

Decision of the European Ombudsman on complaint 157/2002/OV against the European Commission

Decision

Case 157/2002/OV - Opened on 12/02/2002 - Decision on 15/10/2002

Strasbourg, 15 October 2002

Dear Mr K.,

On 24 January 2002, you made a complaint to the European Ombudsman on behalf of the Union of Coastal Passenger Ship-Owners concerning the complaint lodged to the Commission on 10 December 2001.

On 12 February 2002, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 22 May 2002. I forwarded it to you with an invitation to make observations, which you sent on 27 June 2002.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

On 10 December 2001 the Union of Coastal Passenger Ship-Owners (hereafter "the complainant") lodged an Article 226 complaint with the Commission alleging that the Greek Law 2932/2001 on the freedom to provide services to maritime transport infringes 1) Council Regulation (EEC) n° 3577/92 of 7 December applying the principle of freedom to provide services to maritime transport within Member States and 2) Article 49 of the EC Treaty, as well as the case-law of the Court of Justice on the free movement of services.

Contrary to the Commission's internal rules following the Ombudsman's own initiative inquiry into the Article 226 procedure, the complaint was not registered. The complainant only received a reply from the Head of Unit of DG TREN which acknowledged the complaint without any reference to an official registration within the Secretariat General. This letter, dated 20 December 2001, stated that a reply on the substance would not be sent before the end of February 2002. The letter also stated that until 1 January 2004 (transitional period), Greece is free to apply more restrictive provisions than those in the Regulation. According to the



complainant this was wrong and contrary to the Commission's position stated in a letter addressed by Commissioner de Palacio to the Greek Minister of Mercantile Marine, Mr Papoutsis. According to this letter, the date of 1 January 2004 was advanced and the new liberalisation date was 1 November 2002, as stipulated in the Greek Law.

On 24 January 2002, the complainant wrote to the Ombudsman making the following three claims :

1. The complaint of 10 December 2001 should be formally registered and an appropriate letter should be sent by the Commission's services indicating the registration number attributed to the complaint.
2. The Commission should reply on the substance of the complaint by respecting the deadlines set out in its Code of Good Administrative Behaviour.
3. The Commission should reply to the questions concerning the serious economic damages that the members of the Union of Ship-Owners are about to suffer from the abusive provisions of the Greek Law. With this regard the complainant raised the question of the Commission's responsibility under Article 288 of the EC Treaty.

THE INQUIRY

The Commission's opinion

The Commission first recalled the background of the complaint: Following the entry into force of Council Regulation 3577/92/EEC of 7 December 1992 (OJ L 364 of 12 December 1992, p. 7), maritime cabotage was gradually liberalised in the Community. As from 1 January 1999, the only remaining protected trades, until 1 January 2004, are two island cabotage services in Greece: regular passenger and ferry services and services provided for by vessels less than 650 gt (see Article 6, paragraph 3 of the Regulation).

On 27 June 2001, Greece published Law 2932/2001 liberalising these two services as from 1 November 2002. The Commission services and the complainant agree that Law 2932/2001 does not fully liberalise these trades. Consequently, the complainant is of the view that this Law infringes Council Regulation 3577/92 as from now while the Commission services claim that this Law will only infringe the Regulation as from 1 January 2004, if it remains unchanged. The opinion of the Commission services is based on the very clear wording of Article 6 paragraph 3 of the Regulation.

As regards the facts of the complaint, the Commission observed that the complaint of 10 December 2001 was addressed to the Secretariat General, to the DG for Competition (DG COMP) and the DG for Energy and Transport (DG TREN).

In accordance with the Code of Good Administrative Behaviour, a first reply was sent to the complainant on 20 December 2001, by the Head of Unit responsible for the file in DG TREN. This letter mentioned: the Unit responsible for the file, the date (end of February 2002) by which



the complainant would receive a full reply taking into account the need to translate the document in Greek and the need to consult other services of the Commission. DG TREN also indicated in its reply that, in accordance with Article 6, paragraph 3 of the Regulation, Greece had until 1 January 2004 to fully liberalise its island cabotage trades.

On 19 December 2001, DG TREN indicated to the Secretariat General of the Commission that the complaint should not be registered as the grievance at stake could only be pursued after 1 January 2004. On 5 February 2002, the complainant was informed by letter that he would get a single reply for his two letters related to Law 2932/2001.

DG TREN sent a complete reply to the complainant on 19 February 2002. In its reply, DG TREN stated that should the Greek authorities fail to comply with the Cabotage Regulation in 2004, the Commission would then start an infringement procedure. It is only in 2004 that a formal action against Greece can be taken. In the meantime, the Commission services are in touch with the Greek authorities in order to discuss the various issues at stake (a warning letter was sent to the Greek authorities on 17 December 2001).

