



## Entscheidung der Europäischen Bürgerbeauftragten mit Empfehlungen im Nachgang zu ihrer strategischen Untersuchung OI/5/2016/AB zur Verfahrensdauer und Transparenz der Europäischen Kommission bei der Bearbeitung von Vertragsverletzungsbeschwerden

Entscheidung

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**Betroffene Institution** Europäische Kommission ( Keine weiteren Untersuchungen gerechtfertigt ) |

Die korrekte Anwendung des EU-Rechts ist entscheidend für die Glaubwürdigkeit der Union. Um zu prüfen, ob die Mitgliedstaaten das EU-Recht korrekt umsetzen und anwenden, ist die Europäische Kommission – in ihrer Rolle als „Hüterin der Verträge“ – mit der Untersuchung von angeblichen Vertragsverletzungen betraut. Beschwerden von Bürgern, Organisationen und Unternehmen sind eine wesentliche Informationsquelle für die Kommission über mögliche Verstöße gegen das EU-Recht. Die Beschwerdeführer tun sich jedoch mitunter schwer, zu verstehen, dass Vertragsverletzungsverfahren nicht immer der beste Weg sind, um ihr individuelles Problem zu lösen. Zudem finden sie es schwierig, zu akzeptieren, dass die Kommission über eine Ermessensbefugnis bei der Entscheidung verfügt, ob sie nach Abschluss der Untersuchungen ein Vertragsverletzungsverfahren einleitet oder nicht.

Nachdem bei der Bürgerbeauftragten eine Reihe von Beschwerden über die Bearbeitung dieser Fälle durch die Kommission eingingen, leitete sie eine strategische Untersuchung ein, um zu prüfen, ob dem systemische Probleme zugrunde liegen könnten. Die Untersuchung betraf die Bearbeitung von Vertragsverletzungsverfahren durch die Kommission im Rahmen des allgemein als „EU-Pilot“ bezeichneten Systems, in dem die informelle Phase der Vertragsverletzungsverfahren angelegt ist. Ziel des „EU-Pilot“-Systems ist es, einen informellen Dialog mit den Mitgliedstaaten zu führen, um Verstößen gegen das EU-Recht in einer frühen Phase entgegenzuwirken und förmliche Vertragsverletzungsverfahren zu vermeiden. Die Untersuchung umfasst: (i) die Verpflichtung der Kommission, eine zeitnahe Entscheidung zu treffen, (ii) die Information von Beschwerdeführern und (iii) die Information der Öffentlichkeit über EU-Pilotverfahren.

Die Bürgerbeauftragte stellte fest, dass die Bearbeitung von Vertragsverletzungsbeschwerden im Rahmen des „EU-Pilot“-Systems für die Abteilungen der Kommission eine Herausforderung darstellte. Die Kommission hat diese Probleme erkannt und im Januar 2017 eine neue Strategie angenommen, nach der sie ihre Verwaltung von



Vertragsverletzungsverfahren verbessern wird, indem sie sich vor allem auf systemische und hinreichend qualifizierte Verstöße gegen das EU-Recht konzentriert. Gleichzeitig hat die Kommission ihre Verfahren im Hinblick auf die Beziehungen mit Beschwerdeführern aktualisiert.

Die Bürgerbeauftragte begrüßt die Anstrengungen, die die Kommission unternommen hat, um die Probleme zu lösen, die Anlass zu dieser Untersuchung gaben. Sie ist der Ansicht, die Kommission könne weitere Verbesserungen erzielen. **Daher schließt die Bürgerbeauftragte ihre Untersuchung mit acht Empfehlungen ab**, welche die Kommission berücksichtigen sollte, um ihre Beziehungen mit Beschwerdeführern zu verbessern und die Transparenz ihrer Verfahren zu erhöhen.

## The handling of infringement complaints

### Background

**1.** The Ombudsman has received many complaints on alleged delays in the European Commission's handling of infringement complaints and/or failure to properly inform the complainant during the "EU Pilot" procedure, which structures the informal stage of infringement proceedings **[1]**. The Ombudsman opened own-initiative inquiries in 2009 and 2011 **[2]**. As the Ombudsman continued to receive complaints, she decided to open a strategic inquiry, which was launched on 13 May 2016. The inquiry covers three systemic issues: (i) the Commission's duty to reach a timely decision under "EU Pilot", (ii) information to complainants and (iii) information to the public.

