

Decision of the European Ombudsman on complaint 895/97/JMA against the European Commission

Decision

Case 895/97/JMA - Opened on 01/12/1997 - Decision on 13/10/1999

Strasbourg, 13 October 1999 Dear Mr M., On 3 and 15 October 1997, you sent a complaint to the European Ombudsman on behalf of "Movimento Consumatori", Italian consumers association. The complainant concerned both the alleged failure of the Commission to properly consider the problems denounced in your complaints to the institution, and to reply to one of letters of 14 June 1996 related to this matter. On 1 December 1997, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 9 March 1998, which I forwarded to you with an invitation to make observations. On 28 May 1998, I received your observations. On 3 August 1998 and 26 November 1998 you sent me additional information related to your case. In order to clarify some of the points made by the institution in the course of the inquiry, I asked the Commission on 17 March 1999 for further information. On 6 May 1999 the Commission informed me that its services were in the course of gathering completing the requested information, and requested an extension of the deadline to reply. The institution sent this additional information on 18 May 1999. I passed the Commission's new reply to you on 27 May 1999, and received your observations on 1 July 1999. I am writing now to let you know the result of the inquiries that have been made.

THE COMPLAINT

The complaint relates to the way in which the Commission dealt with a problem posed to consumers by an allegedly unsafe product. According to the complainant, a particular type of candlestick being sold in Italy had been the cause of several fires. On 14 June 1996 Mr M., on behalf of an Italian consumers association, made a formal complaint to the European Commission, denouncing that serious damages to consumers had resulted from accidents caused by this candlestick. The complainant alleged that the Italian authorities were not respecting the provisions of Articles 6 and 8 of the Directive 92/59/EEC on general product safety (1) (the Directive), by not taking appropriate measures to control the use of this good. It also referred to the fact that these authorities had not taken any action on a previous notification forwarded to all the Member States by the Spanish authorities regarding the risks of a similar type of product. The complainant requested the Commission to open an inquiry into this matter, since despite the danger of the product the Italian authorities had not started any urgency procedure as laid down in article 8 of the Directive. He asked the Commission to take several initiatives in order to control the risks posed to consumers, including to establish an urgency committee to review the situation, to request further action from the Italian authorities, and to



directly ban the type of candlestick from the market. The complainant received an acknowledgement of receipt from the Commission on 10 October 1996, in which it was indicated that the complaint would be transferred to the Italian authorities responsible for consumer's safety. The complainant wrote again to the Commission on 29 May 1997 but he received no further reply to his letter. In view of the situation, the complainant wrote to the Ombudsman on 3 October 1997, claiming that the Commission had failed to (1) reply to his second letter of 29 May 1997 and (2) take the appropriate measures to ensure that the product referred to in his complaint did not pose any risks to the consumers.

THE INQUIRY

The Commission's opinion The European Commission's comments on the complaint are in summary the following: The Commission services had received a first letter of complaint from Mr M. in June 1996. The complaint related to an alleged failure of the Italian authorities to adopt appropriate emergency measures to control the risks posed by a particular type of candlestick, as required by the provisions of Article 8 of Directive 92/59/EEC (2). The institution pointed out that the aim of this Article 8 is to enable an efficient and rapid system of exchange of information, between the Member States and the Commission, in emergency situations posed by dangerous products. In view of the Commission, on the basis of the Directive, only Member States can trigger the application of Art. 8 of the Directive. In these cases, the Commission should be informed of the measures adopted, informing thereafter of these measures to the other Member States. On the basis of these legal provisions, the Commission explained that its role in this type of consumer cases is very limited. It can only verify the conformity of the information received with the provisions of the Directive, and then forward it to the other Member States. The institution can undertake an own inquiry only if the product poses a serious and immediate risk, and if the national measures are not adequate. The Commission considered that, given these legal limitations, it could not take any of the actions requested by the complainant. The Commission underlined that it had forwarded the complaint to the Italian authorities, since they were responsible for monitoring the safety of products, and could undertake appropriate measures. The Commission had also asked to be kept informed of the outcome of the investigation. In its letter to the Italian authorities, the Commission services had referred to the fact that in 1994, the Spanish authorities had informed the other Member States of the potential dangers posed by a similar type of candlestick, as required by Article 7 of the Directive. In that case, the Commission noted that the Italian authorities did not inform it of any measures adopted. The Italian authorities replied on 9 September 1996 to the Commission's letter of June 1996, and indicated that they had not considered necessary to take any measure regarding the product concerned, since it did not appear to be dangerous for consumers. This decision took account of the fact that a court proceeding involving the use of the product before the magistrates of C. had been dropped by both parties. On the basis of this reply the Commission considered that the claim merely involved an individual case, which did not affect but a limited number of products. The Commission passed on this information to the complainant on 10 October 1996. In the letter, it explained that because of the limitations imposed upon the institution by existing legal rules, namely Directive 92/59/EEC, it could not take any initiative. In its opinion, the Commission referred also to the letter from the complainant of 29 May 1997. It justified the lack of a reply to that correspondence since it was, in its view, a mere repetition of the same arguments put forward by the complainant in



