



28.8.2013

NOTICE TO MEMBERS

Subject: Petition 1472 by Alexandros Triantafyllis (Greek), with two other signatures, on the Greek authorities' failure to enforce EU legislation and the provisions in the Charter of Fundamental Rights in connection with the operation of the Athens Central Market (Organismos Kentrikis Agoras Athinon)

1. Summary of petition

The petitioner complains about the provisions which apply to the operation of the Athens Central Market, under which it is prohibited for other enterprises to conduct wholesale business in fresh fruit and vegetables and fresh meat within a radius of two kilometres. The petitioner regards this situation as a distortion of competition and contrary to applicable EU principles and the case-law of the Court of Justice. With reference to the EU's Charter of Fundamental Rights and, in particular, Article 16 thereof (freedom to conduct a business) and Article 41 thereof (right to good administration), the petitioner – who has already brought the matter unsuccessfully before the national courts – asks the European Parliament to take the matter up.

2. Admissibility

Declared admissible on 12 March 2009. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 1 September 2009.

The petitioner complains of restrictions on undertakings in Greece who conduct wholesale business in fresh fruit/vegetable and fresh meat. The source of these restrictions are the rights granted by the Greek State to the Athens Central Market SA and to Thessaloniki Central Market SA. On the basis of these rights, the wholesale trade in fresh agricultural products and

meat with retailers must be conducted through the Central Markets.

On the basis of the detailed legal information provided by the petitioner and his lawyers, the European Commission has identified a certain number of restrictions, notably:

- the wholesale trade in fresh agricultural products and fresh meat with retailers must be conducted in Athens and Thessaloniki through a Central Market.
- according to two ministerial decisions¹, an undertaking (individual or legal entity) may apply for tenancy/lease in the Athens/Thessaloniki Central Market only if it has a turnover of at least EUR 1 600 000 per lease from the sale of products of plant origin over a minimum of the last four years. For wholesalers of fresh meat, the minimum turnover is set by the Central Market SA per lease over at least the last four years.
- applications for a tenancy/lease in the Central Market are refused because a tenancy/lease is granted preferentially to those already established inside the Central Market and there are no buildings available for other undertakings.
- additional supporting documents might be requested, but there is no clarification as to what exactly these documents are.
- undertakings based outside the Central Markets are not permitted to operate within a 2 km radius of the said markets. Fines may be imposed in case of violation of this prohibition.

According to Article 43 of the EC Treaty, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. According to settled case-law, Article 43 EC precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of the freedom of establishment that is guaranteed by the Treaty².

It is settled case-law that 'A national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty may be justified by overriding reasons of general interest, provided that the measure in question is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose'³.

Moreover, following the settled case-law of the Court of Justice, *'(...) if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe*

1 YA A2-4321 of 23 June 2008 and YA A2-4322.

2 See, in particular, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, and Case C-299/02 Commission v Netherlands, paragraph 15.

3 Judgment of the Court of 21 April 2005, Case C-140/03, Commission v Hellenic Republic, paragraph 34.

*the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned. Furthermore, all persons affected by a restrictive measure based on such a derogation must have a legal remedy available to them*¹.

It follows that, before adopting a final position, the European Commission should examine the possible justification of the restrictions by the Greek authorities as well as their suitability, necessity, coherence and proportionality.

The petitioner further contends that the Greek State, through a series of legislative and regulatory acts, has granted exclusive rights to Athens Central Market SA and to Thessaloniki Central Market SA to conduct wholesale trade in fresh agricultural products, including meat within a given geographical area. Companies that are based outside the Central Markets are not allowed to operate within a radius of 2 km of the said markets. Furthermore, such companies may apply for a tenancy/lease only if they position themselves above a certain turnover threshold, achieved over a certain minimum number of years. These requirements can allegedly prevent smaller companies from applying. It is alleged that such public intervention can induce the undertakings benefiting of such rights to abuse their dominant position, thus breaching Article 82 EC in combination with Article 86 EC. It is furthermore contended that the system, as currently devised, allows for the granting of preferential treatment to retailers that are already licensed to operate on these markets, which can therefore coordinate their activities and restrict competition, thus allegedly breaching Article 81 EC.

