

Decision in case 668/2016/EIS on the failure by the European Commission to provide proper replies to a complainant about his concerns related to a state aid issue in Germany

Decision

Case 668/2016/EIS - Opened on 24/05/2016 - Decision on 06/12/2017 - Institution concerned European Commission (Settled by the institution) |

The case concerned the European Commission's failure to provide proper replies to a complainant who had complained about a state aid issue in Germany. The complainant took the view that Germany was violating the EU state aid rules because of its new funding scheme for public broadcasting. The Ombudsman inquired into the issue and found that, since the Commission ultimately provided an adequate reply, there was no maladministration.

The background to the complaint

1. On 18 March 2016, the complainant wrote to the European Commission, alleging that Germany was violating the EU state aid rules because of its new funding scheme for public broadcasting. The new scheme [1] provided for a move from a funding system based on **individual users** to a funding system based on **households**.
2. On 30 March 2016, the Commission replied to the complainant, saying that different forms of state aid are against EU law in principle. However, the Treaty on the Functioning of the EU ('TFEU') contains certain exceptions to this rule. In the area of broadcasting, funding schemes that have been set up for public service purposes are compatible with EU law in principle. The Commission also provided a link to its Communication on the application of State aid rules to public service broadcasting [2]. It added that, when acting in its capacity as a Guardian of the Treaties, it carefully checks that the public service activity is clearly defined and does not go beyond what is necessary to achieve the goal (prohibition of so-called overcompensation). Within these limits, Member States are essentially free to choose the funding scheme they deem most appropriate. The Commission added that, as the complainant was already aware, by decision of 24 April 2007 [3] (hereinafter referred to as the '2007 decision'), the Commission had found the German broadcasting system, including its funding, compatible with EU law. The fact that the new system involves a move from a funding system based on individual users (devices) to a funding system based on households **does not**, according to the Commission,



give rise to a different assessment.

3. On 2 April 2016, the complainant thanked the Commission for the reply but requested further clarifications on its decision of 24 April 2007, in which the funding arrangement appeared to be based on the fact of owning a **device** whereas the legal basis for the new arrangement was now quite different. Furthermore, the complainant contended that a state aid needs to be notified to the Commission, and any failure to do so amounts to "automatic" illegality. Besides, also other Member States had recently adopted new funding schemes, which had been thoroughly examined by the Commission. In the complainant's view, Germany should not get any special treatment in this respect.

4. Since the complainant received no reply, on 1 May 2016, he turned to the European Ombudsman.

The inquiry

5. The Ombudsman opened an inquiry into the complaint and identified the following issue:

The Commission failed to reply to the complainant's letter of 2 April 2016.

6. In the course of the inquiry, the Ombudsman received the Commission's first reply on 30 May 2016. In that reply, the Commission merely stated that it had nothing to add to its previous reply of 30 March 2016 to the complainant. Subsequently, the Ombudsman also received the comments of the complainant in response to the Commission's reply. Since the Commission's reply was not complete, the Ombudsman invited the Commission to provide an additional reply.

7. In its second reply of 29 July 2016, the Commission referred to its reply of 30 March 2016 and said that the complainant's letter of 2 April 2016 contained no new arguments or facts which had not been already addressed by the Commission. Since this reply did not clarify the issue either, the Ombudsman invited the Commission to reply specifically to the following argument raised by the complainant in his email of 2 April 2016:

The new German funding scheme constitutes a new state aid compared to the state aid on which the Commission took a decision back in 2007.

8. The Commission subsequently provided its third reply on 18 January 2017. In its reply the Commission stated that it had no position on the question. The complainant's comments were received on 24 February 2017.

9. The Ombudsman's decision takes into account the arguments and views put forward by the parties.

The Commission's reply



Arguments made by the complainant and the Commission

10. The complainant wanted to know whether the Commission believed that the new scheme constituted a new state aid, because it was in his view not covered by the 2007 decision. Additionally, he invoked Article 12(1) [4] of Regulation 2015/1589 [5], which allows the Commission to examine information regarding alleged unlawful aid from whatever source on its own initiative.

