

Decision of the European Ombudsman on complaint 1437/2002/IJH against the European Commission

Decision

Case 1437/2002/IJH - Opened on 17/09/2002 - Decision on 08/07/2003

Strasbourg, 8 July 2003

Dear Mr D.,

On 31 July 2002, you complained to the Ombudsman against the Commission's refusal to release the text of the letter of formal notice that it sent to the UK government on 20 December 2001 concerning breaches of Directive 73/239 in relation to the Lloyd's insurance market.

On 17 September 2002, the complaint was forwarded to the President of the Commission. On 23 September 2002, you sent a further letter concerning your case. On 21 November 2002, the Commission sent its opinion. The opinion was forwarded to you with an invitation to make observations. You sent observations dated 11 November 2002, received in this office on 18 December 2002.

On 10 February 2003, the Commission was asked to provide the Ombudsman with additional information. On 18 February 2003, you sent the Ombudsman a further letter, which was forwarded to the Commission on 6 March 2003.

On 31 March 2003, the Commission sent its complementary opinion, which I forwarded to you with an invitation to make further observations. You sent further observations on 6 June 2003.

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

THE COMPLAINT

In July 2002, a complaint was made to the Ombudsman against the Commission's refusal of a confirmatory application for public access to a document.

The complainant had suffered financial loss in the Lloyd's insurance market in the UK. He filed a complaint with the Commission against the UK authorities for failure to implement properly Directive 73/239.



The Commission investigated the complaint in its role as guardian of the Treaty. On 20 December 2001, the Commission sent a letter of formal notice to the UK government, in accordance with the procedure of Article 226 EC.

The complainant applied for public access to the letter of formal notice in accordance with Regulation 1049/2001. The Commission refused the application on the grounds that disclosure of the letter could undermine the proper conduct of infringement procedures based on Article 226 EC.

In his complaint to the Ombudsman, the complainant contests the Commission's refusal of public access to the letter of formal notice and argues that the UK Treasury has stated that it has no objection to the letter being made public.

The complainant emphasised that his complaint to the Ombudsman is confined to the question of public access and does not concern the Commission's handling of his complaint against the UK authorities.

The Ombudsman understands that the complainant has also petitioned the European Parliament concerning the UK authorities and Lloyd's.

THE INQUIRY

The Commission's opinion

The Commission's opinion made, in summary, the following points:

The complainant is one of the private investors in the Lloyd's insurance market ("Names") who suffered considerable financial losses and filed a complaint against the UK authorities for not implementing properly the non-life insurance Directive 73/239/EEC.

On 11 January 2002, the complainant wrote expressing relief that the Commission had started formal infringement proceedings against the UK. He also asked which aspects of Directive 73/239 were in question and whether the Commission's letter of formal notice to the UK authorities was in the public domain.

In reply, the Director General of DG Internal Market sent the complainant a copy of the relevant press release and explained that disclosure of the letter of formal notice would undermine the conduct of the infringement investigation. This exception to the right of access is foreseen in Article 4 (2), third indent, of Regulation 1049/2001.

On 5 February 2002, the complainant made a confirmatory application, arguing that there is an overriding public interest in disclosure. At that stage, the Commission had not received the UK authorities' reply to its letter of formal notice. The Secretary General upheld the initial decision.

The Lloyd's case is very complicated and sensitive. The Commission's investigation into a possible infringement by the UK is still ongoing. Disclosure of documents exchanged with the



UK authorities would adversely affect the conduct of this investigation. The Commission is currently examining new legislation introduced as part of a comprehensive reform of UK financial regulation under the Financial Services and Markets Act 2000. The Commission should not simply check whether the directive has been correctly transposed into national legislation, but rather whether national law is applied correctly. The ultimate objective is to ensure full compliance with Community law. This process requires a climate of mutual confidence that would be jeopardised by disclosing the documents related to the investigation.

