

## Decision of the European Ombudsman closing the inquiry into complaint 400/2014/DK against the European Commission

Decision

**Case 400/2014/DK - Opened on 28/03/2014 - Decision on 08/06/2015 - Institution concerned** European Commission ( Critical remark ) |

The case concerned the European Commission's alleged failure to inform the complainant about the priority status of his State aid complaint.

The Ombudsman inquired into the issue. In the course of her inquiry, the Commission informed the complainant that his complaint was not treated as a priority case. However, the Commission did not explain the reasons for its decision. The Ombudsman therefore closed the complaint with a critical remark concerning the Commission's failure to inform the complainant about why it had given a low priority status to his state aid complaint.

### The background to the complaint

1. In 2013, a German professional basketball club participated in a European competition in which a Spanish basketball club also participated. On 6 August 2013, the complainant complained to the European Commission that Spain had given the following State aid to the Spanish basketball club: (i) EUR 1.9 million per annum for a three-year sponsorship contract for 2014-2016; (ii) EUR 1.5 million for the cancellation of the same sponsorship contract; and (iii) EUR 3.7 million by way of waiving a tax debt.

2. On 3 September 2013, the Commission told the complainant that it had opened a file on the complaint.

3. On 20 September 2013, the complainant asked the Commission to inform him of the priority status of the case at the earliest convenience and, in any case, within the two month-period provided for by Title 7.2 of the Code of Best Practice for the Conduct of State Aid Control Procedures ('the Code [1] ').

4. On 28 October 2013, the Commission replied to the complainant that, in view of the early stage of the communication with the Spanish authorities, it was premature to provide such information.



5. On 1 November 2013, the complainant replied to the Commission noting that it was not 'premature' to inform him of the status of the complaint as 3 months had passed since its submission. The complainant argued that the priority status should be notified as soon as possible.

6. On 1 March 2014, not having heard further from the Commission, the complainant turned to the European Ombudsman. He complained that the Commission failed, in the seven months from 6 August 2013 - 1 March 2014, to comply with the Code as it failed to inform him of the priority status of his complaint. The complainant also pointed out that the Commission had previously asserted in other similar State aid cases that the Code has become partly obsolete. However, the Commission continues to publish the Code on its website and there are no indications on the website that all or part of the Code have become obsolete.

### **The inquiry**

7. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

#### **Allegation:**

The Commission failed to inform the complainant whether his complaint regarding allegedly unlawful State aid is a priority case or not, as required by Title 7.2 of the Code.

#### **Claim:**

The Commission should treat the complaint as a priority case and inform the complainant accordingly.

8. The Ombudsman also asked the Commission to answer the following questions:

*" What is the standing of the Code at the present (i.e. (a) are all parts of the Code fully in force; and (b) are all parts of the Code fully adhered to by the Commission);*

*If the answer to (a) is no, please specify which parts of the Code are fully in force and what the Commission has done/is doing to publicise this;*

*If the answer to (b) is no, please specify which parts of the Code are fully adhered to by the Commission and what the Commission has done/is doing to publicise this ".*

9. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the observations of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.



**10.** On 2 December 2014, the complainant informed the Ombudsman that (i) by letter of 2 October 2014, the Commission had informed him that his complaint had not been given priority status; and that (ii) by letter of 25 November 2014, the Commission informed him that, further to its communication with the Spanish authorities, its services had "*not been able to identify any issue regarding unlawful State aid*" and therefore the Commission did "*not envisage to pursue the matter further*". In his letter forwarding the Commission's letters, the complainant said that the Commission had not informed him as to why it had decided not to give priority to his complaint.

### **Alleged failure to inform the complainant whether his complaint was a priority**

Arguments presented to the Ombudsman

**11.** In its opinion, the Commission first cited paragraph 48 of the Code which allows the Commission to give different degrees of priority to complaints. It may thus postpone dealing with a case which is not a priority [2] .

**12.** The Commission then noted that it replied to the complainant by letter of 3 September 2013 and also by e-mail of 28 October 2013. It argued that these communications indicated (indirectly) that the complaint was not being treated as a priority case. However, the Commission acknowledged that the information sent to the complainant in autumn 2013 could have been more explicit with respect to the priority status.

**13.** In short, the Commission now stated that it had decided not to grant priority to the complainant's case. In addition, paragraph 48 of the Code provides that the Commission, in principle, endeavours to send an initial administrative letter to the complainant setting out its preliminary views within twelve months. The complainant's case was not a priority case and there was therefore no pressing need to address it. Moreover, at the date of the Commission's opinion, the twelve-month period had not yet elapsed.

**14.** As regards the Ombudsman's questions relating to the standing of the Code, the Commission noted that the Code provides guidance on the day-to-day conduct of State aid procedures. It neither creates nor alters any rights or obligations set out in the Treaties, in the Procedural Regulation [3] or in Regulation 794/2004 [4] . As regards whether all parts of the Code were still in force, it confirmed that all parts, apart from paragraph 46 (complaints' form), of Title 7 of the Code still applied after the entry into force of Regulation 734/2013 on 20 August 2013 (the Implementing Regulation). As the new complaints' form had been published in the Official Journal, the Commission considered that there was no need to take further steps to inform the public. The Commission stated that it was fully committed to the implementation of the Code, but that it must respect the Procedural Regulation and the Implementing Regulation. The contents of the Code were non-mandatory in the Commission's view and are subordinate to these regulations.

