

Decision of the European Ombudsman on complaint 715/98/IJH against the European Commission

Decision

Case 715/98/IJH - Opened on 30/07/1998 - Decision on 10/04/2000

Strasbourg, 10 April 2000 Dear Mr L., On 7 July 1998, TIE (Toy Industries of Europe) made a complaint to the European Ombudsman against the European Commission. On 30 July 1998, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 19 November 1998. I forwarded the Commission's opinion to TIE with an invitation to make observations, which were sent on 29 January 1999 and 18 February 1999. On 29 April 1999, I asked the Commission for further information and it replied on 2 June 1999. On 16 June, I forwarded the Commission's reply to TIE with an invitation to submit observations before 31 July 1999. On 30 July 1999, you wrote to me on behalf of TIE, requesting further time in which to submit observations. On 1 December 1999, I wrote to you again inviting observations by 31 December 1999. On 17 December 1999, you sent observations. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

The complaint to the Ombudsman concerns the Commission's handling of a complaint which TIE made to the Commission in November 1994 against the prohibition, imposed by the Greek authorities, on television advertising of children's toys between 7.00 and 22.00. In the complaint to the Ombudsman, TIE alleged : (i) undue delay , in that the Commission did not send a letter of formal notice to the Greek authorities until two years after the complaint, not within one year as laid down in its own internal procedures. Furthermore, the complainant alleged that the Commission ignored its repeated requests for urgent treatment of its complaint; (ii) lack of information , in that the Commission never provided any official information concerning the actions taken on TIE's complaint; (iii) neglect of duty , in that the Commission decided to consult experts and interested parties before sending a reasoned opinion to the Greek authorities. The complainant claimed that where there is an obvious case to answer with regard to a suspected infringement it is for the Member State to provide the necessary information and not for the Commission or any third parties. The complainant also alleged lack of impartiality by the college of Commissioners and requested the Ombudsman to examine the general efficacy of the Article 169 (now Article 226) procedure. The Ombudsman informed the complainant that the allegation and request did not appear to provide sufficient grounds for inquiry, as required by Article 195 of the Treaty establishing the European Community. The Ombudsman's inquiry in this case was therefore limited to points (i), (ii) and (iii) above.



THE INQUIRY

The Commission's opinion The Commission explained that, in its complaint to the Commission, TIE claimed that the prohibition on television advertising has a particularly detrimental effect on non-Greek Community producers of toys and alleged that, although it is presented as a measure to safeguard children, its aims are protectionist. Undue delay The Commission accepted that two years had elapsed between the date of the complaint to the Commission and the sending of the letter of formal notice, but enclosed a detailed chronology of events, in order to demonstrate that it did not remain idle during this period. The Commission also mentioned that its procedures had subsequently been improved so as to deal with infringement cases more quickly. As regards the complainant's requests for urgent treatment, the Commission explained that they could not be satisfied because of the technical and sensitive nature of the problem. In particular, it was important to identify the correct legal basis of infringement proceedings and this involved many exchanges of memoranda with the Commission's Legal Service. Secondly, the disproportionate nature of the Greek measure had to be proven. Lack of information The Commission considered this aspect of the complaint to be particularly unjustified. Although the complainant was not systematically informed in writing of the different measures taken, its representative was regularly and precisely informed of developments, often on DG XV's initiative. These contacts took place mainly by telephone. The complainant was also received by the Director General of DG XV two months after the complaint was registered and also met other responsible officials on at least three occasions. Neglect of duty The Commission explained that the Greek authorities had stated in their reply to the letter of formal notice that the objective of the ban on television advertising of children's toys is to prevent children seeing advertisements which might cause them to suffer feelings of frustration, or to exert strong pressure on their parents to buy a toy that is beyond the family budget. The supposed public interest justifications of the law therefore concern the protection of children and the safeguarding of family peace. Before receiving the above reply, the Commission had believed that the Greek authorities were concerned about possible risks inherent in the content of the advertising message. The Commission considered that the objectives put forward in the reply shed a different light on the case, necessitating a thorough investigation. The protection of children against risks cannot be taken lightly and the Commission recently set up a group of government experts in the field of commercial communications. Its role is not to take a decision on infringement proceedings but to discuss horizontal issues, such as the risks to which toy advertising may expose children and, if such risks are identified, the best means of combating them. The Commission services were currently evaluating the result of a discussion at the second meeting of the expert group, with a view to making a proposal to the Commission for an appropriate follow-up to the complaint by the beginning of 1999 at the latest. The Commission also pointed out that the Court of Justice has consistently held that, under the Article 169 procedure (now Article 226), it is the Commission's responsibility to prove that an obligation has not been fulfilled. **The complainant's observations** Undue delay The complainant questioned whether the Commission's internal rules of procedure on extension of deadlines for reply by a Member State to a letter of formal notice were complied with. Because there was no relevant Commission meeting between June and December 1997, the three-week delay in the reply from the Greek authorities caused a further five month delay in the Commission's dealing with the matter. The complainant also claimed that the Commission acted swiftly against an identical Greek ban on advertising in 1991



