



Decision of the European Ombudsman on complaint 841/2003/(FA)OV against the European Commission

Decision

Case 841/2003/(FA)OV - Opened on 19/06/2003 - Decision on 10/05/2004

Strasbourg, 10 May 2004

Dear Mr G.,

On 23 April 2003, you made a complaint to the European Ombudsman on behalf of Intersalonika concerning the way the European Commission has supervised the transposition of Community insurance law into Greek national legislation.

On 19 June 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 1 October 2003. I forwarded it to you with an invitation to make observations, which you sent on 3 December 2003. On 7 January 2004, you sent additional comments.

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

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person, such as the Greek authorities for instance, may be the subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into your complaint have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission.

THE COMPLAINT

The complainant is the President of a Greek insurance company established in Thessaloniki and providing, among other services, means of transport in order to assist patients. The complaint is made on behalf of the company.

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



On 26 September 2001, the complainant addressed a letter to the European Commission (DG for Energy and Transport) in which he expressed concern as regards the transposition by the Greek authorities of Directives 84/641/EEC (1) and 92/49/EEC (2) as well as of Community legislation in the field of air carriers (Council Regulations 2407/92 (3) and 2408/92 (4)). In particular, the complainant referred to the fact that the complainant's helicopters - operated by Air Intersalonika - are prohibited from transporting patients because the Greek National Centre for Emergency Assistance (EKAB) has an exclusive right to provide this kind of assistance. In his letter, the complainant called on the Commission to take action to make the Greek authorities apply Community law.

On 6 November 2001, the Commission replied to the complainant's letter acknowledging that, under Community air transport legislation, no restrictions should apply to Air Intersalonika and that *"it appeared justified to inquire with the Greek Authorities why they have not given effect to the application for an operating licence by Air Intersalonika"* . The Commission also informed the complainant that DG Internal Market (Unit for Insurance Matters) should examine to what extent Greece has correctly transposed Council Directives 84/641/EEC and 92/49/EEC into its national legislation.

On 26 February 2002, the complainant sent a further letter to DG Internal Market, in which he asked the Commission to inform him about the transposition of Directives 84/641/EEC and 92/49/EEC in Greece. In his letter, the complainant referred in detail to all the articles of both Directives which appeared not to have been correctly transposed.

On 7 March 2002, the Commission replied to the complainant's letter. It presented the scope of application of Directives 84/641/EEC and 92/49/EEC and referred to the laws which had amended the Greek legislation in order to transpose Community law. Moreover, the Commission informed the complainant that infringement proceedings under Article 226 of the EC Treaty (ref. 1998/4727) had been launched against Greece, because these Directives were applied and interpreted by the Greek authorities in a way which prevented insurance companies based in other Member States from exercising the right of establishment, or freedom to provide services, in order to carry out certain insurance activities in Greece. However, following the opening of the infringement proceedings, the Greek law was amended so as to remove the restrictive rule. The Commission therefore informed the complainant that the infringement proceedings would be formally closed.

In his complaint to the Ombudsman, lodged in April 2003, the complainant argues that the Commission's reply of 7 March 2002 was too general and limited in providing clarifications, as it concerned only the activities of insurance companies from other Member States and made no reference to the legal framework for Greek companies operating in Greece. In addition, no explanation was provided as regards the problematic articles of the Directives. According to the complainant, the Commission has applied Community law selectively, to the detriment of Greek insurance companies and has failed to clarify the legislative chaos which exists in Greece in the field of insurance. In support of this argument, the complainant points out that the National Centre for Emergency Assistance (EKAB) has an exclusive right to provide assistance in



Greece and that it refuses to deliver licences for the complainant's ambulances and helicopters.

The complainant also argues that the Commission failed to notice that some Community provisions were transposed into national law only in order for Greece to escape infringement proceedings and that, when this had been achieved, these provisions were abolished and replaced by others that again infringed Community law.