It must be noted that, in light of the information presented, dominance could be established only if the relevant markets would be defined as narrowly as the petitioner suggests (i.e. the 2 km radius around the Central Markets concerned). However, should such a market definition be retained, it is unlikely that the geographic market at issue would be such as to represent a substantial part of the common market within the meaning of Article 82. Furthermore, it is highly unlikely that the practice at issue would be capable of affecting inter-State trade. On this basis, national law would apply.

As regards the analysis under Article 81 in conjunction with Article 86 EC, similar considerations apply, in the sense that the appreciable anti-competitive foreclosure effect in respect of smaller retailers could possibly be found only if the relevant geographic market would be defined as narrowly as indicated above. However, in such circumstances, the agreements entered into by the relevant Central Market on one hand, and larger retailers already operating on that market on the other hand, would not be capable of affecting inter-State trade to any significant degree. Again, on this basis, national law would apply to the issue at stake.

The Commission's services will contact the Greek authorities in order to request the complete legal framework relating to the Athens and Thessaloniki Central Markets, the justification of the above-mentioned restrictions, as well as an appropriateness and proportionality analysis of

¹ Judgment of the Court of 20 February 2001, C-205/99, Analir [2001] ECR I-01271, paragraph 38.

the measures applied by the Greek authorities.

The Commission will keep the EP Petitions Committee informed about the progress of the inquiry.

4. Further Commission reply, received on 25 March 2010.

Further to its previous reply and on the basis of information received from the Greek authorities, the Commission wishes to inform the EP of the following developments. The Commission's services forwarded a letter to the Greek authorities on 29 June 2009 to which they received a reply on 7 January 2010.

(a) Summary of the legal framework relating to the Athens and Thessaloniki Central Markets

In their reply, the Greek authorities set out the legal framework relating to the establishment and operation of the Athens and Thessaloniki Central Markets. Greek legislation (Laws 3475/55, 802/78, 3190/03 and 3557/07 and Presidential Decree 228/A/109/2-5-89, etc.) did authorise the appropriate ministries to take joint ministerial decisions to allow, under certain conditions, wholesale trade outside the Central Markets, provided that it was conducted at least 2 km from those Markets. However, a ministerial decision of this nature had never been taken.

Other means of supply and distribution of fruit and vegetables and meat had been established, such as distribution networks of companies that operated outside the prefectures where the Central Markets were established (Athens and Thessaloniki). In addition, three major supermarket chains had set up reception and internal movement centres within these regions.

Furthermore, administrative courts that had heard cases in this connection had not held the national provisions to be contrary to European law.

Despite Law 3475/55, fresh meat wholesalers had been established and were operating outside the Central Fresh Meat Markets. Taking account of the substantial investment undertaken, Article 35 of Law 3784/2009 had enabled the Ministry of Economic Affairs to approve the continued operation of companies still in business as at 7 August 2009 by regularising their situation accordingly. Consequently, these companies, whose headquarters were located within a radius of 2 km or less or even beyond this radius, could now operate freely and legally outside the Central Markets.

(b) Objectives of national legislation

The principle laid down in national legislation involved the authorisation and, consequently, consolidation of wholesale trade solely within the Central Markets, subject to exceptions (such as that provided for by the aforementioned 2009 Act governing the wholesale trade in fresh meat), so as to enable the retailer, the final link in the chain before the consumer, to have direct access to the requisite information on price, quality and quantity. According to the Greek authorities, this provided healthy competition for both the wholesaler and the retailer as well as for the final consumer.

(c) With regard to the provisions of Ministerial Decisions A2-4321 and 4322 of 23 June 2008 relating to leases in the Central Markets

These provisions were no longer applicable, since they had been replaced by those set out in Decisions A2-2186 and 2187 of 5 May 2009.