The Commission referred to the complainant's statement that Commissioner de Palacio herself acknowledged that Greece should fully liberalise the trade as from 2002 and not as from 2004. When the Commissioner wrote to Mr Papoutsis on 6 June 2001, the Greek Law had not been adopted yet. The Commissioner believed at the time that it was the intention of the Greek authorities to fully liberalise the trade and she made some comments in her letter explaining what could be revised in the draft legislation in order to achieve this goal. But she never stated that the Greek authorities had to fully liberalise the trade as from 2002 because they had committed themselves to adopt this new legislation. In the end the Greek authorities liberalised their trade to a certain extent but not completely. They chose not to amend their draft along the line suggested by the Commissioner. Until 2004, this is perfectly admissible under the Cabotage Regulation.

As regards the claims of the complainant, the Commission made the following comments:

1. As regards the claim concerning the registration of the complaint, the Commission observed that its services knew that the complaint would not be admissible before 2004. Therefore they did not register the letter as a complaint. The text of the Regulation is so clear on this issue that it leaves no room for interpretation. However, this does not mean that the Commission services remained inactive. They got in touch with the Greek authorities even before having received the complaint in order to try to sort out in advance the problems that would otherwise arise in 2004.

Even if the complaint was not registered, the Commission recognises that strict application of its commitments vis-à-vis the Ombudsman (1) could justify registration of the complaint. That is why the Commission services proceeded to register it on 10 April 2002 (Complaint 2002/44/17). In addition, the Commission wished to stress that on 20 March 2002 it adopted a communication to the Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [COM(2002)141], thus fulfilling the commitments made in its reply of 15 May 2001 (SG(2001)D/600306) to the criticisms formulated



by the European Ombudsman when closing complaint 995/98/OV. Point 3 of this communication sets out the exceptions to the principle of registration as a complaint.

2. As regards the allegation concerning the reply in substance within the deadline of the Code of Good Administrative Behaviour, DG TREN is of the view that the Code was respected: It sent a preliminary reply to the complainant within two weeks after having received the complaint. It stated in the reply that the complaint would not be admissible until 2004 and explained that a more detailed answer would be sent after translation and consultation of other Commission services at the end of February 2002. This deadline was respected as the second letter was sent on 19 February 2002. All this is in line with the Code of Good Administrative Behaviour.

3. As regards possible serious economic damages that the members of the Union are about to suffer from the abusive provisions of the Greek Law and the responsibility of the Commission under Article 288 of the Treaty, DG TREN explained in its second reply to the complainant that any claims for potential damage should be dealt with at national level, as the Commission has no power in this field. In any case, it fails to see on which legal basis Greece would be condemned as the Cabotage Regulation expressly allows Greece to derogate from the principle of freedom to provide services until 2004. DG TREN concluded that the claim related to economic damages should be brought before a national court.

There was no damage caused by the servants of the Commission in this case, so Article 288 of the EC Treaty does not apply.

The complainant's observations

The complainant observed that its initial complaint of 10 December 2001 concerning the provisions of Law 2932/2001 has not been registered and answered properly until today. A letter sent by the Commission to the complainant on 3 May 2002 fails in particular to address a number of important and damaging provisions of Law 2932/2001 raised in the 14 pages complaint of 10 December 2001. The Commission should investigate these aspects in the light of the provisions of the Treaty as well as the Court's case law, and not limit the examination in the context of Regulation 3577/92/EEC.

The complainant is of the opinion that the island cabotage market in Greece should be liberalised by 1 November 2002 in accordance with the provisions of Article 1 of Law 2932/2001 which implements Regulation 3577/92/EEC in Greece.

The complainant maintained that DG TREN infringed the Code of Good Administrative Behaviour and the internal Commission's rules on the handling of complaints, and that there are grounds for the application of Article 288 of the EC Treaty for the reason that the Commission, in addition to the question of the deadline of the regulation, refuses to take immediate action even for the infringements of Articles of the Treaty and the Court's case law.

The complainant finally drew attention to contradictions between the Commission's letter of 19 February 2002 (from Energy and Transport DG) in which the complainant is suggested to contract Mr Moavero Milanesi, Director of DG Competition, and a letter of 28 February 2002 from DG Competition, in which it is stated that the problem raised by the complainant does not



fall within the competence of DG Competition, but in the competence of DG Energy and Transport. The complainant finds this way of dealing with its complaint as a clear indication of lack of co-ordination and consultation between the Commission's services having negative consequences on his interests.

THE DECISION

1 The claim that the complaint should be registered

1.1 The complainant claims that its complaint of 10 December 2001 should be formally registered and an appropriate letter should be sent by the Commission's services indicating the registration number attributed to the complaint.

