

Decision of the European Ombudsman closing the inquiry into complaint 1731/2013/PHP concerning the European Commission's handling of three alleged cases of State Aid to football clubs in Spain and a related request for access to documents

Decision

Case 1731/2013/PHP - **Opened on** 08/10/2013 - **Decision on** 11/02/2016 - **Institution concerned** European Commission (No maladministration found) |

This case concerned the European Commission's handling of information submitted by the complainant, alleging three cases of unlawful State aid granted to Spanish football clubs. The complainant argued that the Commission had failed to decide within a reasonable time whether it should open a formal investigation into the allegedly illegal State aid. Since, in the complainant's view, the Commission was failing to take action, the complainant made a request for access to some documents related to two of these cases. *The Commission refused to give access on grounds of the protection of the purpose of the investigations.*

The Ombudsman inquired into the issue and found no maladministration on either issue by the Commission. She has therefore closed the case.

The background to the complaint

1. The complainant, a Spanish national, is a shareholder in an unidentified football club. He maintains that rival football clubs receive unlawful State aid. On 27 July 2011, 13 October 2011 and 20 May 2012, the complainant submitted information to the Commission concerning three alleged cases of State aid to football clubs in Spain. The first case (SA.33411) concerned the alleged non-payment of taxes and social security contributions by all football clubs in Spain. The second case (SA.33754) referred to real estate transactions between a named football club and a local administration. The third case (SA.34941) concerned a bank loan granted to a named football club by a publicly owned commercial bank.

2. On 22 April 2013, the complainant made a request for access to documents under Regulation 1049/2001, [1] concerning the correspondence between the Commission and Spain as regards cases SA.33411 and SA.33754. The Commission refused the request on grounds of the protection of the purpose of investigation. [2] The Commission also referred to the general



presumption, recognised by the EU Courts, that granting access to documents concerning State aid procedures would, in principle, undermine the purpose of the investigation. [3] The complainant sought a review of the decision, known as a confirmatory application, following which the Commission confirmed its initial position.

3. On 10 September 2013, the complainant turned to the Ombudsman both in relation to the handling of the State aid allegations and the refusal of the access to documents request.

The inquiry

4. The Ombudsman opened an inquiry into the complaint and identified the following allegations and related claims:

Allegations

1) The Commission failed to decide within a reasonable time whether it should open a formal investigation into three complaints concerning alleged State aid granted by the Spanish authorities to certain Spanish football clubs (cases SA.33411, SA.33754 and SA.34941).

2) The Commission incorrectly refused to grant access to the documents concerning the State aid investigations in question.

Claims

1) The Commission should take a decision within a reasonable period as to whether it should open a formal investigation into the three above-mentioned complaints.

2) The Commission should grant access to the requested documents.

5. In the course of the inquiry, the Ombudsman received the opinion of the European Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman also carried out an inspection of the Commission's file. 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 whether to open a formal investigation within a reasonable time and the related claim

Arguments presented to the Ombudsman

6. According to the complainant, the Commission failed to comply with the need to use its best



endeavours " *to investigate a complaint within an indicative time frame of twelve months from its receipt* ", as required by the Commission's Code of Best Practice for the conduct of State aid control procedures (hereinafter "Code of Best Practice"). [4] The action to be taken within this twelve month period depends on whether the case is regarded as a priority or non-priority case. With a priority case, the Commission will endeavour to make a decision within twelve months in accordance with Article 4 of Regulation 659/1999. [5] With a non-priority case, the Commission will endeavour, within twelve months, to send an initial administrative letter to the complainant setting out its preliminary views. Where the complainant fails to submit further comments within a one month deadline, the complaint will be deemed to have been withdrawn. The complainant stated that he had not received any such letter or decision from the Commission.

7. In addition, the complainant considered that the Commission had not complied with the case law that requires the opening of a formal investigation when it encounters serious difficulties in the preliminary examination of the information at its disposal.

8. In its opinion, the Commission contested the complainant's allegation that he had not received any reply or information on the handling of his complaints, and it provided copies of the following documents it had sent to him:

a) Case SA.33411 : on 10 August 2011, the Commission informed the complainant that, on the basis of the information submitted, there were not sufficient grounds to take a view. The letter also invited the complainant to provide further information within one month. The complainant did not submit any additional information; the complaint was thus deemed withdrawn.

b) Case SA.33754 : on 20 December 2011, the Commission informed the complainant of the opening of a preliminary investigation. On 18 December 2013 (after he had complained to the Ombudsman), the Commission notified him of its decision to open a formal investigation.

c) Case SA.34941 : on 8 June 2013, the Commission notified the complainant of its decision to open a preliminary investigation. However, in November 2013 the Commission informed him that it had decided to close the investigation " *without taking a decision* ".