The complainant's argument that the UK Treasury does not object to disclosure of the letter of formal notice is incorrect. The complainant sent a report from *The Mail on Sunday* newspaper of 10 March 2002, containing the following: "*The Treasury, which will respond to the Commission's charges by the end of April, denied that it was refusing to hand over its reply unless secrecy was guaranteed*". This clearly refers to the UK authorities' reply, not the Commission's letter. Furthermore, the Commission asked the UK authorities to waive confidentiality in the framework of other requests for access to documents linked to these infringement proceedings, but they have not done so.

In several judgments, the Court of First Instance has recognised the need for confidentiality in infringement investigations and, hence, justified the refusal to grant access to documents related to such investigations (1). Although this case law refers to the provisions of Commission Decision 94/90, it remains valid, since the wording of the relevant exception has been maintained in Regulation 1049/2001. The only new feature is the need to balance the harm caused by releasing a document against the public interest in its disclosure.

Compliance with Community law is a vital public interest, which clearly outweighs the interest of the general public in obtaining access to the documents produced and exchanged in the course of the investigation. The public is informed, through press releases, of the fact that infringement proceedings have been launched and of the key questions at stake.

The interest of Names or other parties involved in obtaining access to the documents relating to the infringement procedure is not a public interest in disclosure. The complainant has a right to be informed on the progress of the proceedings that were launched as a result of his complaint, in accordance with the code of conduct adopted by the Commission with regard to the treatment of complaints. (2)

Legal action to obtain compensation for the losses suffered by the complainant and other Names should be taken before the English courts. The Commission can only try to ensure that the UK complies with Community law and ultimately take the UK to the Court of Justice. The Court may state that the UK has acted in breach of the Treaty provisions. A Court judgement stating such an infringement would strengthen the complainant's case before an English court. In the meantime, the Commission has made clear that it would cooperate fully with the English judicial authorities if summoned to witness or to produce evidence.

The complainant's observations

In summary, the complainant's observations made the following points:



There have been many complaints to the Commission and petitions to the European Parliament concerning possible breaches of Directive 73/239. By refusing transparency, the Commission prevents complainants and petitioners furthering their case, because they do not know what defence the UK government has entered and so are unable to offer counter arguments or correct misleading statements.

The replies to the Commission from the UK government will, inevitably, rely heavily on information provided by Lloyd's. This is of great concern to complainants and petitioners because Lloyd's have, in the past, been economical with the truth.

The continuing non-disclosure of the correspondence leads to the suspicion that it would not stand up to public scrutiny. If there has been a breach, how has it been possible for it to have continued (and still continue) for so long? Publication of the correspondence would remove the impression that the aggrieved Names are being deliberately put at a considerable disadvantage.

Furthermore, the exchanges in 1977/78 between the Commission and the UK government concerning the transposition of Directive 73/239 are now 25 years old and can hardly be secret.

The complainant's understanding is that it is not now possible to obtain compensation in UK national courts without a judgement of the Court of Justice in favour of the Names. An alleged breach of the Directive has already been raised in the UK courts and dismissed as irrelevant. This issue is *res judicata*, which means that it cannot be overturned other than by the Court of Justice.

The complainant's additional letter

On 18 February 2003, the complainant asked the Ombudsman to take account of, in summary, the following:

At a hearing of the Committee on Petitions, Commissioner Bolkestein stated that the Commission would only investigate current alleged breaches of Directive 73/239 and that past failings would not be taken into account. The many complaints and petitions to the Commission and European Parliament from financially damaged members of Lloyd's relate to past irregularities. Justice for Lloyd's members cannot be won in the UK courts without a prior verdict from the Court of Justice that the UK government was at fault.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman wrote to the Commission concerning the complainant's argument that the replies to the Commission from the UK government will inevitably rely heavily on information provided by Lloyd's. The Ombudsman pointed out that, if correct, the complainant's argument implies that confidentiality could adversely affect the conduct of the Article 226 procedure, since the information that the Commission receives via the UK authorities is not subject to critical scrutiny.