and questioned why similar action was not possible against the measure adopted in 1994. Finally, the complainant alleged that the delay of 13 months between the Commission's receipt of the reply from the Member State to the letter of formal notice and its decision to consult the group of experts was excessive. Lack of information The complainant acknowledged that DG XV provided regular information, but specified that this aspect of the complaint concerns other DGs, as well as certain Commissioners' cabinets and the Legal Service. The observations referred in particular to criticisms of the lack of transparency and dominant position of the Legal Service made in a report by a committee of the European Parliament and in the resolution subsequently adopted by the Parliament. The complainant supported the Parliament's call for the Commission to make the complete legal arguments on specific cases known to the complainant and to provide a possibility for the complainant to challenge this opinion before a final decision is taken on whether formally to pursue a complaint. Neglect of duty The complainant expressed the view that the primary responsibility of the Commission in infringement cases is the enforcement of the single market by eliminating obstacles to free movement as swiftly as possible. If there is a case to answer, the Commission should act within the time-limits set by its own rules of procedure and use its discretionary powers effectively. If there is no case, the Commission should close the file. The fact that the toy advertising case has dragged on for so many years indicates that there is a case to answer. The fact that still no decisive action has been taken indicates neglect by the Commission of its responsibilities as guardian of the Treaty.

FURTHER INQUIRIES

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore invited the Commission to respond to the complainant's observations as regards the issues of undue delay and lack of information. The Ombudsman also noted that the Commission's opinion stated that its departments envisaged making a proposal to the Commission for an appropriate follow-up to the complaint by the beginning of 1999 at the latest. The Ombudsman requested to be informed of any subsequent developments, as well as of any timetable for possible future action by the Commission in this matter. **The Commission's reply** Undue delay The Commission explained that the relevant Commission departments had intended to table a proposal to send a reasoned opinion to the Greek authorities at the Commission infringement meeting in June 1997. However, this proposal was dropped when the reply from the Greek authorities was received. The reply was two to three weeks late, but the Commission was obliged to take account of it. In view of the substance of the reply, the case would probably have been held over to December 1997, even if the Greek authorities had complied with the deadline. The Commission noted that the rules on extensions of deadlines to which the complainant referred did not apply in this case, since the Greek authorities had not requested an extension. However, it also stated that, at the time of the events in question, the Commission was sometimes comparatively lenient with regard to late replies (some of which may only have been intended to buy time), but that in recent decisions taken with a view to improving its working methods in relation to infringement procedures the Commission has undertaken to adopt a firmer line towards Member States which fail to comply with their deadlines for replying. As regards the comparison with the action taken when a similar ban was imposed in 1991, the Commission pointed out that it also acted swiftly in 1994, by sending a pre-Article 169 letter less than six months after the complaint was