1.2 The Commission observed that, as its services knew that the complaint would not be admissible before 2004, it decided not to register the complainant's letter as a complaint. However, the Commission recognised that strict application of its commitments towards the Ombudsman in the framework of the own initiative inquiry 303/97/PD would justify the registration of the complaint. Its services therefore proceeded to register the complaint on 10 April 2002 (reference 2002/44/17).

1.3 In its commitments towards the Ombudsman in the framework of the own initiative inquiry into the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law (2) , the Commission undertook a) to register all complaints and that *no exceptions* would be made to this rule, and b) to acknowledge receipt by letter to the complainant with an annex attached explaining the details of the infringement proceedings.

1.4 In the present case, the Commission (Energy and Transport DG) replied on 20 December 2001 merely acknowledging the complainant's letter. It thus appears that the Commission did not at that point respect its undertaking to register the complaint and to provide the complainant with the annex setting out the details of the infringement proceedings.

1.5 However, referring to its commitments in the own initiative inquiry and also to the communication it adopted on 20 March 2002 on relations with the complainant in respect of infringements of Community law, the Commission has finally registered the complaint on 10 April 2002 (reference 2002/44/17). Even if the Commission did not inform the complainant of this fact by letter, it appears that this information was provided to the complainant via the Commission's opinion sent to the Ombudsman. The Commission therefore appears to have rectified its earlier failure and no further inquiries appear to be necessary.

2 The claim for a reply on the substance of the complaint within the deadlines of the Code of Good Administrative Behaviour

2.1 The complainant claims that the Commission should reply on the substance of the complaint by respecting the deadlines set out in its Code of Good Administrative Behaviour.

2.2 The Commission stated that it sent a preliminary reply to the complainant within two weeks after having received the complaint. It stated that a more detailed answer would be sent at the



end of February 2002. This deadline was respected as the second letter was sent on 19 February 2002. The Commission therefore concluded that it had acted in line with the Code of Good Administrative Behaviour.

2.3 As a preliminary point, the Ombudsman would like to point out that for correspondence from complainants concerning Member States' infringement of Community law, the specific rules are contained in the Commission's notice "Failure by a Member State to comply with Community law: standard form for complaints to be submitted to the European Commission" (OJ 1999 C 119/5), which was published after the Ombudsman's inquiry into the matter. These rules have been clarified and consolidated in the Commission's Communication of 20 March 2002 to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM(2002)141) (3) .

2.4 As regards the time-limit for informing the complainant about the follow-up of complaints alleging infringement of Community law, both the notice and the Communication state that the Commission will inform the complainant of the outcome of the case within one year from the date of the registration of the complaint (4) .

2.5 In the present case it appears that, even if the Commission sent a substantive reply to the complainant concerning Regulation 3577/92 already on 19 February 2002, the complaint was officially registered only on 10 April 2002 (ref. 2002/44/17). It appears therefore that the one year deadline for the Commission to take a position on the allegations of infringement of Article 49 of the EC Treaty, as well as the case-law of the Court of Justice on the free movement of services has not yet expired. The Ombudsman notes also that the Commission could in this framework clarify the points made by the complainant in his observations as regards possible contradictions between the Commission's letters of 19 February 2002 and 28 February 2002. No instance of maladministration was therefore found with regard to this aspect of the case.

2.6 If the complainant would not receive a substantive reply on the outstanding allegations within the one year deadline, he could consider to submit a new complaint to the Ombudsman.

3 The claim concerning the Commission's responsibility under Article 288 of the EC Treaty

3.1 The complainant claims that the Commission should reply to the questions concerning the serious economic damages that the members of the Union of Ship-Owners are about to suffer from the abusive provisions of the Greek Law. In this regard the complainant raised the question of the Commission's responsibility under Article 288 of the EC Treaty.

3.2 The Commission explained in its second reply to the complainant that any claims for potential damage should be brought before a national court, as the Commission has no power in this field. The Commission fails to see on which legal basis Greece would be condemned as the Cabotage Regulation expressly allows Greece to derogate from the principle of freedom to provide services until 2004. The Commission further stated that there was no damage caused by Commission servants in this case.

3.3 Article 288, paragraph 2 of the EC Treaty provides that *"in the case of non-contractual*



liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

3.4 The Ombudsman considers that the complainant has not provided evidence to show that the conditions for the Commission's non-contractual liability are fulfilled. No instance of maladministration was therefore found with regard to this aspect of the case.

4 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 Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Reply of the Commission to the European Ombudsman's own initiative inquiry into the Commission's administrative procedures in relation to citizens' complaints about national authorities dated 24 July 1997 (SG/D(97)34766); European Ombudsman's decision of closure dated 13 October 1997 (ref. 303/97/PD).

(2) 303/97/PD, Annual Report of the European Ombudsman 1997, p. 270.

(3) OJ 2002 C 244/05.

(4) Point 8 of the Communication.