



European Ombudsman

Emily O'Reilly
European Ombudsman

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Decision of the European Ombudsman closing her inquiry into complaint 1928/2014/PD against the European Commission

Dear Ms Gomes,

On 15 November 2014, you submitted a complaint to the European Ombudsman against the Commission because you considered that the Commission had not replied satisfactorily to your infringement complaint about Portugal.

After a careful analysis of all the information submitted to me, I have decided to close my inquiry with the following conclusion:

The Commission must always explain adequately to complainants the reasons for deciding to close its examination of an infringement complaint. As the Commission has now given an adequate explanation in this particular case, this inquiry is closed. However, it would be good for the Commission to do more to explain to citizens, in general terms, the extent of what it can, and what it cannot, do in this area.

I apologise for the length of time it has taken to complete this inquiry.

Please find enclosed my decision on your complaint.



Yours sincerely,

A handwritten signature in black ink, which appears to read 'Emily O'Reilly'. The signature is fluid and cursive, with a long horizontal flourish at the end.

Emily O'Reilly
European Ombudsman

Enclosure:
Decision on complaint 1928/2014/PD



Decision

of the European Ombudsman closing complaint 1928/2014/PD against the European Commission concerning its handling of an infringement complaint against Portugal

The complaint in this case was made by a Portuguese MEP who had complained to the European Commission about the Portuguese authorities' failure to comply with EU law. The failure concerned 'offsets' that Portugal had obtained when procuring submarines. Under an "offsets" arrangement, a foreign firm awarded a procurement contract may undertake to support the domestic economy, for instance through investments. In this case, the Commission decided to close its examination of the infringement complaint.

The complaint to the Ombudsman alleged that the Commission had failed to provide a satisfactory response to the infringement complaint. The Ombudsman inquired into the issue and found that the Commission's various explanations to the complainant, on why it had closed the infringement complaint, were incomplete and inadequate. However, in the course of the inquiry, the Commission explained adequately and fully the reasons for its decision not to pursue the infringement complaint. The validity of the reasons given was confirmed during the Ombudsman's inspection of the relevant documents. On this basis, the Ombudsman closed her examination of the complaint. The Ombudsman also commented on the fact that the role of the Commission in infringement cases is often misunderstood and that it would be good for the Commission to do more to explain its role to citizens.

The background to the complaint

1. In December 2010 and February 2012 the complainant, a Portuguese MEP, lodged a complaint with the European Commission alleging that Portugal had failed to comply with its obligations under European Union law. The complainant alleged



that the Commission had failed to provide her with a satisfactory explanation as to why it had decided to close that infringement complaint.

2. The background to the infringement complaint was a public procurement contract that the Portuguese authorities concluded with a German firm concerning the purchase of submarines. In that context the Portuguese authorities concluded a so-called offsets contract. 'Offsets' mean that when procuring defence material, contracting authorities require 'compensation' from non-national suppliers, for instance in the form of actions to support local industry.

3. The infringement complaint was based on two arguments. The first was that the offsets contract infringed Article 346 of the Treaty on the Functioning of the European Union (TFEU), which allows Member States to take measures to protect its essential security interests as regards the production of or trade in arms, munitions and war material provided the measures taken do not adversely affect competition in the internal market regarding non-military products. The second argument was that there had been corruption in the course of concluding the procurement contract and the offset contracts. In this respect, the complainant stated that two judicial investigations in Portugal, and one in Germany, were on-going.

4. Against this background the complainant claimed that the Commission should take measures to declare the contracts null and void, to ensure the identification of the persons involved in the fraud, and to ensure that the contract concerning the submarines would be awarded in accordance with the Defence Procurement Directive 2009/81.¹ According to the complainant, a 'guidance note' from the Commission in 2009 makes clear its view that the Directive does not allow offsets (hereinafter: the 2009 guidance note).²

5. In May 2012 the Commission informed the complainant that it intended to close its examination of the complaint as Portugal had

¹ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

² Guidance note on Directive 2009/81/EC on the award of contracts in the fields of defence and security, Offsets, established by and representing the views of Directorate General Internal Market and Services.



brought its legislation into line with EU law by implementing, in October 2011, the Defence Procurement Directive 2009/81. That Directive does not allow offsets. It added that the submarines had been delivered and the offsets contract had come to an end.