received. Furthermore, in 1991 the Greek authorities had complied immediately with the Commission's request, which was not the case in 1994. As regards the delay of 13 months between the Commission's receipt of the reply to the letter of formal notice and its decision to consult the group of experts, the Commission explained the sequence of events between the reply (30 May 1997) and the decision to consult further (24 June 1998). Lack of information As regards the complainant's observations on this point, the Commission stated that there must be limits on the amount of information provided about the positions of particular departments or Member's private offices in order to safeguard the principles of consistency and collective responsibility for the work of the Commission. As regards opinions of the Legal Service, the Commission referred to the order of the President of the Court of First Instance in *Carlsen and others v Council* (1) . The Commission also stated that the complainant and its representatives were kept regularly informed by the responsible department of the results of meetings of the heads of Commissioners' cabinets and of the Commission itself. They were received by the President's cabinet on 30 April 1996 and also had an opportunity to state their point of view at a meeting held on 27 March 1997 with the two officials in the Legal Service responsible for their case. Developments since November 1998 The Commission explained the results of the discussion of the expert group and of its own examination of scientific studies on the subject and enclosed a 20-page summary paper drawn up by its services. Given the difficulty in arriving at a scientifically unassailable theory as to the risks and challenges involved in advertising for children, the Commission decided to investigate the matter more thoroughly and possibly enter into amicable dialogue with the Greek authorities with a view to jointly exploring the various alternatives which would guarantee a high degree of protection for children while safeguarding the requirements of freedom of movement. These discussions had not yet begun because the responsible Greek Minister ceased to hold office at the beginning of 1999 and because of the resignation of the Commission. **The complainant's observations** In December 1999, the complainant sent observations maintaining the complaint of undue delay as regards the 13 months between the Greek authorities' reply to the letter of formal notice and the Commission's decision to consult a group of experts. The complainant considered that the Commission's intention to begin an amicable dialogue with the Greek authorities had been just another avenue for delaying a decision and pointed out that such negotiations normally take place only after a reasoned opinion has been delivered, since otherwise the Commission has no leverage vis-à-vis the Member State. Finally, the complainant noted that the Commission had closed the file on the case in September 1999, on the grounds of lack of evidence and that the case had been pending for too long. The complainant had received notice of the intention to close the case and an invitation to submit new evidence within one month, which it had done. The complainant alleged that the decision to close the file had been taken by a "care-taker" Commission, in an atmosphere of desk-cleaning, with no proper legal assessment of the merits of the case, nor of the expert advice that the Commission had collected.

THE DECISION

1 The scope of the Ombudsman's inquiry 1.1 The complaint to the Ombudsman, which was made in July 1998, concerned the Commission's handling of an ongoing Article 169 (now Article 226) infringement procedure, investigating the Greek prohibition on television advertising of children's toys. The complaint to the Ombudsman alleged undue delay, failure to provide information about the ongoing infringement procedure and neglect by the Commission of its



duty as guardian of the Treaty. 1.2 In observations made in December 1999, the complainant noted that the Commission had closed the infringement procedure in September 1999. The complainant alleged that this decision had been taken by a "care-taker" Commission, in an atmosphere of desk-cleaning, with no proper legal assessment of the merits of the case, nor of the expert advice that the Commission had collected. 1.3 The Ombudsman did not consider it justified to start inquiries into this allegation, which was outside the scope of original complaint. The complainant has the possibility to submit a new complaint to the Ombudsman, containing sufficiently precise allegations and supporting evidence to justify an inquiry, as required by Article 195 EC.

2 Undue delay 2.1 The complainant alleged that the Commission did not send a letter of formal notice to the Greek authorities until two years after the complaint; that the Commission had not enforced the deadline for a reply from the Greek authorities; and that the 13-month delay between the date of the reply and the Commission's decision to consult a group of experts was unjustified. The complainant also alleged that the Commission ignored its repeated requests for urgent treatment of its complaint. 2.2 The Commission explained that the complainant's requests for urgent treatment could not be satisfied because of the technical and sensitive nature of the problem. Furthermore, the Greek authorities had adopted a different attitude compared to that in 1991, when they had swiftly removed a prohibition on television advertising of toys following the Commission's request. The complainant did not pursue this aspect of the allegation of delay. 2.3 The Commission accepted that two years had elapsed between the date of the complaint and the letter of formal notice, but enclosed a detailed chronology of events in order to demonstrate that it did not remain idle during this period. The Commission also accepted that, at the time of the events in question, it was sometimes comparatively lenient with regard to late replies. The Commission mentioned that its procedures had subsequently been improved, so as to deal with infringement cases more quickly and to adopt a firmer line towards Member States which fail to comply with their deadlines for replying. 2.4 The Ombudsman notes that five years passed between the date of the complaint and the Commission's decision to close the file. Although, part of this period was accounted for by the need properly to investigate a case raising complex and difficult issues, involving the protection of children, it is clear from the Commission's answers that some of the delay resulted from its internal procedures. However, in view of the fact that the Commission has subsequently made efforts to reform these procedures (2), the Ombudsman does not consider it necessary to pursue his inquiry into this aspect of the particular case.