9. Concerning case SA.33411, the complainant stated that he had never received the Commission's letter of 10 August 2011. He also noted that in its initial and confirmatory refusals to grant access to the requested documents, dated 7 May and 19 July 2013 respectively, the Commission had stated that the requested documents were part of an "ongoing investigation". In addition, according to the complainant, at a press conference in December 2013, the former Commissioner responsible for competition had indicated that no decision had yet been taken on this case. This statement, he argued, contradicted the Commission's letter of 10 August 2011 informing him that there were not sufficient grounds to open an investigation.

10. During the Ombudsman's inspection in June 2014, the Commission stated that case SA.33411 had in the meantime been reopened at its own initiative. In this respect, the complainant referred to an email to him of July 2014 from the Commission stating that the case was no longer being pursued. The complainant argued that, according to the case law of the EU



Courts, the fact that the time spent exceeded the time usually required for a preliminary examination may, along with other factors, show that the Commission had encountered "serious difficulties" and that it should therefore have opened a formal investigation. [6] In further correspondence with the Ombudsman, the complainant argued that the fact that the Commission opened an investigation on its own initiative, into a case where it had initially rejected a complaint, constituted an abuse of law. The complainant also argued that following the inspection, the Commission ought to have informed the Ombudsman of its further decision not to pursue this case.

11. In relation to case SA.34941, the complainant argued that, by closing the investigation " *without taking a decision* ", the Commission had failed to comply with Article 13 of Regulation 659/1999, which requires the examination of possible unlawful aid to result in a decision under Article 4(2), (3) or (4).

The Ombudsman's assessment

12. The Ombudsman notes that point 47 of the Commission's Code of Best Practice provides that 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 case and the need to request additional information, the Commission may extend this period.

13. In addition, the case law of the EU Courts has recognised that 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 serious doubts as to the compatibility of the measures with the internal market. However, the Commission can carry out this assessment only when the information at its disposal is complete. [7]

14. It is in the light of these principles that the Ombudsman will examine the Commission's handling of the three alleged cases of State aid granted to certain Spanish football clubs.

Case SA.33411

15. In its letter of 10 August 2011, the Commission informed the complainant of its preliminary decision not to open a formal investigation (see point 8 above). The complainant contends that he did not receive this letter. However, the Ombudsman's inspection showed that the Commission had sent that letter to the complainant's personal email address. The Ombudsman is satisfied that the Commission did send the letter of 10 August 2011 to the complainant. [8]

16. The complainant argues that the fact that the Commission refused his subsequent request for access to documents, on grounds of the protection of an "ongoing investigation", together with the Commission's acknowledgement that it had reopened the case, demonstrates that the Commission had encountered "serious difficulties" in its preliminary examination of the information he had submitted. This, according to the complainant, should have prompted the Commission to open a formal investigation.



17. In this respect, the Ombudsman notes that the lawfulness of a *decision not to raise objections* [9] depends on whether the information and evidence which the Commission had at its disposal during the preliminary examination were such as to have raised doubts as to the measure's compatibility with the internal market. [10]

18. In its letter of 10 August 2011, the Commission informed the complainant that it had concluded that "*on the basis on the information currently in our possession*", there were insufficient grounds for taking a view. [11] The Ombudsman considers that the Commission complied with the applicable provisions and informed the complainant of its position on the alleged granting of State aid. Moreover, the Commission's letter was sent in less than a month from the date of the submission of the relevant information by the complainant (27 July 2011). The Ombudsman has no reason to believe that the Commission was responsible for the fact that the complainant did not receive this letter.

19. The fact that the Commission decided, at a later stage, to reopen the procedure suggests that new information may have come to the Commission's attention that justified it in taking a different position. Under the State aid rules, the Commission may at any time, based either on a new complaint or on information received, (re)open a procedure into an alleged State aid on its own initiative. The complainant has not submitted any evidence to support the view that, by August 2011, the Commission ought to have had serious doubts as to the compatibility with the internal market of the alleged State aid granted to the football clubs in question. Nor did the inspection carried out by the Ombudsman show that this was the case at the time it sent the complainant its letter of 10 August 2011. Thus, the Ombudsman finds no maladministration arising from the Commission's reply to the complainant of 10 August 2011.

20. Moreover, there is no reason for the Ombudsman to look into the argument of the complainant that by, reopening on its own initiative an investigation into a complaint that was first rejected, the Commission may have abused its powers. Likewise, the Ombudsman does not consider that the fact that the Commission did not inform the Ombudsman about the follow-up to this case constitutes maladministration.