6. In reply to that communication, the complainant informed the Commission that the German judicial investigation had resulted in the conviction of a number of persons for bribery. She added that the offsets contract had not yet come to an end.

7. In September 2013 the Commission again informed the complainant of its intention to close its examination of the complaint. The Commission again stated that Directive 2009/81 had now been implemented in Portugal and that the national offsets law had been abolished. It added that, according to the information provided by the Portuguese authorities, the offsets had been mostly delivered and would in any case be delivered in full by 2015. Regarding the corruption allegation, the Commission stated that it had no jurisdiction to deal with individual instances of corruption. In reply to that communication the complainant stated that the information provided by the Portuguese authorities was incorrect. She insisted that the offsets had been renegotiated and that 19 of the projects provided for initially had been replaced by a luxury hotel project and a project concerning company X. The complainant put various questions to the Commission as regards Portugal's compliance with Article 346 TFEU.

8. In November 2013, the Commission informed the complainant that it had closed the examination of the complaint. According to the Commission, the information about the renegotiation of the offsets was already known to it when it communicated its intention to close its examination of the complaint. The Commission reiterated that Portugal had implemented the Defence Procurement Directive 2009/81 and abolished the offsets law. The Commission added that it is not the main purpose of Article 258 TFEU to bring cases before the Court of Justice concerning infringement proceedings; rather, its main purpose is to bring the Member State concerned into line with EU law. Therefore, once the Member State concerned implements the measures necessary to **prevent a repetition of the illegal practice**, the Commission in principle closes the infringement case. The complainant replied to



that letter in December 2013, again asking whether Portugal had complied with Article 346 TFEU.

9. In March 2014 the Commission replied to the complainant. It reiterated that the Defence Procurement Directive had been implemented in Portugal; that it is not the purpose of Article 258 TFEU to lodge infringement actions before the Court of Justice but rather to bring the Member State concerned back in line with EU law; and that it does not have jurisdiction to pursue individual instances of fraud. Moreover, the Commission added:

- The offsets contract covered two different sorts of offsets, namely 'direct' ones which were linked to the substance of the submarines contract, and 'indirect' or 'civil' ones which were not related to the substance of the submarines contract. According to the view set out in the Commission's 'Interpretative Communication on the Application of Article 296 EC' (now Article 346 TFEU), indirect offsets are not allowed under Article 346 TFEU. Thus, the indirect offsets in the offsets contract were not in conformity with that provision.

- According to the information provided by the Portuguese authorities the only remaining offsets, that is the luxury hotel project and the one concerning company X, would be implemented by 2015 at the latest.

- The contracts dated back to a time when the Commission had not provided guidance on Article 346 TFEU; at that time offsets were a common practice in many Member States.

- Under settled case law the Court of Justice cannot, in an infringement judgment, declare contracts such as the ones at issue null and void.

- The two judicial investigations in Portugal concerning fraud had so far resulted in one judgment in which all of the defendants in that particular case were acquitted.

10. Finding the Commission's reply unsatisfactory, in November 2014 the complainant turned to the Ombudsman.



The inquiry

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

Allegation

The Commission failed to provide a satisfactory reply to the infringement complaint.

Claim

The Commission should (i) require the Portuguese authorities to use all possible legal means to return to a situation of legality, or, as a minimum, (ii) make it clear whether it considers that the renegotiated offset projects, after the entry into force of the Defence Procurement Directive 2009/81 and the publication of the 2009 guidance note, were justified by an essential security interest. The Commission should explain why it did not act upon the offsets which were renegotiated on two occasions, in 2012 and in 2014.

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

13. The complainant argued in particular:

- In 2012 - that is, after the Defence Procurement Directive 2009/81 entered into force and was transposed in Portugal, and after the 2009 Commission's guidance note had been published - the projects covered by offsets agreed in 2004 were replaced by new projects in the civil sector, that is the luxury hotel project and the one concerning company X. In its replies, the Commission did not make it clear whether it considered that the new offsets were justified on the basis of essential security interests. The complainant further argued that, in 2014, the offsets contracts were renegotiated for the second time, the hotel project being replaced by a project to construct a wind power platform.