precedent letters. Lastly, the Commission illustrated the interest of its services in the appropriate application of the Directive in Italy by the fact that the responsible Commissioner at the time, Mrs Bonino, had written to the Italian authorities on 13 May 1997 to express her concern for the way Directive 92/59/EEC was being implemented in Italy. **The complainant's observations** The Ombudsman forwarded the Commission's opinion to the complainants with an invitation to make observations. In his letter of 20 May 1998, the complainant insisted on the arguments already outlined in his complaint. Mr M. replied, however, to some observations made by the Commission in its opinion. The complainant underlined that the aim of his complaint was not to ask the Commission to support the actions undertaken by his association or to take any direct action in relation to the allegedly dangerous product. The complainant's aim was to ensure that the Commission take the necessary measures to make the Italian authorities comply with the obligations set out in Directive 92/59/EEC. In view of the complainant, following the notification made by the Spanish authorities in 1994 of the dangers posed by a similar product, under Art. 8 of the Directive, the Italian authorities were obliged to inform the Commission of the measures undertaken in their territory, or the reason for not adopting any such measure. The complainant pointed out to the fact that the Italian authorities had not reply to the reports produced by the Spanish authorities in 1994 and which had been distributed to all Member States. In addition, the Commission had not taken any measures to request this information from the Italian authorities. Its services had inquired into this matter two years after, and only following the complainant's letter of June 1996. Although the Commission had mentioned the letter of Commissioner Bonino to the Italian authorities on 13 May 1997 as example of the efforts made by its services to ensure the proper application of the Directive in Italy, the complainant pointed out to the fact that such letter did not bear any relation with the particular problems mentioned in his complaint.

FURTHER INQUIRIES

In order to clarify some of the arguments used by the Commission in its support, the Ombudsman requested some further information from the institution by letter dated 17 March 1999. The Commission had defended its position in the present case on the basis that the provisions of Directive 92/59/EEC were addressed by and large to Member States, and thus, the institution could not take any initiative. In his letter to the Commission, the Ombudsman recalled that the Directive, in paragraph 8 of its Annex seems to allow the Commission to directly inquire into the dangers of certain consumer goods (3) . In view of the circumstances of the case, the Ombudsman asked the Commission whether it had considered, or should be considering, using its powers to institute an investigation of its own motion. In its letter of 6 May 1999, the Commission recognized that, on the basis of the directive, it enjoys certain power of initiative, such as to institute an investigation of its own motion and/or convene the committee on Emergencies. However, it added that these powers are only granted in exceptional circumstances which were not present in this case. In view of the Commission, the use of these powers can only occur if and when a prior notification of the existence of a dangerous product has been made by a Member State. No notification had been made regarding the situation denounced by the complainant. Even in the event of such notification, the Commission added, action on its part depends on the need to gather additional information, and only after verifying the existence of exceptional circumstances. These exceptional circumstances are to be determined on the basis of the urgency and importance of the risk posed by a product, the size



of its market, and the unforeseeability of accidents. The institution made also some considerations on the factual background of the case. It pointed out that the product had only caused a single accident until that time. The Ombudsman forwarded this additional opinion from the Commission to the complainant. In his reply of 30 June 1999, Mr M. pointed out that the Commission had already received on 12 July 1994 a notification by the Spanish authorities which referred to a very similar type of product. In his view the attitude of the Commission to rely literally on the terms of the Directive showed a lack of willingness on the part of the institution for the defense of consumers.

THE DECISION

On the basis of the information provided by the complainant and the observations submitted by the European Commission, the Ombudsman has reached the following conclusions: **1 Reply to the letters from the complainant** 1.1. The complaint wrote first to the Commission on 14 June 1996. The letter warned of the risks posed by a particular type of candlestick marketed in Italy, and the need for the Commission to undertake further action in order to avert potential damages. The Commission replied to that request on 10 October 1996. Since the complainant considered that the problem was not being satisfactory addressed by the Commission, he sent an additional letter to the institution on 29 May 1997. In his complaint to the Ombudsman, the complainant claims that the Commission never replied to this letter. 1.2. The Commission has recognized that the second letter from the complainant was left unanswered. Yet, it justified its failure to reply on the grounds that this new correspondence referred to the same claims as the first one, to which it had already replied. 1.3. The European Ombudsman has stated that the Commission is under a duty to properly reply to the queries of citizens. However, it appears, as the Commission has pointed out, that the queries made by the complainant in his second letter had already being replied to. Under these circumstances, the Ombudsman considers that no further remark is necessary as regards this aspect of the case. **2 Measures to be undertaken by the Commission in case of emergency situations** 2.1. The complainant considered that the Commission had failed to properly deal with the problem denounced in his letters, since the institution did not take the actions it had been called upon. In order to control the risks posed to consumers by an allegedly dangerous candlestick, the complainant asked the Commission to take a number of initiatives, including to establish an urgency committee to review the situation, to request further action from the Italian authorities, and to directly ban the type of candlestick from the market. 2.2. The Commission has argued that, on the basis of the applicable Community legislation, namely Directive 92/59/EEC, it is beyond its powers to undertake any such action. It underlined that only the concerned national authorities can determine the magnitude of the risks posed by the product and establish the appropriate measures for its control. Under this procedure, the Commission can only verify the information submitted by the responsible national authorities, and transmit it to the other Member States. It added, furthermore, that even in the event of a notification from a Member State, its intervention is only possible in exceptional circumstances. These are to be determined on the basis of the urgency and importance of the risk posed by a product, the size of its market, and the unforeseeability of accidents. Since no notification had been made by the Italian authorities, the Commission believed that it did not have competence to intervene in this matter. Moreover, it concluded that the risks posed by the product were not significant, and thus, that no exceptional circumstances were present in the case. 2.3. As laid out in Directive 92/59/EEC, the Commission can take



