



EUROPEAN COMMISSION

Brussels, [DD/MM/YYYY] * D/[XXXXX]
COMP/UNIT-E2/JC/TM

COMP Operations

Herrn Udo Platte
Haldenweg 7

8632 Tann
SCHWEIZ

Subject: Case AT.40165 BP Europa
(Please quote this reference in all correspondence)
Commission Decision rejecting the complaint

Dear Mr Platte,

1. I refer to your complaint of 5 December 2013 against BP Europa SE ("BP"). I am writing to inform you that the European Commission ("the Commission") has decided to reject your complaint, pursuant to Article 7(2) of Commission Regulation (EC) 773/2004¹.

1. THE COMPLAINT

2. Your complaint essentially relates to sub-lease and lubricants distribution agreements that you entered into with Aral AG ("Aral" - now part of BP) around thirty years ago.
3. You firstly claim that Aral's leasing practices in the late 1970s and early 1980s resulted in a partitioning of the internal market in breach of Article 101 TFEU.
4. You go on to claim that Aral's sub-lease and lubricants distribution agreements with your firm breached Article 101 TFEU in the following respects:
 - a. The agreements linked the sub-lease to an exclusive purchasing obligation for lubricants.

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

- b. The agreements were entered into for a fixed term lasting until 31 December 1982, and were then renewed year by year.
 - c. Under Article 101(3) TFEU, Aral ought to have sought approval from the Commission before transferring its obligations and responsibilities under the agreements on 1 July 1987 to its subsidiary ARKA GmbH.
 - d. Your sublease agreement was terminated on 27 September 1989, with effect from 31 December 1990, whereas this ought only to have been possible every five years, i.e., on 30 June 1986, 30 June 1991, 30 June 1996, *etcetera*.
5. You also claim that both Article 101 and 102 TFEU have been breached in the following respects:
- a. Aral was in a dominant position within the meaning of Article 102 TFEU (ex Article 82 TEC) because it had exclusive control over the admission to or exclusion from its sub-lease agreements.
 - b. Aral imposed standard contractual terms on your firm, i.e., terms that were not individually negotiated, which, you claim, must therefore be considered unfair.
 - c. Aral issued notice of ordinary termination under the sublease agreement on 27 September 1989, without giving objectively justified grounds, and without prior notice.
6. By letter of 25 June 2014, the Commission informed you of its intention to reject your complaint. In response, you made additional observations by letters of 3 July 2014 and 10 July 2014. Although these submissions largely repeat the arguments made in your complaint, you also clarify your claim that Aral ought to have applied for an individual exemption under Article 101(3) TFEU (ex-Article 81 TEC), and that it would have been for Aral to demonstrate that the requirements for such an exemption were met.
7. Finally, in your letter of 3 July 2014, you asked the Commission to process the notification of your distribution contract which you lodged on 27 May 2001 pursuant to Article 4(1) of Regulation 17/62².

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- 8. The Commission is unable to pursue every allegation of an infringement of EU competition law which is brought to its attention. It has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the Handling of Complaints.³
- 9. The case-law allows the Commission to reject complaints without taking investigative measures⁴. Although it has no fixed set of criteria, the Commission takes various

² Council Regulation No 17/62 - Official Journal 013, 21/02/1962 P. 0204 – 0211.

³ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

⁴ Case T-432/05, Judgment of the Court of First Instance of 12 May 2010, *EMC Development*, paras. 57-59; Case T-320/07, Judgment of the Court of First Instance of 23 November 2011, *Jones*, paras. 112-116;

factors into account when deciding which cases to pursue. One element the Commission may consider is whether the matters complained of relate principally to an individual dispute⁵, or rather have a broader impact on the economy as a whole and on consumers. The Commission may also take into account whether the matters have already been dealt with by national courts and whether the latter may be well-placed to examine the allegations made⁶. In addition, the Commission may take into consideration whether, on the basis of the information available, it seems unlikely that further investigation will ultimately result in the finding of an infringement. Finally, the Commission will be less inclined to launch an investigation if the matters complained of lie so far in the past as to make that investigation difficult, and to potentially prevent the Commission from imposing sanctions if it detected any breach of the competition rules⁷.

