

Complaint form

Complaint about maladministration

Complaint submitted on: 15 November 2014

European Ombudsman

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Against which European Union (EU) institution or body do you wish to complain?

European Commission

What is the decision or matter about which you complain? When did you become aware of it?

Add annexes if necessary.

I would like to submit a complaint concerning the official replies that I received from the **European Commission (EC) to the Complaint nr. 1712/11MARK** that I have filed with the EC, on the 20th December 2010, concerning contracts that the Portuguese state signed with a German Submarine consortium (GSC) for the acquisition of submarines for the Portuguese Navy and respective offsets contract.

In April 2004, then Portuguese Defence Minister (and current Vice Prime Minister) Mr. Paulo Portas signed a contract, which in the end amounted to one billion euros, to buy two submarines from the German Submarine Consortium (GSC), composed of German companies HDW, Ferrostaal and Thyssen. In 2006, the deal came under the attention of the Portuguese Public Prosecutor's Office, which has since been investigating the transaction for suspicions of corruption, fraud, collusion, money laundering and illegal party financing. The Prime Minister at the time was José Manuel Barroso, current President of the European Commission.

A related offsets contract, which established the German consortium's obligations to invest 1.2 billion euro in the Portuguese economy, led to the indictment of 10 people (three Ferrostaal board members and seven Portuguese businessmen), facing accusations of fraud that have, according to the Portuguese Attorney General, cost the Portuguese taxpayers 34 million euro. The court ruling in February 2014 acquitted all the indicted of criminal responsibility, but the Attorney General has appealed. The renegotiation of the offsets contract, which occurred in October 2012, was an argument used by the lawyers of the defendants and taken by the judges to dismiss the case.

In my complaint, I argued that the original contract violated European Union primary law, namely with respect to the offsets contract, which, in my understanding, breached Article 346 TFEU (former Article 296 TEC). According to the Guidance Note on Offsets published by the EC, if a Member State intends to rely on Article 346 TFEU to justify an offset contract (which is, in principle forbidden by EU law), it must submit a specific justification to sign contracts of this type on the basis of an 'essential security interest', which must be restrictively interpreted, and that was never done by the Portuguese government.

In my understanding, since many of the projects agreed under the offsets contract could not, in any way, be justified on the basis of an "essential security interest" (for instance, those related to the automobile industry), it should be expected that the EC, as the guardian of the Treaties, would press the Portuguese State to use all possible legal means to return to a situation of legality, which would imply a renegotiation of both contracts. Portugal could, then, provide the EC with an opportunity to analyse the offsets agreed in the light of EU law. So much so, that still to this day the offsets projects are still very far from being fully executed.

In its first reply of 10/05/12 signed by Ms. Joanna Szychowska from DG MARKT, the EC informed me that it had initiated a procedure, thereby inquiring the Portuguese authorities. Following that exchange, and according to the information submitted by the Portuguese authorities, **the EC proposed to put an end to the procedure, given that a) Portugal had transposed the Directive 2009/81/EC to national law and b) the submarines had been delivered and the offsets contract was about to reach its term.**

In my response to the EC of 08/06/12, I emphasized that the information submitted by the Portuguese authorities was not correct. In fact, the offsets contract would only expire in October 2012 and that the execution of the offsets projects agreed reached, at that time, merely 31,5%. In its reply of 16/09/13, **the EC essentially submitted the same justification, ignored my concerns and insisted on the execution of the offsets and transposition of the Directive 2009/81/EC** to close the procedure and highlighted the fact that the EC has no competence to intervene in corruption cases in Member State. In my subsequent reply of 14/10/13, I once again insisted on the low execution rate of the offsets projects and informed the EC that the offsets contract had been renegotiated in October 2012, to substitute previously unfulfilled projects by new projects - the renovation of a hotel in the Algarve and an investment in renewable energies.

I stressed that this contract was kept in secrecy and was not sent to me, despite my formal request. Furthermore, I asked several questions to the EC, namely to ascertain whether the Portuguese government had, at any point, complied with the procedure to justify the new offsets agreed in accordance with Article 346 TFEU and whether the EC considered those projects as providing an "essential security interest". The EC replied on 16/11/13, informing me that it was aware of the renegotiation of the contracts and the new offsets projects and,

relying on the same justifications, definitively put an end to the procedure.

Given this circumstance, on 02/12/13, **I sent a comprehensive letter to Mr. Barroso, President of the European Commission, conveying my perplexity and disappointment over the replies to my Complaint by DG MARKT** and asking for further clarifications regarding the EC's own interpretation of the Treaties and the law of the European Union concerning offsets contracts signed by Member States in defence procurement. I specifically asked several questions on the application of Article 346 TFEU on this case, seeking for the replies which had not been given in previous communications. Commissioner Barnier replied, of behalf of the EC President, in a letter of 05/03/14.