- The Commission did not explain why it did not act upon the renegotiation of the offsets contract.
- The closure of the infringement procedure shows that the Commission has opted to 'cover up'.
- Offsets under the offset contract were not implemented or were of a considerably lesser value than provided for in the contract.

14. The Commission argued in essence:

The main purpose of a procedure under Article 258 TFEU is to bring the Member State back into line with EU law; the procedure is not primarily intended to bring infringement proceedings before the Court of Justice. It was also made clear in the letters to the complainant that, in the present case, the main objective of the investigation of the Commission was the correction of the wrong practice of the Portuguese authorities on offsets. This objective was achieved with the transposition by Portugal of the Defence Procurement Directive and with the repeal of the national offsets law.

It was also indicated to the complainant that when a Member State under investigation implements the necessary measures to prevent a repetition of the illegal practice, the Commission, in principle, closes the case.

Such practice is in conformity with the settled case law of the Court of Justice that has recognised the discretionary power of the Commission to decide on pursuing a case or not and on its closure.

In the present case, and taking into account the particular circumstances, the Commission did not find any reason to deviate from its usual practice.

In fact, several considerations acted against deciding to pursue the case. At the time of the decision to close the case, the purchase contract for the submarines had been fully completed which, according to settled case law, made it impossible to open an infringement procedure on this contract. The Court considers that in relation to public contracts, an action for failure to fulfil obligations is inadmissible if, when the period prescribed in the



reasoned opinion expires, the contract in question has been implemented fully.

Regarding the option of launching an infringement procedure specifically on the offset contract, two factors were considered. First, the only applicable law was Article 346 TFEU. Directive 2009/81 was not applicable at the time. Second, there were doubts on the possible consequences for the 'ancillary' offsets contract of the fact that the purchase contract was already fully implemented

There was a more practical problem which would have made it pointless to open an infringement procedure on the offsets contract: this contract was almost fully implemented and, according to the Portuguese authorities, the only project remaining to be implemented was the hotel project. This project would almost certainly be fully implemented by the time of the sending of any eventual reasoned opinion by the Commission to Portugal.

Another point which was taken into account in the Commission's decision to close the case was the fact that there were, at the time, two related cases before Portuguese courts: one on the legality of the award of the acquisition contract and one on possible corruption involving the conclusion of the offsets contract. It was clear that the national courts were in a much better position than the Commission to investigate any possible illegality related to the offsets contract.

Further to these points regarding the particular circumstances of the present case, there was also the more general consideration that it is not the practice of the Commission to pursue old cases of this type, that is, cases arising prior to the adoption of the Defence Procurement Directive 2009/81. Similar old cases in other Member States had also been closed on these grounds. Pursuing this case would have constituted discriminatory treatment.

In conclusion, according to the Commission, the offsets contract could not be justified on the basis of Article 346 TFEU but, for the reasons stated, the Commission decided not to pursue the infringement. The renegotiation of the offsets does not alter this reasoning.



The Ombudsman's assessment

15. To the extent that the complainant requests the Commission to take a specific course of action, it is relevant to have regard to the Commission's powers in relation to infringement proceedings and to the scope of the Ombudsman's inquiries in relation to such proceedings.

16. The Commission enjoys a significant discretion in deciding on infringement proceedings. This includes discretion on whether or not to commence infringement proceedings, whether or not to drop commenced proceedings, when to commence or to drop the proceedings, and whether or not to refer a matter to the Court of Justice. In the exercise of this discretion, the Commission is not constrained by the right of any third party, including EU citizens, to require it to adopt a specific position.

17. The Commission itself refers to this discretion on its webpage containing the standard complaint form that citizens may use for lodging a complaint about national authorities. The complaint form itself also mentions the Commission's discretion, in the following terms: *...the Commission is not bound to open the formal infringement procedure, even in cases where a complaint reveals the presence of an infringement (indeed the Commission enjoys discretionary power [to decide] if and when to commence infringement proceedings).*

18. On the other hand, the Commission's discretion does not mean that it may arbitrarily decide whether or not to examine a case or that it may mishandle citizens' complaints. The Ombudsman has therefore consistently taken the view that the Commission's handling of infringement complaints must comply with the principles of good administration.