The complainant's allegations can therefore be summarised as follows:

1. The Commission has failed to ensure the correct transposition of the insurance Directives into Greek national legislation. In particular, the Commission has neglected to follow up the situation of the Greek insurance companies operating in Greece, compared to companies coming from other Member States. Also, the Commission has failed to examine whether these Directives continued to be properly transposed *after* the infringement proceedings were dropped.
2. The Commission has failed to reply in detail to the complainant with respect to the articles which he alleged had been badly transposed into Greek national law (listed in his letter of 26 February 2002).

THE INQUIRY

The Commission's opinion *The legal framework*

The Commission first explained the applicable Community legislation in the field of assistance insurance. Directive 84/641/EEC ("the Assistance Directive") completes the First Directive 73/239/EEC in order to include the activity of tourist assistance (added as "class 18" of the Annex). The Assistance Directive takes the special characteristic of this activity into consideration, namely that the insurer mostly provides services in kind and in so doing, may have recourse to means (personnel and equipment, such as ambulances, planes, call-centres) provided by third parties.

The Community insurance legislation (Directives 73/239/EEC and 92/49/EEC) provides for a system of a single approval and control of insurance companies in their Member State of origin, allowing an approved company to exercise its activities in all Member States. However, Article 6 of the Assistance Directive allows every Member State to provide for control of assistance insurance companies as regards their direct and indirect means (personnel and equipment, including the qualification of medical staff and the quality of the equipment). If a Member State decides to exercise such control, its authorities have to take into account the specific applicable provisions which go beyond the strict framework of insurance legislation. Given the system of single approval, control of technical means is the exclusive responsibility of the Member State of origin and other Member States cannot exercise control over companies that have already been approved and which set up a subsidiary or provide services elsewhere.

The Greek legislation transposing Directive 84/641/EEC

The "Assistance Directive" was transposed into Greek law by Presidential Decree n° 103/1990 of 22 March 1999 (5) . The Commission carried out an *ex officio* examination of this legislation and also received complaints from insurance companies from other Member States which had



been prohibited from providing assistance in Greece by using means belonging to third parties. In April 2000, the Commission started the infringement procedure foreseen in Article 226 EC. Since Greece did not comply with the reasoned opinion of 22 September 2000, the Commission brought the matter before the Court of Justice on 21 December 2000. On 10 April 2001, Greece adopted a new Law (n° 2698/2001) modifying its legislation and communicated it to the Commission on 1 June 2001. On 20 March 2002, the Commission decided to drop the infringement procedure. On the basis of information recently received from the complainant, it appears that there are no longer any obstacles to assistance insurance companies using technical means provided by third parties. Nor has the Commission received new complaints on the matter. The Commission considers that it has used all means to verify that the Assistance Directive was correctly transposed into Greek law.

The situation of Greek assistance insurance companies and its compatibility with Community law

As regards the complainant's argument that the Greek legislation transposing the Assistance Directive discriminates against Greek companies, Community law does not prevent a Member State from having a system that establishes a stricter regime for its own nationals than for the nationals of other Member States who invoke the right of establishment or the right to provide services. The insurance Directives foresee a minimal system, allowing each Member State to adopt stricter provisions for companies that are approved by its own authorities.

Article 6 of the Assistance Directive permits every Member State to provide for control of assistance insurance companies as regards their direct and indirect means. The Greek insurance control legislation (Decree Law 400/70) has used this possibility. Its Article 17, c) foresees, for assistance, that *"the control by the controlling authority also concerns the qualifications of personnel, including medical personnel, and the quality of the equipment used by the companies to fulfil their engagements. This control is carried out in direct collaboration with the competent services of the Ministries concerned"* (translation from French by the Ombudsman's services).

In accordance with the rule of a single approval and control by the Member State of origin of the insurance company, this system only applies to companies falling within the competence of the Greek supervision authorities, i.e. Greek companies.

As regards Regulation 2407/92/EEC on licensing of air carriers, this Regulation, which is part of the rules of liberalisation of air transport in the Community, foresees uniform criteria for granting operating licences. It concerns only commercial airline services, private air carriers being excluded. The licences are delivered exclusively by the competent national authorities after they have verified that the requirements of the Regulation are fulfilled.

