Decision in case 25/2013/ANA concerning the European Commission's alleged failure to ensure that Greek hospitals comply with EU public procurement law

Decision
Case 25/2013/ANA - **Opened on** 21/01/2013 - **Recommendation on** 26/03/2015 - **Decision on** 21/03/2016 - **Institution concerned** European Commission (Draft recommendation accepted by the institution) |

The case concerns the Commission's role in ensuring that Greek hospitals' tenders for medical supplies comply with EU public procurement law and with the judgment of the Court of Justice of the EU in this regard.

The Ombudsman inquired into the issue and proposed, as a solution to the complaint, that the Commission should re-examine its infringement complaint file against Greece.

Following its re-examination the Commission maintained that Greece had adequate measures in place to ensure both compliance with EU law and redress for affected tenderers. However, the Ombudsman inquired into the matter further and found that the Commission had not examined the complainant's allegations with proper diligence. The Ombudsman therefore recommended to the Commission that it carry out a proper examination of the information provided by the complainant in support of its allegation.

The Commission accepted the Ombudsman's recommendation and opened an investigation into the matter under the EU Pilot procedure for dealing with infringement cases. Therefore, the Ombudsman closed the case.

The background **[1]**

1. The complainant, a Greek company, had complained in 2009 to the Commission that the procedures followed by Greek hospitals for the award of public supply contracts did not comply with the judgment of the Court of Justice of the European Union (CJEU) in Case C-489/06 *Commission v Greece* [2] . In that judgment, the CJEU ruled that, by rejecting tenders in respect of medical devices bearing the CE certification marking [3] , Greece had failed to fulfil its obligations under the Public Contracts Directive [4] and the Medical Devices Directive [5] .

2. The complainant argued that, despite the above mentioned ruling by the Court, Greek

hospitals did not change their practices and, in fact, developed other practices in order to circumvent the CJEU's rulings to favour their preferred supplier.

3. In addition, according to the complainant, the Greek government kept increasing the fees to be paid for filing an injunction by aggrieved tenderers (up to EUR 5 000 per injunction).

4. The complainant turned repeatedly to the Commission which responded that it had initiated sanctions proceedings against Greece. However, because Greece adopted new legislation on the subject to remedy the infringement in question (Article 21 of law 3897/2010) [6] , the Commission decided to close the infringement file.

5. Dissatisfied with the outcome of its infringement complaint, on 31 December 2012, the complainant turned to the European Ombudsman.

6. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The Commission failed to ensure that Greece complies with EU public procurement legislation concerning public tenders for medical devices as well as the CJEU's judgment in Case C-489/06 *Commission v Greece* .

2) The Commission should take appropriate action to ensure that Greece complies with EU public procurement legislation concerning public tenders for medical devices as well as the CJEU's judgment in Case C-489/06 *Commission v Greece* .

Allegation that the Commission failed to ensure that Greece complies with EU public procurement legislation concerning public tenders for medical devices as well as the CJEU's judgment in Case C-489/06 *Commission v Greece* **and the related claim**

The Ombudsman's solution proposal

7. After examining the arguments and opinions put forward by the parties, on 14 July 2014, the Ombudsman made the following proposal for a solution to the Commission:

" *... the Ombudsman proposes that the Commission re-examine the infringement complaint file concerning Greece's compliance with EU public procurement legislation in respect of public tenders for medical devices and the CJEU's judgment in Commission v Greece.*

In doing so, the Commission could address the complainant's arguments that (a) the Greek hospitals consistently issue unlawful calls for tenders for medical devices, and (b) the monitoring of hospital practices and the remedies available to affected tenderers are insufficient."

The Ombudsman's recommendation

8. In its reply of 9 October 2014, the Commission disagreed with the Ombudsman's findings that led to the solution proposal and outlined its actions and the information received from the Greek authorities, on the basis of which it decided to close the case. The Commission argued that there was no evidence that the national redress system and the Greek administration would not be able to ensure both adequate enforcement of the applicable rules in Greece and compliance with the CJEU judgment in the future. It added that, should it become clear that further follow-up of the measures taken by Greece become necessary, it would not hesitate to proceed accordingly. As regards the fee for filing an injunction, the Commission took the view that this fee has been considered to be in conformity with the Greek Constitution by the Greek courts and with EU law by the Commission. Moreover, the Commission argued that, under Greek law, the total amount of the fees must be refunded to the claimant if the application is fully or partially upheld by the courts.

9. In its observations, the complainant contested the Commission's arguments. Specifically, the complainant argued that the procedural requirements to trigger the application of Article 21 of Law 3897/2010 are so cumbersome that it has never been applied in practice. In addition, the complainant adduced evidence to support its view that, in 2014, the percentage of calls for tenders containing illegal specifications increased to 87.8%. As regards the fee for filing an injunction, the complainant argued that the judicial fees are refundable in case of success, but the administrative injunction fees, the first step in the procedure, are not.