19. Good administration implies that a public authority must always have good reasons for choosing one course of action rather than another. It is inherent to the normal exercise of discretionary power to explain the reasons why a particular course of action has been chosen.

20. It is against this background that the Ombudsman must assess whether the Commission has explained adequately the reasons for its decision not to take action against Portugal in this particular case.



21. Overall the Ombudsman is satisfied that the Commission has now properly justified the decision it has taken in this case. The Commission has made it clear that there was a violation of EU law by Portugal. But it has also now explained in a detailed fashion the various legal and policy reasons underlying its decision to close its examination of the infringement complaint. The Ombudsman is satisfied, based on her inspection of the relevant Commission file, that these reasons are valid. Nothing discovered in the course of the Ombudsman's inquiry suggests that the Commission has in any way attempted to cover up or play down any of the actions of the Portuguese authorities. The Commission's focus was quite clearly on ensuring Portugal's adherence to EU law for the future; it was not in the business of seeking sanctions against Portugal for the violation of EU law which had already occurred.

22. That being said, the facts of this case show that it was not until after the complainant had turned to the Ombudsman that the Commission gave a full and detailed account of its reasons. The Commission's initial replies to the complainant were incomplete and inadequate. Had the Commission, from the outset, given a fuller account of its reasons, it may well have been that the complainant would have found it unnecessary to complain to the Ombudsman.

23. The Ombudsman is aware that in replying to infringement complaints the Commission may be under various constraints which limit its capacity to explain fully the reasons for its actions or inactions. For example, where the Commission is considering issuing a letter of formal notice or a reasoned opinion to a Member State, it will obviously need to respect the rights of defence of that Member State. However, where the Commission has decided not to proceed with its examination of an infringement complaint, it should, all things being equal, be in a better position to give a comprehensive explanation for the decision it has taken.

24. It is not satisfactory, where the Commission has decided not to proceed with an infringement complaint, that the Commission provides a proper explanation for its decision only following lengthy exchanges of correspondence with the complainant and only where the complainant has been tenacious in insisting on getting a proper explanation. The Ombudsman therefore emphasises that the Commission must always explain adequately



the reasons for a decision to close its examination of an infringement complaint. As the Commission has now given an adequate explanation in this particular case, the Ombudsman concludes that, there are no reasons to inquire further into the present complaint.

25. As a final observation, the Ombudsman is conscious of the fact that there may not be a widespread understanding among complainants, and citizens generally, of the role of the Commission in dealing with infringement complaints. The role conferred on the Commission by the Treaties is one of ensuring and overseeing the application of EU law "under the control of the Court of Justice". With a focus on responding to non-compliance, and ensuring compliance for the future, the Commission does not have the authority to impose penalties on Member States for past failures of compliance prior to the Commission having become involved in an infringement situation. In circumstances where citizens do not fully understand this role of the Commission, there may be a tendency to believe that the Commission intentionally operates a regime under which Member States sometimes appear to be able to violate EU law with impunity. Some citizens may believe that a Member State can act almost with impunity up to the point where it is required by the Commission (or by the courts) to change its practice and comply with EU law.

26. The Ombudsman recognises that this is a complex and difficult area. In terms of the imposition of sanctions for infringements, Member States' own courts constitute the primary forum for dealing with alleged infringements of EU law. However, it is unfortunate that many citizens appear to have misplaced expectations of what the Commission should do, in terms of seeking the imposition of sanctions on Member States for past violations of EU law. It would be good, therefore, for the Commission to do more to explain as clearly as possible to citizens the extent of what it can, and what it cannot, do in this area.

Conclusion

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



The Commission must always explain adequately to complainants the reasons for deciding to close its examination of an infringement complaint. As the Commission has now given an adequate explanation in this particular case, this inquiry is closed. However, it would be good for the Commission to do more to explain to citizens, in general terms, the extent of what it can, and what it cannot, do in this area.

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

Emily O'Reilly

Strasbourg, 03/05/2016