SA.33754

21. On 28 July 2014, the Ombudsman closed another complaint concerning the handling of an allegation of unlawful State aid to four Spanish football clubs, submitted by a representative of a number of investors and shareholders of European football clubs. One of the allegations in that complaint (made in 2011) was the Commission's failure to make a timely decision on the complaint. [12] In the course of her inquiry in that case, the Ombudsman had made a proposal and, subsequently, a recommendation to the Commission to make such a decision as soon as possible. [13] In her closing decision of 28 July 2014, the Ombudsman refrained from pursuing the case further since the Commission had decided to open a formal investigation on 18 December 2013. This Commission decision was made two days following the Ombudsman's recommendation in the case.



22. In this case under reference SA.33754, the Commission also decided to open a formal investigation on 18 December 2013. On this basis, and consistent with the above-mentioned Ombudsman's decision of 28 July 2014, the Ombudsman considers that there are no grounds to look further into this matter.

Case SA.34941

23. The complainant argued that, by closing the investigation " *without taking a decision* ", the Commission had failed to comply with Article 13 of Regulation 659/1999.

24. According to EU case law, [14] the Commission may restrict itself to a preliminary examination of a measure liable to constitute State aid if it is able to satisfy itself that the aid is compatible with the internal market. If the Commission informs the interested parties that there are insufficient grounds for taking a view, it must allow those interested parties to submit additional comments within a reasonable time. Once the comments are received, or the period provided to do so has expired, Article 13(1) of Regulation 659/1999 obliges the Commission to close the preliminary examination by making a decision under Article 4(2), (3) or (4). [15] The Commission must then send a copy of that decision to the interested party.

25. In considering whether the complainant was entitled to a formal decision based on Article 4(2), (3) or (4) of Regulation 659/1999, the Ombudsman inspected two additional letters to the complainant concerning this case. First, in a letter of 21 February 2014, the Commission explained again that, by its letter of 28 November 2013, the investigation had been administratively closed because there was no evidence that the loan in question had been provided by the Spanish authorities. The Commission also mentioned in that letter that, in the absence of further factual evidence suggesting the existence of a State aid, it did not intend to reverse its position. Importantly, the Commission considered that the complainant was not an "interested party" within the meaning of Article 20(2) of Regulation 659/1999, and therefore could not submit a formal complaint, but only provide general market information.

26. This was stated again in a letter to the complainant on 23 April 2014, where the Commission considered that he was not a party whose own interests might be affected by the alleged State aid measure. Therefore, the Commission stated that it was entitled to close its investigation administratively without taking a formal decision.

27. It follows from the above that, as regards the complainant's argument that the Commission should have made a decision under Article 4 of Regulation 659/1999, and provided him with a copy of that decision, the Commission could only have done so where the complainant was considered to be an interested party within the meaning of Regulation 659/1999. Accordingly, the key issue here is whether or not the Commission was correct in deciding that the complainant was not an "interested party" within the meaning of Regulation 659/1999.

28. Regulation 659/1999 defines "interested party" as " *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* ".



[16] The definition has also been the subject of examination by the EU Courts [17] and the Ombudsman is satisfied that the approach taken by the Commission accurately reflects the relevant case law. The Ombudsman therefore agrees with the Commission that the mere fact that a person is a shareholder of a competing company does not suffice to qualify as an "interested party" for the purposes of Regulation 659/1999. An important corollary of having the status of "interested party" is the right to challenge the decision concerning a State aid measure. If it were the case that shareholders of competing companies were "interested parties", hundreds or even thousands of shareholders could claim to be an "interested party" and thus acquire the corresponding procedural rights under the relevant State aid rules and jurisprudence of the EU Courts. Following the case law, it is for the competing company itself (rather than an individual shareholder) to take a view as to whether a State measure constitutes illegal State aid and affects its interests and /or position on the relevant product and geographic market.

29. Therefore, as the Ombudsman is satisfied that the complainant did not qualify as an "interested party", the Ombudsman does not accept the complainant's claim that the Commission ought to have taken a formal decision based on Article 4 of Regulation 659/1999 and provide him with a copy of that decision. The Ombudsman therefore finds no maladministration by the Commission in this regard.

Allegation that the Commission incorrectly refused to grant access to the requested documents and the related claim

Arguments presented to the Ombudsman

30. The complainant did not accept the Commission's position when it found that he was not an "interested party" for the purposes of Regulation 659/1999. Nevertheless, he sought alternative access to the relevant documents by way of a request for access under the provisions of Regulation 1049/2001.