The Ombudsman therefore requested the Commission to provide further information concerning



the procedures used to check the accuracy of the information that it receives in the Article 226 procedure.

By letter dated 6 March 2003, the Ombudsman asked the Commission also to respond to the complainant's letter of 18 February 2003.

The Commission's reply

The Commission's reply contained, in summary, the following points:

The general issue

As far as the general question regarding the possibility for complainants to comment on Member States' arguments is concerned, the Commission wishes to recall that the Court (3) has clearly stated that individuals are not parties to proceedings under Article 226 EC and for that reason cannot invoke rights to a fair hearing involving application of the *audi alteram partem* principle.

In the framework of proceedings under Article 226, information provided by Member States is examined by the Commission services as well as any other sources of information, including those provided by the complainant, so as to allow the institution to come to a decision on the conformity of a situation with Community law.

As the Court has stated in the above mentioned case-law, the Community institutions, when adopting decisions, make use of documents originating with third parties, given that the transparency of the decision-making process and the confidence of citizens in Community administration can be assured by adequate reasoning of those decisions. Adequate reasoning means that, basing itself on a document originating with a third party, the institution must explain the content of that document in that decision and justify that document's choice as a basis for that decision.

The Commission is of the view that the confidentiality which the Member States are entitled to expect of the Commission in infringement investigations, must not be deprived of its substance and therefore the right balance should be found when disclosing information in application of the above mentioned obligation.

The complainant's case

The original infringement case, with which the complainant's case is associated, concerns alleged failure to apply properly requirements under Directive 73/239 to the prudential regulation and supervision of Lloyd's, in particular with regard to the auditing arrangements and the verification of solvency.

This kind of case is more difficult than those concerning transposition of a Directive, because the issue is not one of simply determining whether a legal text has been properly promulgated, but rather whether national law implementing EU requirements has been properly applied by the competent national authorities.

The Commission raised its concerns with the UK authorities, primarily through two detailed questionnaires, followed by a letter of formal notice and a supplementary letter of formal notice issued in January 2002. Although the Commission's information is received from the UK authorities, not from Lloyd's, the Commission understands the complainant's concern that the



UK authorities would rely heavily on information provided by Lloyd's.

Although the Commission has no reason to doubt the accuracy of information received from the UK authorities, the Commission is able to check its accuracy by the following means:

- The Commission services can seek further information and clarification from the complainant. This can be obtained through normal communication, e.g. mail, fax, and typically telephone or e-mail. In some cases, Commission officials have met with complainants.
- The Commission has received complaints from a large number of parties. Although complainants generally make the same points, some parties are better informed on specific points than others. Having regard to the need to use limited resources efficiently, the Commission has often concentrated its checking or clarification of specific items with those complainants who have the most information for that point. Commission officials have met with other complainants, including their specialist advisors, to discuss specific aspects. Typically, when seeking information, an official has had a lengthy telephone discussion or an extended exchange of correspondence by e-mail. Furthermore, the fact that information has been provided from a variety of sources means that the Commission often has more information than any individual complainant.
- There are further sources of information for checking accuracy. The most important of these are the judgements of UK courts in cases concerning Lloyd's. Although these cases concern different parties and different issues, the judgements can nevertheless provide important factual information. Mention should also be made of the petitions to the European Parliament concerning Lloyd's. Some are very extensive: one petition extends to seven A4 lever arch files.
- The Commission has also examined or made reference to a wide series of other documents including Official Reports prepared by the UK Parliament, Reports commissioned by the UK Government into Lloyd's, Reports prepared on behalf of Lloyd's, Reports on Lloyd's Disciplinary proceedings, expert books, as well as newspaper or magazine articles.
- The Commission has also been able to access in-house expertise on technical matters such as auditing arrangements and legal issues.

Thus, notwithstanding its obligation to respect confidentiality in the conduct of Article 226 EC proceedings and the absence of formal powers to call witnesses and sub-poena documents, the Commission has been able to corroborate to a very great extent the accuracy of information it has received.

