

## **Decision of the European Ombudsman on complaint 2944/2004/(GK)(OV)ID against the European Commission**

Decision

**Case 2944/2004/(GK)(OV)ID - Opened on 18/10/2004 - Decision on 24/01/2006**

The complainant lodged an infringement complaint with the Commission in August 2003. In September 2004, she argued in a complaint to the Ombudsman that the Commission had failed to inform her of its assessment of the merits of her allegation concerning national regulations on working hours and on-call time that were allegedly in violation of Community Directives.

In his decision on the complaint, the Ombudsman first noted that, pursuant to the undertaking given by the Commission in point 8 of its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [1], the one-year deadline provided for in that point may not be complied with only in special cases, and that the Commission must adequately explain the reasons for the delay.

In the present case, the Commission explained that it had postponed a decision on whether to proceed with the complainant's Article 226 complaint because such an eventual course of action depended on the further course of its proposal of 22 September 2004 to amend the Community legislation regarding working time, including on-call time. In this regard, the Commission noted that the proposal had been adopted after extensive consultation across Europe, following the decisions of the Court of Justice in cases C-303/98 and C-151/02, which had a deep impact on Member States, especially on their public health systems. In his decision (given in January 2006), the Ombudsman found that the Commission had provided reasonable and adequate explanations for its failure to assess the merits of the complainant's Article 226 complaint within the above-mentioned one-year deadline. Nevertheless, the Ombudsman made a further remark, in which he reiterated that it is good administrative practice for the Commission to keep the complainants informed about the status of complaints that they lodge with the Commission, and encouraged the Commission to regularly inform the complainant about the status of her complaint. He also noted that the complainant could file a new complaint with the Ombudsman, if she was not satisfied with the Commission's further handling of her infringement complaint.

[1] COM(2002) 141 final, OJ 2002 C 244, p. 5.



Strasbourg, 24 January 2006

Dear Mrs G.,

On 30 September 2004, you made a complaint to the European Ombudsman concerning the handling of complaint 2003/5029 SG (2003) A/8291/2, which you had lodged with the European Commission in August 2003.

On 18 October 2004, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 11 February 2005. I forwarded it to you with an invitation to make observations, which you sent on 15 March 2005.

On 10 October 2005, your complaint was re-assigned to Legal Officer Ioannis Dimitrakopoulos.

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 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 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 Commission.

## THE COMPLAINT

In August 2003, the complainant, an attorney-at-law, lodged a complaint with the Commission under Article 226 of the EC Treaty ("Article 226 complaint") on behalf of 32 doctors working at hospitals in the Greek National Health System. This complaint concerned Greek hospital regulations on working hours that allegedly infringed Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (1) ("Directive 89/391"); Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (2) ("Directive 93/104"); and Presidential Decree 88/1999 (enacted for the implementation of Directive 93/104). Furthermore, the complaint alleged that remuneration for overtime work violated Act 2875/2000 and the constitutional principle of equality. By letter dated 3 October 2003, the Commission informed the complainant that her Article 226 complaint had been registered under number 2003/5029 SG (2003) A/8291/2, and that the complaint would be examined by the Commission's services dealing with the relevant area of Community law. By letter dated 21 October 2003, Directorate-General Employment and Social Affairs and Equal Opportunities of the European Commission ("DG EMPL") informed the complainant that its competent Units would analyse her complaint and inform her of the outcome of their investigation. Subsequently, by letters dated 5 January 2004 and 26 March 2004, the complainant indicated that she would like to be considered as acting also on behalf of several other doctors, and she informed the Commission that she had filed actions before national courts regarding the matter in question (and enclosed copies of these actions in her letters).



On 30 September 2004, the complainant filed a complaint with the Ombudsman, alleging that, despite the Commission's above-mentioned letter of 3 October 2003, several telephone calls to the Commission and her above letters, the Commission had not informed her of the progress of its examination of her Article 226 complaint. Relatedly, the complainant noted that she was afraid that the Commission did not examine her Article 226 complaint because of the importance of the matter and of the political pressure exercised by the Greek Government regarding this case. The complainant stated that she expected the Commission to find a violation of Community law by Greece.

On 18 October 2004, the Ombudsman opened an inquiry into the above complaint.