10. In her analysis leading to the recommendation, the Ombudsman considered the issue whether, in fact, dissatisfied tenderers have access to an effective remedy by way of a court action. In this regard, the Ombudsman agreed with the Commission's view that the refundable judicial injunction fee is in line with the principle of proportionality and does not render the exercise of rights under EU law excessively difficult. However, when looking into the non-refundable administrative injunction fee, the Ombudsman agreed with the complainant's argument that the administrative fee, in the way it is applied, calls into doubt the availability of an effective remedy to the affected tenderers in Greek hospital tenders. She thus called upon the Commission to address this issue in its detailed opinion.

11. Next, the Ombudsman examined the principal aspect of the complainant's allegation, that is, that Greek hospitals continue to be in breach of the Medical Devices Directive and the CJEU's judgment in *Commission v Greece by* rejecting offers for the supply of sutures bearing the CE marking. The Ombudsman found that the complainant put forward well-reasoned and substantiated arguments and supporting evidence to make the case that, notwithstanding the enactment of Article 21 of Law 3897/2010, Greek hospitals have not abandoned their practice of rejecting medical devices bearing the CE marking. In this connection, the Ombudsman found that the Commission relied on the assumption that the mere enactment of Article 21 of Law 3897/2010 would suffice to discourage hospitals from infringing EU law governing public procurement of medical devices and has not addressed the complainant's detailed submissions that the relevant provision is not applied in practice.

12. In light of the above, the Ombudsman found maladministration on the part of the Commission arising from its failure to examine with the required diligence the complainant's allegation that Greece has not yet taken all the necessary measures to comply with the

CJEU's judgment in *Commission v Greece* . On 26 March 2015, the Ombudsman made the following recommendation to the Commission in order to remedy this maladministration:

" *The Commission should carry out a proper examination of the information provided by the complainant in support of its allegation that Greece has not yet taken all the necessary measures to comply with the CJEU's judgment in* **Commission v Greece** *. If it considers that it does not have sufficient evidence at its disposal, it should act upon the complainant's offer to provide clarifications and additional information. If, on the basis of a diligent examination of the available information, it considers that the infringement of the Medical Devices Directive and the CJEU's judgment remains, it should examine whether it would be appropriate to re-open the sanctions proceedings against Greece* **."**

13. In its detailed opinion on the Ombudsman's recommendation dated 28 July 2015, the Commission summarised the steps it has taken in the procedure, and maintained its view that it handled the case with diligence.

14. However, the Commission informed the Ombudsman that it had decided to accept the Ombudsman's recommendation and to open an EU Pilot investigation in order to examine whether Greece has complied with the CJEU's judgment. In the context of this EU Pilot investigation, the Commission will also examine the compliance of the administrative injunction fee with EU public procurement law. In doing so, the Commission undertook to assess any information which the complainant has submitted and will submit in future, and to ask for specific information from the Greek authorities on their compliance with the CJEU's judgment. Moreover, in the light of the Ombudsman's recommendation, the Commission undertook to invite the complainant to submit further information and evidence if it finds that it needs more information or clarifications to support its investigation. Based on this EU Pilot investigation, the Commission will decide whether or not to open an infringement procedure against Greece under Article 258 TFEU.

The Ombudsman's assessment after the recommendation

15. The Ombudsman welcomes the Commission's acceptance of her recommendation. Moreover, the Ombudsman trusts that the Commission will observe all the undertakings it gave to the Ombudsman in this context, and will keep her updated of the outcome of its EU Pilot investigation. In light of these considerations and the fact that the complainant submitted no observations on the Commission's detailed opinion, the Ombudsman closes the case.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Commission has accepted the Ombudsman's recommendation.

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

Strasbourg, 21/03/2016

[1] The background information provided here contains only the essential information regarding this complaint. For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's friendly solution proposal available at: http://www.ombudsman.europa.eu/cases/correspondence.faces/en/59352/html.bookmark . The Ombudsman also addressed a recommendation to the Commission which is available at: http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/59397/html.bookmark

[2] Case C-489/06 *Commission v Hellenic Republic* [2009] ECR I-1797.

[3] The CE marking is a mark that medical devices should, as a general rule, bear in order to indicate their conformity with the provisions of the Medical Devices Directive, to enable them to move freely within the Union and to be put into service in accordance with their intended purpose.

[4] Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1, which has been replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114.

[5] Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, OJ 1993 L 169, p. 1, as amended.

[6] Article 21 of Law 3897/2010 imposes strict penalties on hospitals, members of the management bodies of hospitals and members of evaluation committees that reject offers of products bearing the CE marking.