The issue of past failings

The Commission recognises that improvements to the regulatory and supervisory framework for Lloyd's have been achieved through the Financial Services and Markets Act 2000, which came into effect on 1 December 2001.

The objective of infringement proceedings under EU law is to establish or restore the compatibility of national law with EU law, not to rule on past compatibility or incompatibility. Consequently, the thrust of the current Commission inquiries relates to the examination and analysis of the application of the new framework under the Financial Services and Markets Act 2000.

When he appeared before the Committee on Petitions on 22 January 2003, Commissioner



Bolkestein emphasised that actions for damages can only be taken at national level. Furthermore, the case law of the Court of Justice confirms that infringement procedures under Article 226 EC aim solely to put an end to the failure to comply with Community law by a Member State, and not to record *in abstracto* that a failure existed in the past.

The complainant's observations

In summary, the complainant's observations made the following points:

Lack of transparency means the complainant has no defence against any incorrect statements in the replies from the UK government to the Commission.

The Commission's recognition that the Financial Services and Markets Act 2000 has achieved improvements to the regulatory and supervisory framework is, in effect, a feeble admission that Directive 73/239 was breached before the Act.

Article 226 EC uses mandatory wording: "*If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion...*" Although the complainant does not seek financial redress from the Commission, the latter is clearly culpable for the delay in ensuring enforcement of Community law. The Commission should issue a reasoned opinion stating that the UK government has not complied with Community law over a period of nearly 30 years.

THE DECISION

1 Preliminary remark

1.1 The complainant's final observations make a new allegation that the Commission is culpable for the delay in ensuring enforcement of Directive 73/239 in relation to the Lloyd's insurance market. The complainant claims that the Commission should issue a reasoned opinion stating that the UK government has not complied with Community law over a period of nearly 30 years.

1.2 The Ombudsman considers that it is not appropriate to delay a decision on the present case in order to inquire into this new allegation and claim. The complainant has the possibility to make a new complaint to the Ombudsman.

2 Refusal of access to the letter of formal notice of 20 December 2001

2.1 The complainant applied to the Commission for public access to a letter of formal notice sent by the Commission to the UK government on 20 December 2001, concerning breaches of Directive 73/239 in relation to the Lloyd's insurance market. The complainant contests the Commission's refusal to release the letter and argues that the UK Treasury has stated that it has no objection to the letter being made public.

The complainant also argues that replies to the Commission from the UK government will rely heavily on information provided by Lloyd's, which has, in the past, been economical with the truth.

2.2 According to the Commission, disclosure of the letter of formal notice would undermine the conduct of its investigation into the supposed infringement. The exception to the right of access



foreseen in Article 4 (2), third indent, of Regulation 1049/2001 (4) therefore applies.

The Commission argues that the Lloyd's case is very complicated and sensitive and that its investigation into a possible infringement by the UK is still ongoing. Disclosure of documents exchanged with the UK authorities would adversely affect the conduct of this investigation. The ultimate objective is to ensure full compliance with Community law. This process requires a climate of mutual confidence that would be jeopardised by disclosing the documents related to the investigation. The complainant's argument that the UK Treasury does not object to disclosure of the letter of formal notice is incorrect. The Commission asked the UK authorities to waive confidentiality in the framework of other requests for access to documents linked to these infringement proceedings, but they have not done so.

The Commission also argues that it has checked the accuracy of information supplied by the UK authorities using a number of identified external sources, as well as in-house expertise on technical matters.

2.3 The Ombudsman notes that Article 4 (2) of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of "the purpose of inspections, investigations and audits", unless there is an overriding public interest in disclosure. In a judgement concerning Commission Decision 94/90 (which Regulation 1049/2001 replaced) the Court of First Instance considered that the preservation of the objective of an amicable resolution of the dispute between the Commission and the Member State could justify refusal of access to letters of formal notice drawn up in connection with Article 226 proceedings (5) . Subject to the question of possible overriding public interest, which is dealt with in point 2.5 below, the Ombudsman takes the view that, in the light of the above-mentioned case law, the Commission could reasonably conclude that it was justified in refusing public access to the letter of formal notice in question. The Ombudsman recalls, however, that the Court of Justice is the highest authority on Community law.