3. ASSESSMENT OF YOUR COMPLAINT

10. As to your request that the notification of your distribution contract which you lodged on 27 May 2001 pursuant to Article 4(1) of Regulation 17/62⁸ be processed, the Commission would underline that it is no longer in a position to do so⁹.
11. As regards the remainder of the claims in your complaint and your letters of 3 July 2014 and 10 July 2014, the Commission firstly observes that these principally relate to an individual dispute between you and BP. You have provided no indication that BP's behaviour may affect a significant number of undertakings or may currently have an impact upon the economy as a whole or upon consumers, and the Commission has received no such indications from other sources.
12. Secondly, the Commission notes that the matters which are the subject of your complaint and your letters of 3 July 2014 and 10 July 2014 can be, and indeed have been, dealt with by the German courts.¹⁰

Case T-319/99, Judgment of the Court of First Instance of March 2003, *FENIN*, para. 43; Case T-204/03, Judgment of the Court of First Instance of 27 September 2006, *Haladjian Frères*, para. 28; and the Notice on handling of complaints, point 47.

⁵ See in this regard point 27, p. 68 of the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty - Official Journal C 101, 27.04.2004, p. 65-77

⁶ Ibid, point 44, p. 70.

⁷ See in this regard the rules on prescription set out in Chapter VII of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty - OJ L 1, 04.01.2003, pp. 1-25.

⁸ Council Regulation No 17/62 - Official Journal 013, 21/02/1962 P. 0204 – 0211.

⁹ One of the purposes of Regulation 1/2003 was to do away with the notification system set up by Regulation 17/62, and to replace it with a system of self-assessment. The bulk of Regulation 17, including Article 4 thereof, was therefore repealed by Article 43 of Regulation 1/2003, and as a result, the Commission no longer assesses agreements notified to it. Notifications that had not been processed by the time that Regulation 1/2003 entered into application on 1 May 2004 are deemed to have lapsed, pursuant to Article 34 of Regulation 1/2003.

13. Thirdly, the Commission notes that the origins of the dispute lie around thirty years in the past, which would make any investigation extremely difficult. Your submissions of 3 July 2014 and 10 July 2014 bring no new elements to refute this observation. In the course of such an investigation, the Commission would be obliged to carry out an assessment of Aral's position on the property markets, and of the terms of the leases as well as the actual leasing practices of Aral's subsidiaries. Such an investigation would also oblige the Commission to ascertain Aral's position on the markets for the sale of lubricants at the relevant time, and to assess how easy it would have been for competitors to enter those markets or strengthen their market positions. Many of the data and relevant documents may no longer exist, making it unlikely that the Commission would be able to demonstrate the existence of an infringement to the requisite standard of proof. Moreover, even if any breach of the competition rules were to be detected, the age of the dispute would potentially prevent the Commission from imposing sanctions¹¹.
14. In sum, therefore, it would appear that a further investigation into your allegations would be difficult and disproportionately burdensome.

4. CONCLUSION

15. In its discretion to set priorities, the Commission concludes in view of the above considerations that there are insufficient grounds to further investigate the alleged infringements, and consequently rejects your complaint pursuant to Article 7(2) of Commission Regulation (EC) 773/2004. The Commission also declines to process the notification that you made on 27 May 2001 pursuant to Article 4(1) of Regulation 17/62.

5. PROCEDURE

5.1. POSSIBILITY TO CHALLENGE THIS DECISION

16. An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. CONFIDENTIALITY

17. The Commission reserves the right to send a copy of this Decision to BP. Moreover, the Commission may decide to publish this Decision, or a summary thereof, on its

¹⁰ See notably Case 19 U 54/92, Judgment of the Higher Regional Court of Cologne of 8 January 1993, *Platte v. ARKA*; Case 19 U 53/92, Judgment of the Higher Regional Court of Cologne of 8 January 1993, *Platte v. Zillmann*; Case 8 O 40/13, Decision of the Regional Court of Dortmund of 19 April 2013, *Platte v. BP Europa*. See also footnote 4 above.

¹¹ See footnote 5 above.

website.¹² If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform John CLARK (tel. +32 2 299 5978, e-mail: John.Clark@ec.europa.eu) or Tihana MEIĆ (tel. + 32 2 296 8475, e-mail: Tihana.Meic@ec.europa.eu). Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response by the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can therefore be published on the Commission's website or sent to BP.

18. You may request that your identity is not revealed in the published version of the Decision, but only if this is necessary to protect your legitimate interests.

For the Commission

*Joaquín Almunia
Vice-President*

¹² See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.