certain initiatives in order to control serious and immediate risks from products to the health and safety of consumers. These actions involve: a. To institute an investigation of its own and/or convene the Committee on Emergencies (Art. 8; Annex, § 8), following the notification made by a Member State of the existence of a serious and immediate risk; b. Adopt a decision requiring Member States to take temporary measures if, following a notification, the institution becomes aware that the decisions being taken at national level are contradictory, or that a Community approach is necessary (Art. 9). In both cases, the Directive requires that prior to any such action, a Member State inform the Commission. 2.4. It needs therefore to be assessed whether or not any such information on the dangers of the product in question had been notified. As the Commission itself pointed out in its opinion, the Spanish authorities had forwarded a notification to all Member States and to the Commission on 12 July 1994 related to a similar product. Nevertheless, the institution has stressed that, on the basis of Articles 8 and 9 of the Directive, it could not take action unless a notification by the Italian authorities related to the specific dangerous product had been transmitted. 2.5. Since the Commission's interpretation of Arts. 8 and 9 of the Directive, appears to be accurate, the Ombudsman has concluded that the Commission acted within the limits of its legal authority in the present case, and therefore no instance of maladministration has been established. 2.6. The Ombudsman should point out, however, that the problems posed by defective products are an important source of concern for all European citizens. In order to ensure a high level of consumer protection as underlined by the Treaty of Amsterdam (4) , and reinforce the confidence of the citizens in the European institutions, it is therefore important that these institutions take all possible steps to control unsafe products.

3 Commission's role in monitoring emergency measures taken by Member States

3.1. The complainant claimed that the Commission also failed to properly monitor the application of Community law in the case he had denounced, since it did not take the appropriate measures to ensure that the Italian authorities responded to the notification from the Spanish authorities of 12 July 1994 . Such notification referred to the risks created by a similar type of product. 3.2. As required by Art. 8, paragraphs 2 and 3 of the Directive: *"On receiving this information [notification from a Member State], the Commission shall check to see whether it complies with the provisions of this Directive and shall forward it to the other Member States, which in turn, shall immediately inform the Commission of any measures adopted"* *"Detailed procedures for the Community information system described in this Article are set out in the Annex [...]".* The Annex of the Directive in its § 9 states : *"The other Member States [i.e., not the one making the notification] are required, whenever possible, to inform the Commission without delay of the following: (a) whether the product has been marketed in its territory; (b) supplementary information it has obtained on the danger involved [...]; and in any case they must inform the Commission as soon as possible of the following: (c) the measures taken or decided [...]; (d) when the product mentioned in this information has been found within their territory but no measures have been taken or decided on and the reasons why no measures are to be taken".* 3.3. The Commission has indicated that it did not receive any reply from the Italian authorities to the Spanish notification of July 1994 on the risks of a similar product to that denounced by the complainant. Despite the lack of reply from the Italian authorities, the institution did not take any action. 3.4. Even though the Commission could have acted more efficiently as regards the failure of the Italian authorities to react to the notification made by the Spanish authorities in 1994, the Ombudsman notes, however, that the institution has taken steps to ensure the appropriate application of the Directive in Italy. The letter written to the



Italian authorities by Mrs Bonino, responsible Commissioner at that time, illustrates this effort. In the light of the previous considerations, no further remarks by the Ombudsman therefore appear to be necessary. The President of the European Commission will also be informed of this decision. **4 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman has therefore decided to close the case. The President of the European Commission will be also informed of this decision. Yours sincerely, Jacob SÖDERMAN
(1) Council Directive 92/59/EEC on general product safety, O.J. No L 228/25 of 11.8.92

(2) Article 8 §1 of Directive 92/59/EEC: *"Where a Member State adopts or decides to adopt emergency measures to prevent, restrict or impose specific conditions on the possible marketing or use, within own territory, of a product or product batch by reason of a serious and immediate risk [...] to the health and safety of consumers, it shall forthright inform the Commission thereof [...]."*

(3) Paragraph 8, Annex Directive 92/59/EEC: *"[...] when it [the Commission] considers it necessary, and in order to supplement the information received, can in exceptional circumstances institute an investigation of its own motion and/or convene the committee on Emergencies[...]" .*

(4) Title XIV Art. 153 EC