In this letter, **Commissioner Barnier clarified that the offsets agreed cannot be considered as justified under Article 346 TFEU. However, the Commissioner insisted that this violation of EU primary law is resolved by the transposition of the Directive and the nearly completed execution of the contracts.** By doing so, the EC presumes that the Member State in question, in this case Portugal, will not repeat the violation. Mr Barnier stresses that the decision to launch an award procedure for the purchase of the submarines took place in 1997, at a time when the EC had not yet provided guidance neither on the compliance with Article 364 TFEU nor on offsets.

[Annexes]

What do you consider that the EU institution or body has done wrong?

The EC did not reply to any of the questions that I submitted. The EC did not specifically reply on whether it considered that the abovementioned projects, agreed after the entry into force of the Directive and after the publication of the Guidance Note Offsets, could be considered as providing an "essential security interest".

Given this circumstance, on 02/12/13, **I sent a comprehensive letter to Mr. Barroso, President of the European Commission, conveying my perplexity and disappointment over the replies to my Complaint by DG MARKT** and asking for further clarifications regarding the EC's own interpretation of the Treaties and the law of the European Union concerning offsets contracts signed by Member States in defence procurement. I specifically asked several questions on the application of Article 346 TFEU on this case, seeking for the replies which had not been given in previous communications.

Commissioner Barnier replied, of behalf of the EC President, in a letter of 05/03/14. In this letter, **Commissioner Barnier clarified that the offsets agreed cannot be considered as justified under Article 346 TFEU. However, the Commissioner insisted that this violation of EU primary law is resolved by the transposition of the Directive and the nearly completed execution of the contracts.** By doing so, the EC presumes that the Member State in question, in this case Portugal, will not repeat the violation. Mr Barnier stresses that the decision to launch an award procedure for the purchase of the submarines took place in 1997, at a time when the EC had not yet provided guidance neither on the compliance with Article 364 TFEU nor on offsets.

Commissioner Barnier failed, thus, to provide an explanation as to why the EC did not act upon the renegotiation of the contract in October 2012, taking that opportunity to ensure compliance with the EU acquis, after the entry into force and transposition of the Directive.

Furthermore, in July 2014, the offsets contract has been renegotiated for a second time, substituting again the recovery of a hotel in Algarve for the construction of a wind power platform. Again, the EC turned a blind eye.

The consistent lack of concrete replies and clarifications, as well as the closure of the procedure which did not prompt the Portuguese state to comply with EU law has led me to believe that the EC, represented by Ms. Joanna Szychowska and then Commissioner Barnier, has opted to cover up these controversial contracts and turn a blind eye *vis-a-vis* the behaviour of the Portuguese government, given the important political responsibilities of Mr. Barroso, Prime Minister at the time the contract was signed and till now President of the EC.

Suspicious of a cover-up are reinforced by the evidence of bribery involved. Since my complaints to the EC, former executives of MAN/Ferrostaal have been convicted by a Court in Munich for bribing Portuguese authorities to succeed the bid of the submarines and Portugal's Honorary Consul in Munich has also been convicted for receiving bribes by MAN/Ferrostaal in exchange for facilitation of contacts with Portuguese decision-makers, like Mr. Barroso and Mr. Paulo Portas. In June 2014, the Portuguese Parliament launched a Committee of Inquiry to the purchase of these submarines and other defence equipment, where Mr. Barroso was invited to submit written answers to a number of questions. I submit them to your consideration with this complaint. I am willing to provide more information that underpins a suspicion of corruption.

What, in your view, should the institution or body do to put things right?

As stated before, in my understanding, since many of the projects agreed under the offsets contract could not, in any way, be justified on the basis of an "essential security interest" (for instance, those related to the automobile industry), it should be expected that the EC, as the guardian of the Treaties, would press the Portuguese State to use all possible legal means to return to a situation of legality, which would imply a renegotiation of both contracts. Portugal could, then, provide the EC with an opportunity to analyse the offsets agreed in the light of EU law. So much so, that still to this day the offsets projects are still very far from being fully executed.

At a minimum, The EC should have specifically addressed all the questions that I submitted. The EC should have replied on whether it considered that the new offset projects, agreed after the entry into force of the Directive and after the publication of the Guidance Note Offsets, could be considered as providing an "essential security interest".

Commissioner Barnier should have provided an explanation as to why the EC did not act upon the renegotiation of the contract in October 2012, taking that opportunity to ensure compliance with the EU acquis, after the entry into force and transposition of the Directive. Furthermore, in July 2014, the offsets contract has been renegotiated for a second time, substituting again the recovery of a hotel in Algarve for the construction of a wind power platform. Again, the EC turned a blind eye.

Mr. Barnier could have also used this opportunity to disclose to me the exchange of information between the EC and the Portuguese government, since many of my questions addressed the exchanges between the government and the EC in the context of the procedure

initiated by the EC in the follow up of my complaint. It is crucial for me, as plaintiff and Member of the European Parliament, to know what diligences the EC did to investigate and verify the information granted by the Portuguese authorities.

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes (please specify)

As stated, I sent a letter to President Barroso, stating my objections and doubts concerning the responses from the EC to my Complaint.

If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Not applicable

Has the object of your complaint already been settled by a court or is it pending before a court?

No

Please select one of the following two options after having read the information in the box below:

Please treat my complaint publicly

Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

Yes

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