**15.** In his observations, the complainant agreed that the Commission is entitled to give different degrees of priority to State aid complaints. However, he argued that the allocation of priority



status should be based on objective criteria, as described in Title 7.2 [5] of the Code. He noted that as of 29 September 2014, the Commission had not given any reasons why it considered that his case was not a priority, despite being asked to do so in a letter he had addressed to it on 28 August 2014. Moreover, the Commission still has an obligation to at least use its best endeavours to inform him of the priority status of his complaint. The complainant also noted a contradiction in the Commission's explanations: the Commission's letter of 3 September 2013 implied that his case did not have priority status; however, in its letter of 28 October 2013, the Commission stated that it was still "premature" to notify him of the priority status of his complaint.

**16.** The complainant insisted that the Commission had not respected the Code as it had not replied to him with an administrative letter. The complainant pointed out that just because the Code is non-mandatory, this does not mean that the Commission could randomly ignore its provisions.

#### The Ombudsman's assessment

**17.** As a preliminary point, the Ombudsman considers that it is proper and necessary for public institutions to prioritise their work, in order to best serve the public interest. They should, however, base such prioritisation on objective criteria and they should explain how those criteria have been applied in specific cases.

**18.** The Ombudsman also notes that whereas codes of practice adopted unilaterally by an institution are not law, should a code exist, an institution should comply with it, or give justified reasons for not doing so [6] .

**19.** The Ombudsman further notes that the Code of Best Practice for the Conduct of State Aid Control Procedures requires that the Commission use its "best endeavours" to inform complainants of the priority status of their complaints within a two-month period. This commitment is important for complainants, who, even if the Commission does not classify them formally as "interested parties", have a legitimate interest in knowing, at least in general terms, how the Commission intends to handle their complaints.

**20.** On the basis of the above, the Ombudsman will examine whether or not the Commission properly informed the complainant about the status of his complaint, and whether or not, in doing so, it explained to him why it took a particular position as to the status of his complaint.

**21.** In this regard, the Ombudsman notes that the Commission now insists that it had already taken a position on the priority status of the complaint in its letter of 3 September 2013. At the same time, the Commission also recognised that its communication could have been more explicit in this regard.

**22.** The Ombudsman agrees that, whatever may have been the real intentions of the Commission when it wrote the letter of 3 September 2013, it was difficult, if not impossible, for the complainant to understand from this letter what priority status it had given to his complaint.



That letter certainly did not explicitly state what priority status the complaint had. In any event, even if it were accepted that the Commission's letter of 3 September 2013 sought to inform the complainant of the priority status, the Commission further confused matters by its letter of 28 October 2013, in which it stated expressly that it was "premature to confirm" the priority status of the complaint.

**23.** The Ombudsman therefore finds, as the Commission itself seems to admit in its opinion, that its communication of 3 September 2013 was inadequate in informing the complainant about the priority status of his complaint. It was not until its letter of 2 October 2014 that the Commission clarified that the complainant's State aid complaint had not been given priority status.

**24.** In these circumstances, the Ombudsman finds that the Commission did not provide the complainant with the relevant information until more than a year after he had lodged his State aid complaint. This was the case even though the Code provides that the Commission should use its best endeavours to state the priority status of the case within the two months. The Ombudsman also finds that the Commission failed to provide any convincing reason for this delay or to offer an apology in this regard.

**25.** In light of the above, the Ombudsman concludes that the Commission failed to inform the complainant whether his complaint was a priority case or not. This was an instance of maladministration. The Ombudsman will therefore make a critical remark below.

**26.** As regards the issue of whether the Commission should have informed the complainant as to **why** it had decided not to give priority to his complaint, the Ombudsman notes that the Code explicitly sets out a non-exhaustive list of possible reasons why a complaint might **not** be given priority status. The list includes (i) the (limited) scope of the alleged infringement; (ii) the (limited) size of the beneficiary; (iii) the (relevance of the) economic sector concerned; and (iv) the existence of similar complaints, all combined with the services' overall workload. The Commission did not indicate, however, neither in its opinion to the Ombudsman in the present complaint, nor in its letter of 2 October 2014, why it had decided not to give priority to the complainant's complaint. However, given that this aspect was not part of the complaint on which the Ombudsman had asked the Commission to provide an opinion, the Commission has not yet had the opportunity to express its views on this issue. The Ombudsman considers that it would not be useful to pursue further inquiries as regards this issue.

**27.** Finally, as regards the Code, the Ombudsman notes that the Commission has specifically stated that all parts of the Code are still in force, apart from paragraph 46 (complaints' form) of Title 7 of the Code which has been replaced by a new complaints' form, published in the Official Journal. The Ombudsman therefore considers that this aspect of the complaint requires no further inquiries.

## **Conclusion**

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



critical remark:

**The Commission failed to inform the complainant within a reasonable period of time whether his complaint regarding allegedly unlawful State aid was a priority case or not. This constitutes maladministration.**

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

Emily O'Reilly

Done in Strasbourg, 08/06/2015

[1] The Code of Best Practice for the Conduct of State Aid Control Procedures OJ C 136, 16.6.2009, p. 13.

[2] Case T-475/04 Bouygues SA v Commission [2007] ECR II-2097, paragraphs 158 and 159.

[3] Council Regulation No 659/1999 of 22 March 1999 laying down [detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union \[Link\]](#) of the EC Treaty, OJ L 83, p. 1, as amended by [Council Regulation \(EU\) No 734/2013 \[Link\]](#) of 22 July 2013, OJ L 204, p. 1.

[4] Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 140, p. 1.

[5] These include the scope of the alleged infringement, the size of the beneficiary, economic sector and the existence of similar complaints.

[6] Joined Cases T-79/89, T-84/89, T-85/89, T-86/89 T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 BASF and Others v Commission [1992] ECR II-315 paragraph 78.