11. In its third reply, the Commission stated that, in accordance with Article 24(2) [6] of Regulation 2015/1589, only an **interested party**, such as a competitor or a professional association, may submit a complaint to the Commission of any alleged unlawful aid or any alleged misuse of aid. The complainant was not an interested party and thus could not file a formal complaint under the aforementioned Article, which is also why the Commission found that it was not obliged to enter into an in-depth discussion about the issue with the complainant. The Commission supported its reasoning by referring to the Ombudsman's decision in case 1867/2014/OV [7], in which in the Commission's view the Ombudsman had come to the same conclusion. The Commission added that the complainant himself appeared to acknowledge that he is not an interested party. On that basis, the Commission argued that it cannot be required to take a decision on the matter raised by the complainant.

12. The Commission added that when a citizen such as the complainant asks the Commission to take position on a given matter, this is not a mere information request. The Commission argued this is rather a request for the Commission to take a legal position which can be subject to judicial review and which moreover would require a formal Commission decision. In this regard, the Commission highlighted that in accordance with Article 12 of Regulation 2015/1589, it " *may* " on its own initiative examine information regarding alleged unlawful aid from whatever source. Therefore, this Article allows the Commission to examine the information it receives from whatever source but does not *oblige* it to do so.

13. Despite the fact that the Commission is not obliged to provide a legal assessment in answering information requests, it said that under EU state aid rules Member States are in principle free to determine from which sources and which combination of sources they provide for the financing of public broadcasters. Accordingly, Germany would be free to use fees or taxes as a financing source.

14. In his comments on the Commission's third reply, the complainant pointed out that his complaint concerns the formal aspect of the notification obligation under EU state aid legislation. The question of whether the aid is materially contrary to EU state aid law could be answered conclusively only at a later stage. To this end, he believed that the Commission would have to initiate a formal procedure as a matter of duty. He further argued that the argument put forward by the Commission, that the Member States are free to decide from which sources they finance their public service broadcasters, is not relevant as, according to the case law, the aid cannot be considered separately from its method of financing [8]. The decisive factor is that



Germany changed the form of financing with effect from 1 January 2013 and thus has granted a new aid which should have been notified to the Commission before its introduction. The complainant further argued that since the Commission failed to initiate an investigation pursuant to Article 12 of Regulation 2015/1589 against Germany, it had violated the principles of good administration.

The European Ombudsman's assessment

15. The issue in this complaint is the Commission's initial failure to reply to the complainant's letter of 2 April 2016. The Ombudsman notes that in the course of this inquiry the Commission has provided a substantive reply to the questions asked by the complainant in that letter. It is unfortunate that the Commission did not provide that reply at an earlier stage.

16. The Ombudsman notes that the complainant does not accept the content of the Commission's substantive reply. However, that is a separate, technical legal matter which is not dealt with in this inquiry.

17. Against this background the Ombudsman considers the matter settled and closes the case.

Conclusion

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

The case has been settled.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 06/12/2017

[1] The new scheme is in force as of 1 January 2013.

[2] Available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC1027\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC1027(01))



[Link]

[3] The decision is available at:

http://ec.europa.eu/competition/state_aid/cases/198395/198395_680516_260_2.pdf.

[4] “ *Without prejudice to Article 24, the Commission **may** on its own initiative examine information regarding alleged unlawful aid from whatever source [...]*” (emphasis added).

[5] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ 2015 L 248, p. 9.

[6] “ *Any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. To that effect, the interested party shall duly complete a form that has been set out in an implementing provision referred to in Article 33 and shall provide the mandatory information requested therein [...]*”.

[7] This decision is not available online.

[8] Judgment of the Court in case C-449/14 P *DTS Distribuidora de Televisión Digital* , ECLI:EU:C:2016:848, paragraph 67.