The alleged failure to reply in detail to the complainant's correspondence

The Commission dealt with all the complainant's correspondence in conformity with its Code of good administrative behaviour by giving detailed replies, within the deadlines. These replies allowed the complainant to understand the legal reasons for the Commission's position and its interpretation of the Community law provisions.

The Commission gave a detailed overview of its replies, quoting the exact references of all



letters:

The complainant wrote to DG for Energy and Transport (DG TREN) on 26 September 2001, referring to a letter from the manager of Hellas Air SA to DG TREN and DG TREN's reply to that letter.

In its reply of 6 November 2001, DG TREN gave an explanation of the Community air transport rules from the point of view of operating licences and market access. More particularly, DG TREN explained that operating licences are delivered by the competent national authority, which in this case was the Directorate General of Greek Civil Aviation. In its reply, the Commission services recalled the conditions under which the licences can be delivered, and also referred to the link with the Community rules on market access and to the possibility to introduce restrictions in conformity with the Community rules. The reply concluded that *"in absence of such measures currently in force, there should be no restriction applicable to Air Intersalonika to serve any routes within Greece or the Community. Hence, it appears justified to inquire with the Greek authorities why they have not given effect to the application for an operating licence by Air Intersalonika."*

The complainant, who was an applicant for an operating licence, therefore had the possibility, on the basis of this reply, to understand better the applicable legal framework and to submit a file to the Greek authorities. The complainant did not address himself again to DG TREN with regard to the later refusal of an operating licence.

A copy of DG TREN's reply was also forwarded to DG Internal Market (DG MARKT) in order to verify whether Directive 84/641/EEC had been correctly transposed into Greek law. On 22 November 2001, DG MARKT replied to DG TREN's letter, explaining the modifications made to the Greek legislation further to the infringement procedure.

Furthermore, a letter sent to President Prodi on 31 January 2002 by the President of the Insurers' Union of Northern Greece, mentioned by the complainant in his complaint, was received by the services of DG MARKT on 12 February 2002. DG MARKT replied on 25 February 2002 explaining their position on the points raised and giving reasons for their interpretation of Community law.

The complainant's letter of 26 February 2002 crossed with the Commission's letter of 25 February 2002. In this letter, the Commission explained the system of single approval and control of insurance companies in the Member State of origin. As a complement to its letter of 25 February 2002, DG MARKT gave a further detailed answer by letter of 7 March 2002, explaining the changes made in Greek legislation further to the Commission's action. The letter also indicated to the complainant that, given these changes, assistance insurance companies could now collaborate with other companies which have their own vehicles. In these circumstances, the Commission informed the complainant of its intention to drop the infringement procedure. Since that date, the Commission services have not received new correspondence from the complainant.

The complainant's observations



In his observations, the complainant made, in summary, the following points:

The Commission has not conducted an in-depth investigation and used all means in order to verify that the Assistance Directive has been correctly transposed into Greek law. Contrary to what the Commission stated in its opinion referring to the changes in the Greek legislation, the current system in Greece is not compatible with the Directive.

In transposing the Assistance Directive, Greek legislation made no provision for Greek insurance companies to be entitled to the issue of ambulance licences, and failed to stipulate which departments are responsible for checking staff qualifications and the quality of the equipment used by the companies in question. As a result of this "oversight", the responsible emergency services have refused to issue licences for ambulances on the grounds that the complainant, as an insurance company, is not entitled to ambulance licences. In other words, the complainant's right to provide assistance using company resources, equipment and staff has been nullified, despite the fact that it has a licence to exercise assistance activities from the Hellenic Ministry of Development, and that the licensing authority supports the complainant's right to acquire ambulances in order to exercise assistance activities.