By letter dated 22 November 2004, the Commission informed the complainant of the status of her Article 226 complaint as follows:

*" This complaint concerns the Working Time Directive (Directive 2003/88/EC (3) ), more specifically the fact that a certain type of on call duty is not considered as working time according to Greek legislation or practice.*

*As you are probably aware, the Commission adopted on 22 September 2004, after extensive consultation across Europe, a proposal to amend Directive 2003/88/EC ... which includes amendments to the existing provisions applicable to on call time. This proposal updates key aspects of the working time directive and contains a balanced package of inter-related measures which retains the principal objective while responding at the same time to the needs of the modern European economy.*

*The Commission will look at your complaint in the light of this proposal and on the basis of the discussions currently taking place within the other institutions, and will take action as necessary.*

*As for the issue of remuneration and the violation of the Greek constitution by Greek legislation on this point you mentioned in your complaint, I would like to inform you of the following. Directive 2003/88/EC is a health and safety measure and does not deal with the question of pay. Furthermore, the Commission is not competent to deal with the question of constitutionality of Greek legislation.*

*We regret that we were not in a position to inform you any earlier. However, the delay can be explained due to the technical and legal complexities of this case and to the fact that the Directive concerned is the subject of a re-examination procedure. "*

## **THE INQUIRY**

### **The Commission's opinion**

In its opinion on the present complaint, the Commission made the following comments. The complainant's Article 226 complaint concerned the application of Directives 89/391 and 93/104 in Greece. According to the complainant, on-call time, where doctors' continuous presence at



the hospital was required, was not considered as working time under Greek legislation, contrary to the European Court of Justice's rulings in Case C-303/98 *SIMAP* (4) and Case C-151/02 *Jaeger* (5), in which the Court held that "time spent on-call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate, as overtime, within the meaning of Directive 93/104 when they are required to be at the health centre" (6). As a consequence of this, the complainant argues that the limits on weekly working time, rest periods, and night work are not respected. The Article 226 complaint also concerned unequal treatment of doctors under national legislation. Greek national law regulated a maximum period for overtime and compensation, but doctors were excluded from this regulation. At the time Mrs G. lodged the complaint, the Commission was in the process of analysing the impact of the above-mentioned rulings of the Court of Justice. As some provisions of the Directive were subject to re-examination, the Commission decided to include the issue related to on-call time in this process of re-examination. To that effect, the Commission issued a Communication on working time, which was adopted on 30 December 2003 (7), and, in May 2004, it issued a consultation document, which it sent to the social partners at Community level (8). On 22 September 2004 and after extensive consultation across Europe, the Commission adopted a proposal (9) to amend Directive 2003/88, which codified and abrogated Directives 93/104 and 2000/34 (10). This proposal updates key aspects of EC directives on working time and contains a balanced package of inter-related measures which retains the principal objective while responding at the same time to the needs of the modern European economy. The Commission decided to look at this and other related complaints in the light of this proposal and on the basis of the discussions currently taking place within the other institutions and to take the necessary action. The technical and legal complexity of this issue explained the delay in informing the complainant. The Court's rulings in Case C-303/98 *SIMAP* (11) and Case C-151/02 *Jaeger* (12) had a deep impact on Member States, essentially on public health systems, and a careful analysis of the situation was required before taking any further steps. The complainant had been informed by letter of 22 November 2004 of this development as regards the Working Time Directive and of the fact that the Commission would postpone a decision on whether to proceed with the complaint because it depended on the further course of the proposal. The complexity of the issue and the fact that the complaint had been lodged with the Commission during the preparation of the re-examination explained why the Commission had not, regrettably, given the complainant a substantive reply on the merits of the Article 226 complaint.

#### **The complainant's observations**

In her observations on the Commission's opinion, the complainant stressed that, although she had been informed of the status of her Article 226 complaint, her allegation about maladministration also concerns the Commission's failure (a) to analyse her complaint under Community law; (b) to take steps with a view to examining whether the challenged practices in Greece were compatible with Community law; and (c) to open an infringement procedure against Greece.

## **THE DECISION**

### **1 Commission's failure to inform the complainant of the status of its examination of her Article 226 complaint**

1.1 In her complaint to the Ombudsman, the complainant alleged that the Commission had



failed to inform her of the status of its examination of her Article 226 complaint, registered under number 2003/5029 SG (2003) A/8291/2. Relatedly, the complainant noted that she was afraid that the Commission had not examined her Article 226 complaint because of the importance of the matter and of the political pressure exercised by the Greek Government regarding this case.

