

Decision of the European Ombudsman closing the inquiry into complaint 1381/2014/PL against the European Commission

Decision

Case 1381/2014/PL - **Opened on** 11/08/2014 - **Decision on** 07/05/2015 - **Institution concerned** European Commission |

The case concerned an alleged failure by the European Commission to decide within a reasonable period of time on the State aid allegedly granted by the Netherlands to the shipbuilding sector. The Ombudsman opened an inquiry into the case following which the Commission finalised its preliminary assessment, concluding that the measures in question do not constitute State aid. The Ombudsman found there had not been any maladministration and closed the case.

The background to the complaint

1. On 3 December 2012, two Spanish shipbuilding associations submitted a complaint to the Commission concerning alleged State aid granted by the Netherlands to its shipbuilding sector.
2. The Commission requested information from the Dutch authorities in January and September 2013. In December 2013, the Spanish shipbuilding associations submitted additional information following which the Commission requested additional information from the Dutch authorities which it received in April 2014. The two associations were not however informed of this at the time. On 29 July 2014, the complainant, a Spanish MEP, acting on behalf of these two associations, turned to the Ombudsman.

The inquiry

3. The complainant alleged that the Commission had failed to decide within a reasonable period whether it should open a formal investigation into the alleged State aid granted by the Netherlands in its shipbuilding sector.
4. In the course of the inquiry, the Ombudsman received the opinion of the European Commission on the complaint, and the comments of the complainant in response to the



Commission's opinion.

5. Subsequently, the Commission informed the Ombudsman that, on 16 February 2015, it had sent to the two shipbuilding associations a pre-closure letter informing them of its preliminary finding that the measure in question did not constitute State aid.

6. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the Commission failed to decide within a reasonable period to open a formal investigation

Arguments presented to the Ombudsman

7. The complainant argued that the Commission's failure to open a formal investigation into the alleged State aid measure infringed Article 10 of Regulation (EC) 659/1999, [1] which provides that the Commission shall examine information regarding alleged unlawful aid without delay. Given that the initial complaint was lodged in December 2012, the complainant considered that the Commission's failure amounted to an instance of maladministration.

8. The complainant further argued that the Commission's failure to act constituted an infringement of the principle of equal treatment on the grounds that the Commission had already adopted decisions concerning the Spanish shipbuilding sector in similar cases.

9. In its opinion, the Commission replied that, in view of the complexity of the measures in question and the additional information received, the duration of the investigation could not be deemed unreasonable. It stated that it had complied with the duty to examine the information received without delay, and had requested the necessary information from the Dutch authorities upon receipt of the complaint. However, further clarifications were subsequently needed, in particular following the new information submitted in December 2013 by the two associations.

10. The Commission further noted that, under Regulation 659/1999, and in the light of the applicable case-law, [2] the obligation to open a formal investigation procedure arises only where, after a preliminary examination, the Commission has "serious doubts" as to the compatibility of the measure with the internal market. The Commission pointed out that it could not finalise its preliminary assessment until it had all the necessary information in its possession. In the present case, the last information was received on 29 April 2014.

11. Moreover, the Commission said that, as provided by Article 13(2) of Regulation 659/1999, when dealing with possible unlawful aid, the Commission is not bound by the time-limit imposed with regard to notified aid.

12. Finally, referring to the principle of equal treatment, the Commission said that investigations



cannot be compared on the sole basis of their duration, and that the assessment must be done on the basis of the characteristics of the measure concerned. Moreover, in the Spanish Tax Lease case referred to by the complainant, the time that elapsed between the submission of the complaint until the opening of the formal investigation procedure amounted to five years.

13. In his observations, the complainant reiterated his arguments and emphasised that the Commission did not act with the required diligence in light of the time that lapsed since the last information was received.

The Ombudsman's assessment

14. The Ombudsman notes that, according to Article 47 of the Commission's Code of Best Practice for the conduct of State aid control procedures, [3] the Commission should use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. Depending on the circumstances of the individual case and the possible need to request additional information, the Commission may extend the investigation of a complaint.

15. In this case, the Commission emphasized the fact that having received the complainants' further submissions in December 2013, further clarifications were needed from the Dutch authorities to complete its assessment of the measures in question.

16. The Ombudsman notes that, as laid down in the case-law of the EU Courts, the opening of a formal State aid investigation procedure is required only where the assessment of the information and evidence at the Commission's disposal during the preliminary examination raises doubts as to the compatibility of the measures with the internal market. [4] The Commission can carry out this assessment, however, only when the information is complete. In the present case, the information in the Commission's possession became complete in April 2014. Indeed, it was not until 29 April 2014 that the Commission received the last requested information from the Dutch authorities.

17. In light of this, the Ombudsman understands that the circumstances of the present case did not allow the Commission to deal with the complaint in question within the one-year deadline established by its Code of Best Practice. In particular, the Ombudsman notes that the Commission received further information from the complainant in December 2013, which in turn called for further preliminary inquiries by the Commission.

18. Thus, following the submission of the above mentioned observations by the complainant, the Commission had to inform the Dutch authorities in order to obtain their opinion on the new information received. Having received the last observations and replies by the Dutch authorities on 29 April 2014, the Commission concluded, in February 2015, that there were no grounds for initiating the formal State aid investigation procedure. The Commission thus dealt with the complaint within 12 months of having received all of the relevant information. The inquiry did not reveal, nor did the complainant argue, that the Commission could have completed its assessment at an earlier stage without the need to seek further clarifications from the Dutch



authorities.

19. Lastly, as regards the argument that the Commission infringed the principle of equal treatment, the Ombudsman agrees that the two State aid cases cannot be compared. As the Commission convincingly explained, State aid investigations cannot be compared on the sole basis of their duration. The fact that the Commission may already have taken a decision in another case involving the same sector (shipbuilding does not imply that the Commission should take a similar decision in an even shorter time frame. In fact, the inquiry concerning the Spanish shipbuilding sector took twice as long as did the present inquiry.

20. In light of these findings, the Ombudsman concludes that there was no maladministration by the Commission.

21. Having said that, the Ombudsman points out that the principles of good administrative behaviour and the Code of Best Practices also place the Commission under an obligation to keep Member States and the complainants informed. [5] In this case, however, it appears that the Commission did not always inform the complainant in a timely manner of the steps being taken in its ongoing preliminary investigation. The Ombudsman has consistently taken the view that smooth and regular communication with complainants is good administrative practice. The Ombudsman will therefore make a further remark in this regard.

Conclusion

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

The Ombudsman finds no maladministration by the Commission.

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

Further remark

The Commission should keep in mind the importance of smooth and regular communication with complainants in State aid complaints.

Emily O'Reilly

Strasbourg, 07/05/2015



[1] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

[2] Article 13(1) of Regulation 659/1999 provides that the examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4).

[3] Commission Notice on a Best Practices Code on the conduct of State aid control proceedings OJ 2009 C 136, p. 13-20.

[4] C-148/09 P, Belgium v Deutsche Post and DHL International [2011] ECR I-8573; C-47/10 P, Austria v Scheucher-Fleisch and Others [2011] I-10707.

[5] Article 51 of the Commission Notice on a Best Practices Code on the conduct of State aid control proceedings.