Some authorities in Greece accept the current Community law on assistance activities, whereas others do not. The failure on the part of the Ministries of Health and Welfare (via the emergency services), Transport and Communications, Public Order and Employment and Social Security to amend current provisions regulating controls on staff and equipment used by insurance companies during the exercise of assistance basically renders the Assistance Directive non-applicable.

The Commission did not say whether its services requested information from the Greek authorities concerning Air Intersalonika's application for a licence, despite the fact that the Commission had indicated in its letter to the complainant of 6 November 2001 that it appeared justified to inquire with the Greek authorities why they have not given effect to the application for an operating licence by Air Intersalonika.

The Commission's interpretation of the insurance Directives in its reply of 25 February 2002 implied that it is possible for insurance companies to acquire a uniform operating licence in one Member State of the EU on more beneficial/flexible terms than are available in other Member States and then to trade anywhere in the EU.

In an additional letter of 7 January 2004, the complainant made, in summary, the following further comments.

The local departments of the Ministry of Transport and Communications with jurisdiction for the Prefecture of Thessaloniki accepted the ambulance licences issued by a public hospital. The complainant also obtained two governmental road licences in order to provide assistance using its ambulances on public streets. It therefore appears that the Hellenic Ministry of Transport and Communications is applying Greek and Community law, whereas the Ministry of Health and Welfare refuses to apply it and maintains that insurance companies providing assistance have



no right to hold ambulance licences, despite the acceptance of those licences by the Ministry of Transport and Communications. In fact, the Ministry of Health and Welfare maintains a state monopoly on ambulances contrary to EU law.

The complainant has complained about this infringement of Community Law to the European Commission, which should have addressed the issue in order to make the Ministry of Health and Welfare change its attitude.

THE DECISION

1 The Commission's alleged failure to supervise the transposition of the Directives

1.1 The complainant alleged that the Commission has failed to secure that the Greek authorities have correctly and entirely transposed the applicable insurance Directives (in particular the "Assistance Directive" 84/641/EEC) into national legislation. In particular, the Commission has neglected to follow up the situation of the Greek insurance companies operating in Greece, compared to companies coming from other Member States. Also, the Commission has failed to examine whether these Directives continued to be properly transposed *after* the infringement proceedings were dropped. The complainant pointed out that, on 6 November 2001, the Commission replied to his letter acknowledging that, under Community air transport legislation, no restrictions should apply to Air Intersalonika and that *"it appeared justified to inquire with the Greek Authorities why they have not given effect to the application for an operating licence by Air Intersalonika"*.

1.2 The Commission observed that the Assistance Directive was transposed into Greek law by Presidential Decree n° 103/1990 of 22 March 1999. Further to an *ex officio* examination of this legislation and to complaints received from insurance companies from other Member States, the Commission started infringement proceedings and brought the matter before the Court of Justice. As Greece consequently adopted a new Law on 10 April 2001 (n° 2698/2001) modifying its legislation and notifying it to the Commission on 1 June 2001, the Commission decided on 20 March 2002 to drop the infringement procedure. On the basis of information recently received from the complainant, it appears that there are no longer any obstacles to assistance insurance companies using technical means provided by third parties. Nor has the Commission received new complaints on the matter.

With regard to the situation of Greek companies, the Commission stated that it is not forbidden under Community law for a Member State to have a system which, being compatible with a Directive, foresees a more strict regime for its own nationals than for the nationals of other Member States which invoke the right of establishment or the right to provide services. The insurance Directives foresee a minimal system allowing the Member States to adopt stricter provisions for companies that are approved by their own authorities.

Finally, according to the Commission, its reply to the complainant of 6 November 2001 provided explanations which gave the complainant the possibility to understand better the applicable legal framework and to submit a file to the Greek authorities. The complainant did not address himself again to DG TREN with regard to the subsequent refusal of an operating licence.



1.3 As a preliminary point, the Ombudsman notes that the complainant is concerned with the situation of Greek insurance companies operating in Greece and not the situation of insurance companies from other Member States operating in Greece. The Ombudsman therefore does not understand the complainant to question the adequacy of the Commission's actions as regards the latter situation, which was the subject of the infringement procedure initiated and subsequently dropped by the Commission.