1.2 In its opinion on the present complaint, the Commission made the following comments. The complainant's Article 226 complaint concerned the application of Directives 89/391 and 93/104 in Greece. According to the complainant, on-call time, where doctors' continuous presence at the hospital was required, was not considered as working time under Greek legislation, contrary to the Community Court's rulings in Case C-303/98 *SIMAP* (13) and Case C-151/02 *Jaeger* (14), in which the Court held that "time spent on-call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate, as overtime, within the meaning of Directive 93/104 when they are required to be at the health centre" (15). As a consequence of this, the complainant argued that the limits on weekly working time, rest periods, and night work were not respected. The Article 226 complaint also concerned unequal treatment of doctors under national legislation. Greek national law regulated a maximum period for overtime and compensation, but doctors were excluded from this regulation. At the time the complainant lodged the complaint, the Commission was in the process of analysing the impact of the above-mentioned rulings of the Court of Justice. As some provisions of the Directive were subject to re-examination, the Commission decided to include the issue related to on-call time in this process of re-examination. To that effect the Commission issued a Communication on working time, which was adopted on 30 December 2003 (16), and, in May 2004, it issued a consultation document which it sent to the social partners at Community level (17). On 22 September 2004 and after extensive consultation across Europe, the Commission adopted a proposal (18) to amend Directive 2003/88, which codified and abrogated Directives 93/104 and 2000/34 (19). This proposal updates key aspects of EC law on working time and contains a balanced package of inter-related measures which retains the principal objective while responding at the same time to the needs of the modern European economy. The Commission decided to look at this and other related complaints in the light of this proposal and on the basis of the discussions currently taking place within the other institutions and to take the necessary action. The technical and legal complexity of this issue explained the delay in informing the complainant. The Court's rulings in Case C-303/98 *SIMAP* (20) and Case C-151/02 *Jaeger* (21) had a deep impact on Member States, essentially on public health systems, and a careful analysis of the situation was required before taking any further step. The complainant had been informed by letter of 22 November 2004 of this development as regards the Working Time Directive and of the fact that a decision on whether to proceed with the complaint had been postponed because it depended on the further course of the proposal. The complexity of the issue and the fact that the complaint was lodged with the Commission during the preparation of the re-examination explained why the Commission had not, regrettably, given the complainant a substantive reply on the merits of the Article 226 complaint.

1.3 In her observations on the Commission's opinion, the complainant stressed that, although she had been informed of the status of her Article 226 complaint, her allegation about maladministration also concerned the Commission's failure (a) to analyse her complaint under Community law; (b) to take steps with a view to examining whether the challenged practices in



Greece were compatible with Community law; and (c) to open an infringement procedure against Greece.

1.4 The Ombudsman notes that, by letter dated 22 November 2004 and by its opinion on the present complaint, the Commission informed the complainant of the status of its examination of the complainant's Article 226 complaint. The Ombudsman, thus, considers that the Commission has taken appropriate action in response to this aspect of the complaint. Further, taking into account that, in her observations, the complainant did not challenge the timeliness of the provision of this information, the Ombudsman finds that no further consideration of this aspect of the case is justified.

1.5 As to the complainant's argument that the Commission has failed to inform her of its assessment of the merits of her Article 226 complaint, the Ombudsman, notes that the Commission, in its letter of 22 November 2004, informed the complainant that the Working Time Directive did not deal with the question of pay and that it was not competent to deal with the question of the constitutionality of Greek legislation raised in the Article 226 complaint. These remarks address the part of the complainant's Article 226 complaint concerning remuneration for overtime work, in circumvention of the Act 2875/2000, and of the constitutional principle of equality. Besides, the complainant has not contested the timeliness and the propriety of these remarks, which appear reasonable. Hence, the Ombudsman finds no maladministration as regards this aspect of the complaint.

1.6 With respect to the complainant's argument that the Commission has failed to inform her of its assessment of the merits of her allegation concerning regulations on working hours that were allegedly in violation of Community Directives, the Ombudsman notes the following. The Annex to the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (22) ("the Commission's Communication") provides, *inter alia*, that "*[a]s a general rule, Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General. Where this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing.*" (point 8 of the Commission's Communication). It follows from this undertaking that the above one-year deadline may not be complied with only in special cases, and that the Commission has to adequately explain the reasons for the delay.