2.4 As regards the arguments concerning the attitude of the UK authorities, the Ombudsman considers that, whilst it is for the Commission to apply the relevant exception under Regulation 1049/2001, it seems unlikely that preservation of the objective of an amicable resolution could justify a refusal of access if the Member State concerned was willing to accept disclosure. The Ombudsman finds no basis, however, to question the Commission's argument that the UK authorities are not willing to accept disclosure in the present case.

2.5 As regards the fact that the complainant is unable to correct possibly misleading information supplied to the Commission, the Ombudsman first points out that the Court of First Instance has stated that individuals are not parties to proceedings under Article 226 EC and for that reason cannot invoke rights to a fair hearing involving application of the *audi alteram partem* principle (6) .

The Ombudsman notes, however, that the relevant exception under Regulation 1049/2001 applies " *unless there is an overriding public interest in disclosure* ". The Ombudsman takes the view that the complainant has succeeded in establishing a significant public interest in



disclosure, which would make it possible for the public to check the accuracy of information supplied to the Commission and thereby enhance the effectiveness of the Article 226 procedure. The Ombudsman considers, however, that, in the present state of Community law and in view of the other possibilities for checking to which the Commission refers, the Commission could reasonably conclude, in this case, that the public interest in disclosure is not overriding. The Ombudsman recalls, however, that the Court of Justice is the highest authority on Community law.

2.6 In view of the above, the Ombudsman finds no maladministration in relation to this aspect of the complaint.

2.7 The Ombudsman recalls that the complainant has applied for public access only to the Commission's letter of formal notice of 20 December 2001 and that the Commission has explained that the thrust of the current Article 226 proceedings relates to the position following the entry into force of the Financial Services and Markets Act 2000.

The Ombudsman points out that the complainant has the possibility to apply to the Commission, in accordance with Regulation 1049/2001, for access to documents which, insofar as they relate to the position before the entry into force of the Financial Services and Markets Act 2000, may no longer be relevant to the current Article 226 proceedings.

3 The scope of the Commission's Article 226 investigation

3.1 In an additional letter sent during the inquiry, the complainant argues that the Commission's Article 226 investigation should deal with past irregularities, as well as current alleged breaches of the Directive.

3.2 The Commission argues that the objective of infringement proceedings under Article 226 EC is to establish or restore the compatibility of national law with EU law, not to rule on past compatibility or incompatibility.

3.3 The Ombudsman notes that, according to the Court of Justice, the purpose of that pre-litigation procedure under Article 226 EC is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position. (7) The Ombudsman therefore considers that the Commission is entitled to focus its Article 226 investigation on whether there is an infringement of Community law following the entry into force of the Financial Services and Markets Act 2000. The Ombudsman therefore finds no maladministration in relation to this aspect of the complaint.

4 Conclusion

On the basis of the Ombudsman's inquiries, there appears to be 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,



P. Nikiforos DIAMANDOUROS

(1) Case T-105/95, *WWF UK v Commission* , 1997 ECR II-313, point 63; Case T-309/97 *Bavarian Lager v Commission* , 1999 ECR II-3217, point 46; Case T-191/99, *Petrie and Others v Commission* , 2001 ECR II-3677, point 68.

(2) Commission Communication to the European Parliament and the European Ombudsman on Relations with the Complainant in respect of infringements of Community Law COM(2002) 141 final of 20 March 2002, 2002 OJ C 244/5.

(3) Case T-191/99, *Petrie and Others v Commission* , 2001 ECR II-3677.

(4) Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145/43.

(5) Case T-191/99, *Petrie and Others v Commission* , 2001 ECR II-3677, paragraph 68.

(6) *Ibid.* paragraph 70.

(7) Case C-191/95, *Commission v Germany* 1998 ECR I-5449, paragraph 44.