1.4 Moreover, the Ombudsman notes that the complainant's concerns as regards the situation of Greek insurance companies operating in Greece appear to relate to alleged failures by the Greek authorities to apply the law correctly, rather than just to the transposition of the Directives into Greek law. This is confirmed by the complainant's observations in this case, which refer to differences in the attitude of different Ministries and to alleged failures to apply both Greek and Community law.

1.5 In its letter to the Commission of 26 September 2001, the complainant raised the particular problem of the refusal of licences for its helicopters because of the exclusive right of the National Centre for Emergency Assistance (EKAB) to provide emergency assistance. The Ombudsman has carefully examined the Commission's reply to the complainant and considers that it provides a useful explanation of the relevant legal framework. As regards the concluding phrase cited by the complainant that *"it appears justified to inquire with the Greek Authorities why they have not given effect to the application for an operating licence by Air Intersalonika"*, the Ombudsman notes that the Commission appears to have thought that it was making a helpful remark to the complainant about what he could do, rather than a promise about what the Commission itself would do. The complainant, however, appears to have understood this phrase as meaning that the Commission itself would make inquiries into this point.

1.6 The Ombudsman considers it regrettable that the Commission did not use more precise wording, which could have avoided this misunderstanding. However, the Ombudsman does not consider that the available evidence justifies a finding of maladministration in this regard.

1.7 In conclusion, the Ombudsman draws the complainant's attention to the fact that, as regards his continuing concerns about the correct application of the law by the Greek authorities, he has the possibility make a new complaint to the Commission, making clear the precise nature of his complaint, or to go to a national court of competent jurisdiction in order to protect his rights under Community and/or national law.

2 The alleged failure to reply in detail

2.1 The complainant alleged that the Commission has failed to reply in detail with respect to the articles which he alleged had been badly transposed into Greek national law (listed in the complainant's letter of 26 February 2002).

2.2 The Commission observed that it dealt with all the complainant's correspondence in conformity with the Code of Good Administrative Behaviour, giving detailed replies within the deadlines allowing the complainant to understand the legal reasons for its position and the interpretation of the Community law provisions. The complainant's letter of 26 February 2002



crossed with the Commission's letter of 25 February 2002. In this letter, the Commission explained the system of the single approval and control of insurance companies in the Member State of origin. As a complement to this letter, DG MARKT gave a further detailed answer by letter of 7 March 2002, explaining the changes which had intervened in the Greek legislation further to the Commission's action. The letter also indicated to the complainant that, given the changes, assistance insurance companies could now collaborate with other companies which have their own vehicles. In these circumstances, the Commission informed the complainant of their intention to drop the infringement proceedings.

2.3 The Ombudsman notes that, in his letter of 26 February 2002, the complainant alleged that Directives 84/641/EEC and 92/49/EEC had not been correctly transposed into Greek national law and gave the full list of allegedly incorrectly transposed articles of both Directives.

2.4 In its reply of 7 March 2002, the Commission gave a detailed overview of the relevant provisions of Directives 72/239/EEC, 84/641/EEC and 92/49/EEC and the national Greek legislation. It explained to the complainant the reasons why it had launched infringement proceedings against Greece and why it intended to drop the proceedings.

2.5 The Ombudsman considers that, although the Commission did not comment specifically on every article mentioned by the complainant, the reply sent to the complainant enabled the latter to understand the reasons for the position adopted by the Commission. No instance of maladministration was therefore found.

3 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,

P. Nikiforos DIAMANDOUROS

(1) Council Directive 84/641/EEC of 10 December 1984 amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, O.J. 1984 L 339/21.

(2) Council Directive 92/49/EEC of 18 June 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third no life insurance Directive), O.J. 1992 I 311/34.

(3) Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, O.J. 1993



L 045/30.

(4) Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes.

(5) Published in FEK A n° 47 of 2 April 1990, p. 493.