31. The Commission refused the complainant's request for access on grounds of the protection of the purpose of the investigation. [18] In this regard, the Commission referred to the general presumption, acknowledged by the EU Courts, that disclosure of documents in a State aid review procedure would, in principle, undermine the protection of the objectives of the investigation as long as the proceedings are ongoing.

The Ombudsman's assessment

32. It is important to understand that Regulation 1049/2001 provides for public access to documents and that the decision to be taken by the Commission, under Regulation 1049/2001, would be the same irrespective of the identity of the particular requester. In making his request



under Regulation 1049/2001, the complainant's potential entitlement to access would be the same as for any other EU citizen. The complainant has argued that his right in this case to access documents under Regulation 1049/2001 should be understood in the context of his allegations to the Commission of illegal State aid. The Ombudsman is satisfied that the complainant's argument in this regard is not correct. Any request for access under Regulation 1049/2001 is a request for public access. This means that the identity of the requester, or any of the reasons why access has been requested, is not relevant to the decision to be taken.

33. The Ombudsman understands from the Commission's confirmatory decision that, at the moment the request for public access was submitted, the investigation into the two cases in question was still ongoing. In this regard, the Ombudsman notes that the EU Courts have recognised that there exists a general presumption that, in principle, public access to documents in the administrative file of State aid cases undermines the protection of the objectives of the State aid investigation. That presumption may be rebutted if the requester demonstrates that a given document is not covered by that presumption, or that there is an overriding public interest that justifies the disclosure of the document. [19]

34. The Commission invited the complainant to submit any relevant evidence that could be relied upon to rebut this general presumption. However, the Commission concluded that neither the complainant's initial request nor his confirmatory application provided sufficient reasons to justify granting him access to the documents in question or that there was an overriding public interest in disclosing them. The Ombudsman is satisfied, based on the inspection of the relevant documents, that the Commission was justified in its decision that the complainant had failed to rebut the general presumption and failed to identify public interest considerations of sufficient strength as to constitute an overriding public interest. She considers that the Commission's position was reasonable.

35. In the light of these considerations, the Ombudsman finds that the Commission's decision to refuse public access to the requested documents was justified.

Conclusion

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

There was no maladministration by the Commission.

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

Emily O'Reilly

Strasbourg, 11/02/2016



[1] Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145/43, 31.5.2001, hereinafter "Regulation 1049/2001").

[2] Article 4(2) Regulation 1049/2001.

[3] Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, ECLI:EU:C:2010:376

[4] Code of Best Practices for the conduct of State aid control procedures (OJ C 136, 16.06.2009).

[5] That might be a decision (i) finding that the measure does not constitute aid, (ii) concluding that the measure is compatible with the common market, or (iii) opening the formal investigation procedure.

See Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83/1, 27.03.1999).

[6] Judgment of the Court of First Instance of 10 February 2009, *Deutsche Post and DHL International v Commission*, T-388/03, ECLI:EU:T:2009:30

[7] See decision of the Ombudsman in Case 1381/2014/PL, as well as relevant case law, e.g. Judgement of the Court of 22 September 2011, *Belgium v Deutsche Post and DHL International*, C-148/09 P, ECLI:EU:C:2011:603

[8] The Ombudsman verified that the letter was sent to the complainant's email address. The email address in the letter was the same as the one used by the complainant for correspondence with the Ombudsman.

[9] According to Article 4(3) Regulation 659/1999, the Commission will adopt a decision not to raise objections when, after a preliminary examination, it finds that the measure is compatible with the common market.

[10] See also Judgment of the Court of 27 October 2011, *Austria v Scheucher-Fleisch and Others*, C-47/10 P, ECLI:EU:C:2011:698

[11] Article 20(2) of Regulation 659/1999: " *Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof.* "

[12] <http://www.ombudsman.europa.eu/cases/caseopened.faces/en/11257/html.bookmark>

[13] Article 47 of the Commission's Code of Best Practice for the conduct of State aid control



procedures.

[14] Judgment of the Court of Justice of 17 July 2008, *Athinaïki Techniki v Commission* , C-521/06 P, ECLI:EU:C:2008:422

[15] See footnote 5.

[16] Article 1(h) of Regulation 659/1999.

[17] See, for example, Judgment of the General Court of 28 March 2012, *Ryanair v Commission* , case T-123/09, ECLI:EU:T:2012:164, para.68-73.

[18] Article 4(2) Regulation 1049/2001.

[19] Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau* , C-139/07 P, ECLI:EU:C:2010:376