### The inquiry

**2.** As a first step, the Ombudsman asked for the list of EU Pilot cases open for more than one year at the end of 2015 and the standard letters used to keep complainants informed of progress. The Ombudsman's staff also held a meeting with the Commission to obtain statistics and enhance their understanding of how "EU Pilot" functions in practice **[3]**. As a second step, the Ombudsman's staff carried out an inspection of 10 EU Pilot files, older than one year, in three policy areas (Environment, Justice and consumers, Taxation and customs). A significant number of infringement complaints are submitted in these areas every year. After the Commission published its new Communication "*EU law: Better results through better application*" of 19 January 2017 **[4]** ("the 2017 Communication"), another meeting took place to help the Ombudsman's inquiry team understand the implications of the Commission's new approach. This decision takes account of all the information gathered during these inquiry steps.

### The Ombudsman's assessment

## A. Time-limit for handling infringement complaints



## The challenges faced by the Commission

**3.** As a general rule, the Commission has committed itself to investigate complaints, and arrive at a decision to start a formal infringement procedure or to close the case, **within one year** from the date the complaint is registered. This one year timeframe includes the registration of the complaint in a database called " *Complaint Handling - Accueil des Plaignants* " (CHAP), the initial assessment to decide on whether or not to open an "EU Pilot" and the dialogue with the Member State under "EU Pilot", leading to the decision to open an infringement procedure or to close the case.

**4.** Since March 2010, the Commission also applies a double benchmark of 10 weeks to ensure a speedy management of files under "EU Pilot": the Member State has 70 days to submit its answer to the Commission and the Commission has 70 days to assess the Member State's response.

### **5. Respecting the deadlines it has set itself seems to be a serious challenge for the Commission:**

· Concerning the one-year timeframe, the Commission opened 724 "EU Pilot" cases based on complaints between 1 January 2014 and 31 December 2015. In only 107 cases (that is 15 %), was a decision to close the case or to issue a letter of formal notice taken within one year from the date the complaint was registered [5] . At the end of 2015 the Commission was dealing with 480 pending EU Pilot files triggered by complaints older than one year. Among them, 102 files (21 %) had been open for more than three years [6] . The Commission explained that the dialogue between the Commission and the Member State via "EU Pilot" is not limited to one exchange: for a significant number of the 102 files older than three years, several exchanges with the Member State concerned were necessary [7] . The Commission also explained that the volume of the information submitted by the complainant, before or after the launching of the EU Pilot dialogue, and/or by the Member State, also impacts on the life duration of EU Pilot cases, given that the Commission has to assess that information before deciding on the way forward.

· Concerning the double ten-week benchmark, the average time needed by Member States to reply to the Commission's questions was 72 days in 2015 which is close to the ten-week benchmark [8] . The Commission's average time for assessing these responses, however, was 91 days in 2015, 21 days above the benchmark [9] . The Commission specified that one factor impacting on the time taken to assess Member States' replies is the need to translate the Member States' responses.

## The main reasons for the delays

**6.** The Ombudsman is mindful that the Commission manages a large number of complaints and that the one-year timeframe is a self-imposed objective. When handling complaints alleging excessive delays, the Ombudsman has consistently taken the view that, when the



one-year time-limit is exceeded, good administration requires the Commission to provide specific and valid reasons for the delay.

7. The Ombudsman has considered that there could be maladministration if the delay is due to administrative inactivity or if the Commission fails to provide a valid explanation [10]. The Ombudsman has also considered that, even if there are good reasons, a delay of several years might not be reasonable within the meaning of Article 41 of the EU Charter of Fundamental Rights, on the right to good administration.