According to the new provisions, tenants had to be able to generate a turnover of between EUR 400 000 and EUR 1 600 000, depending on the location of the space they wished to rent. Other factors, however, were also taken into consideration, such as the number of workers employed and the nature and range of products, etc.

(d) Rejection of lease applications

According to the authorities responsible for the Central Markets, a pre-existing tenancy agreement did not imply any entitlement to the allocation of new leases for unoccupied premises and, therefore, did not, in itself, constitute a reason to reject any new interested party.

With regard to the availability of premises, this matter would be discussed at a later stage; where appropriate, the extension of existing buildings would be considered.

(e) Requirement to provide additional supporting documents

According to the authorities responsible for the Central Markets, it was for the Central Markets' Board of Directors – within the limits, however, of the joint ministerial decision – to determine which additional supporting documents were to be requested. Prospective tenants were always informed in advance of any such request, which did not, in itself, constitute a barrier or a means of discrimination.

(f) Prohibition on trading of undertakings within a radius of 2 km from the Central Markets

As stated above, Article 35 of Law 3784/2009 allowed fresh meat wholesalers who were already established as of 7 August 2009 to continue operating outside the Central Markets, either within or beyond a radius of 2 km of those Markets.

Similar rules could be applied to govern wholesale trade in fruit and vegetables, if that should prove to be necessary.

Consequently, the Greek authorities consider that, given the limited area involved, the legislator did not in any way seek to limit wholesale trade on the Athens and Thessaloniki Central Markets.

The Commission is concerned about this situation, especially since it could prove to be contrary to the principle of freedom of establishment and freedom to provide services within the internal market.

The Commission intends to give further consideration to the organisation and operation of and access to the Athens and Thessaloniki Central Markets. Nevertheless, the Greek authorities are in the process of taking measures to open up the Central Markets with regard to wholesale trade in fresh meat. It remains to be seen whether the Athens and Thessaloniki Central Markets will open up for wholesale trade in fruit and vegetables in order to meet existing demand. However, for the time being, restrictions on access to the Athens and Thessaloniki Wholesale Fruit and Vegetables Markets remain in place, and the question arises as to the compatibility of those restrictions with the TFEU.

Furthermore, a complaint concerning the same matter has already been lodged with the Commission.

The Commission will keep the Committee on Petitions informed of any further developments in this matter. .

5. Further reply from the Commission, received on 2 September 2010

Further to its previous replies, the Commission wishes to inform Parliament of the latest developments.

In connection with complaints addressed to the Commission on the same subject as petition 1472/2008, the Commission sent a letter of formal notice to the Greek authorities on 24 June 2010. The Commission will keep the Committee on Petitions informed of the Greek Government's response, and of any further developments in this matter.

6. Further Commission reply, received on 3 March 2011. (REV III)

In June 2010 the European Commission sent the Hellenic Republic a letter of formal notice, in which it concluded that Article 6 of Law 3475/1955 and Royal Decrees 143/1963 and 869/1966, as well as the provisions of Ministerial Decisions A2-2186 and 2187 of 15 May 2009, by imposing restrictions on access to the Central Markets of Athens and Thessaloniki for suppliers of fresh meat and fresh agricultural products based in other Member States, are incompatible with Article 49 of the Treaty on the Functioning of the European Union (TFEU) and Articles 12 and 15(1), (2)(a) and (3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market¹.

In their reply, the Greek authorities argued that the national courts (Judgment 1038/2006 of the Council of State, Judgment 384/1996 of the Court of First Instance of Piraeus) had issued rulings that mainly concerned the ban on selling fruit and vegetables outside the Central Markets. These rulings were based on the idea that the administration could impose restrictions on the free development of the economic life of the country for reasons of public interest and to protect society. They considered that the limitations imposed were decided objectively and were for reasons of public interest, including maintaining uniform prices, protecting producers and consumers and combating trafficking and tax fraud.

