letter of 20 December 2013 and in a press conference. The complainant argued that the Commission had all the relevant information needed to decide on the Complaint as early as in March 2011, following the complainant's comments on the Spanish Authorities' last set of replies. He added that, in practice, DG COMP, or the Commissioner himself, had put the Complaint on hold for more than two and a half years without any valid justification. The complainant suggested that the Ombudsman should investigate DG COMP's internal decision processes and uncover the reasons for the above.

The Ombudsman's assessment after the draft recommendation

14. The Ombudsman notes that, after a delay of more than four years, the Commission has finally acted in this case and is now investigating the facts of the Complaint. She is satisfied that DG COMP has accepted the draft recommendation. She sees no additional advantage in acting on the complainant's suggestion that she should investigate DG COMP's internal decision processes.

Conclusion

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

The Ombudsman's draft recommendation was accepted.

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

Emily O'Reilly

Done in Strasbourg on 28 July 2014

[1] According to Point 48 of Section 7.2 of the Code of Best Practice for the conduct of State aid control procedures (OJ 2009 C 136, p. 13), "[t] he Commission is entitled to give different degrees of priority to the complaints brought before it ... depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations ... it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to: (a) adopt a decision for priority cases ... with a copy addressed to the complainant..."



[2] COM(2007) 391 final.

[3] 2011/2087/(INI).

[4] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry leading, first, to a friendly solution proposal and, later, to a draft recommendation, please refer to the full texts of the Ombudsman's friendly solution proposal and draft recommendation available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54599/html.bookmark> [Link] and

<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/52859/html.bookmark>

[5] Point 5 of Section 1. 'Scope and purpose of this Code'. Footnote 5 to Point 5 of Section 1. 'Scope and purpose of this Code' appears to contain some guidance in respect of the shape any such " *specific circumstances* " may take. It provides, in this respect, the following explanation: "[i] n the context of the 2008 banking crisis, the Commission has taken appropriate steps to ensure the swift adoption of decisions upon complete notification, if necessary within 24 hours and over a weekend. See Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8). As regards the real economy, see Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1). "

[6] Point 48 of Section 7.2 'indicative time frame and outcome of the investigation of a complaint' of the Code of Best Practice reads as follows: "[t] he Commission is entitled to give different degrees of priority to the complaints brought before it ... depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations ... it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to: (a) adopt a decision for priority cases ... "

[7] The Commission did not provide any copies of this letter.

[8] The Commission provided a link to a press release, dated 6 March 2013, pertaining to 'State aid: Commission opens in-depth investigation into public funding of five Dutch professional football clubs': http://europa.eu/rapid/press-release_IP-13-192_en.htm [Link]

[9] The Commission provided a link to the Joint Statement: http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf [Link]