#### **Excessive delay in case 583/2013/MHZ [11]**

A farmer complained to the Ombudsman claiming that the Commission should have taken speedier action on his two infringement complaints. The Commission could not explain why it was unable to launch the "EU Pilot" in both infringement cases until 11 months after it had received the complaints. The Ombudsman criticised the Commission, taking the view that "*[i]n particular, by delaying the start of the Pilot procedure and, as a result, making it impossible for itself to comply with the one year deadline to decide on the complainant's infringement complaints, the Commission was guilty of maladministration.*"

8. The inspections carried out in the context of this inquiry confirmed that some delays are beyond the Commission's control, for example when a **modification of national law** is needed to end the infringement, when it is necessary to **build infrastructure** (notably in the environmental area) or when, at the time of EU Pilot, the Commission has to **wait for the results of a Court ruling**. In other cases, the Commission may need further time to assess **additional information provided by the complainant** in the course of the procedure, or to link the complaint to **similar files** against other Member States. These cases do not constitute administrative inactivity.

9. Other more problematic situations involve organisational issues, such as **heavy workload in the unit**, the need to liaise with **several Commission departments** or **additional time needed for translation**, as complaints can be submitted in any official EU language and sometimes involve a significant amount of documentation. As a result of these problems, the initial assessment of the complaint, before the Commission even decides to open an "EU Pilot" dialogue, may in itself take several months.

10. Delays can also stem from lengthy exchanges between the Commission and the Member State under "EU Pilot", due to **incomplete or unsatisfactory replies**.

#### **Excessive delay in case 1146/2012/AN [12]**

In December 2009, a complainant lodged an infringement complaint for which the Commission opened an "EU Pilot". In June 2012, the complainant complained to the Ombudsman about the Commission's delay in dealing with the matter. During the inquiry, the Commission explained that the length of the procedure was due to the Member State's delays in replying to its requests for information and to the incompleteness of the replies provided. The Ombudsman criticised the Commission, considering that **it had failed to**



properly implement the EU Pilot procedure. The objective of “EU Pilot”, to find rapid and better solutions for infringement complaints, had been undermined in this case . In its response, the Commission informed the Ombudsman that it had opened a formal infringement procedure.

In another case brought to the Ombudsman in 2015, the Commission sent nine information requests to the Member State [13] .

**11.** The “EU Pilot” procedure was designed as an amicable way of solving problems. It also allows the Commission to gather sufficient evidence about the alleged infringement. However, “EU Pilot” is based on the principle of “sincere cooperation” which is jeopardised by successive incomplete replies from the Member State involved. Moreover, the formal infringement procedure is another tool at the Commission’s disposal to gather evidence before deciding to refer the case to the Court of Justice.

## The Commission’s new strategy

**12.** In its 2017 Communication, the Commission acknowledged that “EU Pilot” has not always been effective in solving problems quickly . It said that “EU Pilot “ *was set up to quickly resolve potential breaches of EU law at an early stage in appropriate cases. It is not intended to add a lengthy step to the infringement process, which in itself is a means to enter into a problem-solving dialogue with a Member State. Therefore, the Commission will launch infringement procedures without relying on the EU Pilot problem-solving mechanism, unless recourse to EU Pilot is seen as useful in a given case .”*

**13.** The Commission intends to focus its enforcement action on systemic and serious breaches of EU law. With this new approach, the Commission will stop using “EU Pilot” as a default procedure. It will be easier to move directly to a formal infringement procedure without opening an “EU Pilot”. In individual cases of incorrect application of EU law, the Commission will encourage complainants to use appropriate problem-solving mechanisms available at EU or national level and will propose to transfer the file to the most suitable body if necessary. **As it is too early to measure the impact of this new approach on the Commission’s capacity to handle complaints more quickly, the Ombudsman intends to follow-up on this subject in the coming years .**

**14.** The Ombudsman welcomes the Commission’s intention to strengthen its cooperation with the European Network of Ombudsmen, in order to provide complainants with better means of redress at national level. Her Office is actively pursuing this with the Commission.

## Holding the Commission accountable for its actions

**15.** The Commission's annual report on ‘ *Monitoring the application of EU law* ’ provides useful information on the numbers and types of cases opened. However, it does not fully reflect the effectiveness of the informal dialogue stage, which aims to find **better and quicker**



responses to Member States' failure to apply EU law correctly.