In addition, according to the Greek authorities, the assessment concerning any obstacle to the freedom of establishment was primarily based on the buildings' infrastructure. An investment plan for these buildings was under examination. This would involve creating additional facilities to allow the public to trade there. In addition, for the purposes of e-commerce, plans to set up electronic markets were being considered.

Finally, the Greek authorities gave an assurance that they would re-examine the criteria as soon as possible to ensure that all criteria provided for under current legislation were objective, transparent, impartial and proportional.

The Commission considered the response of the Greek authorities to be unsatisfactory. The Greek authorities clearly intended to invest in the buildings' infrastructure in order to create more spaces in the Central Markets and to re-examine the criteria to ensure their objectivity,

¹ OJ L 376, 27.12.2006, p. 36.

transparency, impartiality and proportionality. However, the reasons of public interest claimed by the Greek authorities cannot be considered sufficient justification for the substantial restrictions on freedom of establishment. In fact, some of the reasons given, such as the guarantee and maintenance of uniform prices, do not apply because they represent economic purposes, while other restrictions seem disproportionate in view of the stated objectives (such as combating tax fraud). The Commission's services therefore propose sending a reasoned opinion to the Hellenic Republic in early 2011.

7. Further Commission reply, received on 18 July 2011 (REV IV)

As stated above, the Commission considered the response of the Greek authorities to the letter of formal notice to be unsatisfactory; a reasoned opinion was therefore sent to the Hellenic Republic on 17 February 2011.

The Greek authorities responded with two letters dated late April 2010 in which they drew the Commission's attention to a law of 2 March 2011 (L 3919/2011) on the principle of freedom to choose an occupation and the abolition of unjustified restrictions on access to and the pursuit of occupations, which set out general principles in this area and was due to enter into force in early July 2011. Building on this law, a draft law which focuses on wholesale trade in central markets is currently being examined by both houses of the Greek National Assembly; two subsequent versions of this draft law have also been sent to the Commission.

Reform is thus underway in this area, and the Commission has undertaken to assess, as far as it can, the compatibility of the new legal provisions with EU law. It will carry out a detailed assessment once definitive measures have been adopted and formally notified to it.

The Commission will keep Parliament informed of any developments regarding this matter.

8. Further Commission reply, received on 20 April 2012 (REV V)

In their reply to the reasoned opinion, the Greek authorities notified the Commission, in July 2011, of Law 3982 of 17 June 2011 containing, *inter alia*, provisions amending the regulation applicable to the Athens and Thessaloniki Wholesale Markets. That law abolished the prohibition on establishment within 2 km of the Central Markets, and called on the Central Markets' management companies to draw up rules on the lease of spaces within the Central Markets, subject to the approval of the ministers concerned.

In October the Commission also received the lease rules for these two Central Markets. The Greek authorities should have provided additional information, but have not yet sent anything to the Commission.

After consideration, doubts remain at this stage and the Commission therefore intends to continue the infringement proceedings in progress.

The Commission will keep Parliament informed of any developments regarding this matter.

9. Further Commission reply, received on 28 August 2013 (REV VI)

In reply to the reasoned opinion, the Greek authorities notified the Commission in July 2011 of Law 3982 of 17 June 2011 amending the regulation applicable to the Athens and Thessaloniki central wholesale markets.

Under this law, the prohibition on wholesale activity outside the Athens and Thessaloniki central markets was lifted and operators were allowed to establish themselves either within or beyond a radius of two kilometres from the central markets and beyond. Decision A2-565, published in Official Gazette No 1503 of 4 May 2012, ratified the regulation applicable to the lease of spaces within the central markets.

Concerning sales outside the central markets, the Greek authorities indicated that, for objective reasons of general interest, it was also necessary to obtain from the planning authorities permission to use the spaces for a specific activities (establishment).

Given that establishment within the central markets is no longer compulsory and that installations next to the central markets are now authorised, the Commission takes the view that there is no longer any substantial restriction of freedom of establishment and that the problem of the complainants has been resolved. In the absence of any response from their lawyer to its notification that it did not intend to take any further action, the Commission accordingly decided, on 20 June 2013, to close consideration of the petition.