1.7 In the present case, the Commission explained that it had postponed a decision on whether to proceed with the complainant's Article 226 complaint because it depended on the further course of its proposal of 22 September 2004, adopted after extensive consultation across Europe, to amend the Community legislation regarding working time, including on-call time. The Commission pointed out that the Court's decisions in Case C-303/98 *SIMAP* and Case C-151/02 *Jaeger* have had a deep impact on Member States, especially on their public health systems, that the situation had to be carefully examined and that its foregoing proposal updated key aspects of Directive 2003/88 and contained a balanced package of inter-related measures which retained the principal objective while responding at the same time to the needs of the





modern European economy. Noting that the Commission's proposal establishes that the inactive part of on-call time is not working time within the meaning of Directive 2003/88 (which replaced Directive 93/104), unless national legislation, collective agreements or agreements between the social partners decide otherwise, the Ombudsman finds that the Commission has provided reasonable and adequate explanations for its failure to assess the merits of the complainant's Article 226 complaint, within the above-mentioned one-year deadline. Hence, the Ombudsman finds no maladministration as regards this aspect of the case. It thus follows that the Commission's failure to take a decision as to the initiation of infringement proceedings against Greece, on the basis of the alleged violation of Community law pointed out in the complainant's Article 226 complaint, cannot be deemed as an instance of maladministration either.

## **2 Conclusion**

Since the Commission has informed the complainant of the status of its examination of the complainant's Article 226 complaint, it appears that the Commission has taken appropriate action in response to the relevant part of the complaint. Further, the Commission's failure to inform the complainant of its assessment of the merits of her Article 226 complaint, within the one-year deadline provided for in the Commission's Communication, does not appear to amount to an instance of maladministration. From this it follows that the Commission's failure to take a decision as to the initiation of infringement proceedings against Greece, on the basis of the complainant's Article 226 complaint, cannot be deemed as an instance of maladministration either. The Ombudsman, therefore, closes the case.

The President of the Commission will also be informed of this decision.

## **FURTHER REMARKS**

The Ombudsman reiterates that it is good administrative practice for the Commission to keep the complainants informed about the status of complaints that they lodge with the Commission (23). In the present case, the Commission has decided to look at the complainant's Article 226 complaint in the light of its proposal for amending Directive 2003/88 and on the basis of the relevant discussions currently taking place within the other institutions. It has also indicated that a decision on whether to proceed with the complaint depends on the further course of the proposal and has therefore to be postponed. Under these circumstances, the Ombudsman encourages the Commission to regularly inform the complainant about the status of her complaint, in view of the course of its foregoing proposal. Relatedly, the Ombudsman notes that the complainant has the possibility to file a new complaint with the Ombudsman, if she is not satisfied with the Commission's further handling of her Article 226 complaint, including the Commission's decision on whether to proceed with this complaint.

Yours sincerely,

P. Nikiforos DIAMANDOUROS



- (1) OJ 1989 L 183, p. 1.
- (2) OJ 1993 L 307, p. 18.
- (3) Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003, L 299, p. 9. The Directive entered into force on 2 August 2004.
- (4) C-303/98 *Sindicato of Médicos of Asistencia Pública* (SIMAP) [2000] ECR I-7963.
- (5) C-151/02 *Jaeger* [2003] ECR I-8389.
- (6) See C-303/98, op.cit., paragraphs 48-52, and C-151/02, op.cit., paragraphs 68-71.
- (7) Communication from the Commission to the Council, to the European Parliament, to the European Economic and Social Committee and to the Committee of the Regions concerning the re-examination of Directive 93/104/EC, Document COM(2003)843 final.
- (8) Second stage consultation of the social partners at the Community level concerning the review of Directive 93/104/EC, Document SEC(2004)610.
- (9) Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC, Document COM(2004)607 final.
- (10) Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ 2000, L 195, p. 41.
- (11) C-303/98 *Sindicato of Médicos of Asistencia Pública* (SIMAP) [2000] ECR I-7963.
- (12) C-151/02 *Jaeger* [2003] ECR I-8389.
- (13) C-303/98, *Sindicato of Médicos of Asistencia Pública* (SIMAP), [2000] ECR I-7963.
- (14) C-151/02, *Jaeger*, [2003] ECR I-8389.
- (15) See C-303/98, op.cit., paragraphs 48-52, and C-151/02, op.cit., paragraphs 68-71.
- (16) Communication from the Commission to the Council, to the European Parliament, to the European Economic and Social Committee and to the Committee of the Regions concerning the re-examination of Directive 93/104/EC, Document COM(2003)843 final.
- (17) Second stage consultation of the social partners at the Community level concerning the review of Directive 93/104/EC, Document SEC(2004)610.





(18) Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC, Document COM(2004)607 final.

(19) Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ 2000, L 195, p. 41.

(20) C-303/98, *Sindicato of Médicos of Asistencia Pública* (SIMAP), [2000] ECR I-7963.

(21) C-151/02 *Jaeger* [2003] ECR I-8389.

(22) COM(2002) 141 final, OJ C 244/10.10.2002, p. 5.

(23) See Decision on complaint 1045/2002/GG, point 1.3.