3 Lack of information 3.1 The complainant alleged that the Commission never provided any official information concerning the actions taken on its complaint. During the Ombudsman's inquiry, the complainant acknowledged that DG XV had provided it with regular information. Furthermore, the Commission gave details, which the complainant did not contest, of meetings between the complainant's representatives and the cabinets of the President and other Commissioners, as well as with the relevant Commission services. 3.2 The complainant also argued that the Commission should make the complete legal arguments on specific cases known to the complainant and provide for a possibility for the complainant to challenge this opinion before a final decision is taken on whether formally to pursue a complaint. In this context, the complainant referred to points made in a report by a committee of the European Parliament (3) and in the resolution subsequently adopted by the Parliament. 3.3 In reply, the Commission stated that there must be limits on the amount of information provided about the positions of particular departments or Member's private offices in order to safeguard the principles of consistency and collective responsibility for



the work of the Commission. As regards opinions of the Legal Service, the Commission referred to the order of the President of the Court of First Instance in *Carlsen and others v Council* (4) , which considered that an institution could refuse access to legal opinions which are merely working instruments. 3.4 The evidence available to the Ombudsman in this case is that the complainant was provided with regular information about the progress of the complaint, but did not receive full information about the Commission's legal assessment of the case at the time when the Commission's decision to close the file on the complaint was taken. In the present state of Community law, and in view of the Commission's reasons for closing the file on the specific complaint, the Ombudsman finds no maladministration in relation to this aspect of the case. **4 Neglect of duty** 4.1 The complainant alleged that the Commission neglected its duty as guardian of the Treaty by deciding to consult experts and interested parties before sending a reasoned opinion to the Greek authorities. The complainant claimed that where there is an obvious case to answer with regard to a suspected infringement it is for the Member State to provide the necessary information and not for the Commission or any third parties. 4.2 During the inquiry, the complainant also claimed that the Commission should act within the time-limits set by its own rules of procedure and use its discretionary powers effectively. If there is no case to answer, the Commission should close the file. As regards respect for time-limits, this point is dealt with in section 2.4 of the decision above. 4.3 The Commission explained that the Greek authorities' reply to the letter of formal notice had shed a different light on the case, by claiming that the prohibition of television advertising of children's toys is justified by the public interest in the protection of children and the safeguarding of family peace. A thorough investigation of these claims was needed and the Commission consulted a group of government experts in the field of commercial communications. According to the Commission, the role of the expert group was not to take a decision on infringement proceedings but to discuss horizontal issues. The Commission subsequently explained the results of the discussion of the expert group and of its own examination of scientific studies on the subject in a summary paper drawn up by its services. The complainant did not contest these explanations. 4.4 As regards the range of sources which the Commission consulted in order to obtain adequate information and evidence in this case, the Ombudsman's inquiry revealed no evidence that the Commission acted outside the limits of its legal authority as the guardian of the Treaty. The Ombudsman therefore finds no maladministration in relation to this aspect of the complaint. **5 Conclusion** On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case. The President of the European Commission will also be informed of this decision.

FURTHER REMARKS

The general issues of whether the Commission has suitable procedures to deal promptly, fairly and effectively with citizens' complaints to it in its role as guardian of the Treaty, including whether the complainant could be informed of the Commission's legal assessment of his case and, if so, at what stage of the procedure, will be examined in a future own-initiative inquiry by the European Ombudsman. Yours sincerely Jacob SÖDERMAN

(1) Order of the President of the Court of First Instance of 3 March 1998 in Case T-610/97R, *Carlsen and others v Council* [1998] ECR-II 485.

(2) See SEC (1998) 1733, "Improvement of the Commission's working methods in relation to



infringement proceedings"; XVIth Report on monitoring the application of Community law COM(1999)301 final, 9/07/1999.

(3) Report on the communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the follow-up to the Green paper on Commercial Communications in the Internal Market (COM(98)0121 - C4-0252/98), A4-0503/98 (rapporteur Jessica LARIVE).

(4) Order of the President of the Court of First Instance of 3 March 1998 in Case T-610/97R, *Carlsen and others v Council* [1998] ECR-II 485.