**16.** According to the Commission's annual reports, "EU Pilot" has been effective in reducing recourse to formal infringement procedures. [14] 75 % of EU Pilot files handled in 2015 were closed after receiving "satisfactory answers" from Member States. The Commission's statistics however include cases where there was in fact no breach of EU law [15] . In order to better reflect the effectiveness of its action, the Commission could usefully evaluate the percentage of cases where there was an actual problem, which was solved as a result of the Commission's intervention.

**17.** Concerning its capacity to deal quickly with infringement complaints, the Commission could publish the average time it needs to take a decision on a complaint, or the percentage of complaints for which a decision was taken within one year. Finally, the Commission discloses information on the performance of each Member State on the ten-week benchmark under "EU Pilot" in its annual report, but does not disclose information on its own performance.

**To enhance the transparency of its action, the Ombudsman encourages the Commission to provide more information on its performance in resolving actual breaches of EU law under pre-infringement procedures - and on the average duration of the process - in its annual report.**

## **B. Keeping complainants informed**

### The importance of regular and adequate information

**18.** Infringement complaints are an essential source of information for detecting possible breaches of EU law. At the same time, complainants may find it difficult to understand that infringement procedures are not geared at solving their individual problems and that the Commission cannot obtain redress for them. Complainants also find it difficult to understand why the Commission may need time to deal with their complaint. They may find it even harder to understand why the Commission, using its margin of discretion, can decide not to open an infringement procedure at the end of its investigation.

**19.** Many complaints lodged with the Ombudsman alleging excessive delay also allege that the Commission has failed to keep the complainant adequately informed. Lack of adequate information is likely to increase complainants' frustration stemming from long delays. Conversely, adequate and regular explanations help complainants understand and accept why the Commission needs additional time to investigate their complaints, or why it has decided to close a case.

**20.** In this context, complainants need to be reassured that their cases will be handled diligently. Some of the improvements contained in the annex to the Commission's 2017 Communication help give effect to the principle of good administration, which includes the



duty to give reasons for decisions and to reply to information requests. These include the following: (i) complaints will be submitted to the Commission using a standard form, to improve the basis for assessing the merits of a complaint and facilitate better complaint-handling; (ii) the acknowledgment of receipt sent by the Commission will set out in clearer terms the limits of the Commission's action; and (iii) when the Commission exceeds the one-year timeframe to take a decision, complainants will be informed in writing **automatically** and not only **upon request**, as was previously the case.

**21.** The Ombudsman welcomes the fact that the Commission updated its procedures for handling relations with complainants at the same time as it adopted its new strategy [16]. On the basis of her experience, the Ombudsman encourages the Commission to build on its new strategy to further improve its relations with complainants by promoting best practices, beyond the strict procedural obligations it has set itself. Improving relations with complainants is also likely to enhance the effectiveness of the "EU Pilot" dialogues that the Commission will still deem useful to launch under its new strategy. A good way of doing so would be to **update its internal guidelines on handling infringement complaints**, taking into account the remarks and suggestions set out below.

## Keeping complainants informed during the initial assessment phase

**22.** The initial assessment of the complaint is an essential step, for which it is important to give the complainant adequate and timely information. Following its initial assessment, the Commission can decide to move directly to a formal infringement procedure, to open an "EU Pilot", to close the case or to direct the complainant towards alternative means of redress at EU or national level.

**23.** After the complaint has been registered in the "CHAP" database and the acknowledgement of receipt sent out, its initial examination is not subject to any time-limit and can take several months. There is no set procedure for keeping the complainant informed during the period in which the Commission is deciding on whether or not to further examine the complaint with the Member State. When the initial assessment in CHAP cannot be performed within a reasonable time (usually two or three months), some Directorates-General have developed the good practice of sending a holding reply to the complainant, with the contact details of the case handler and explaining how the complaint is being dealt with.

**The Ombudsman encourages the Commission to set an indicative deadline for initial analysis of complaints in CHAP. She also encourages the Commission to generalise the good practice of sending a holding reply to the complainant when the initial assessment of the complaint cannot be performed within this deadline.**

**24.** The Ombudsman also asked if individuals/organisations who submit a complaint on a case the Commission is already investigating on its own initiative, or on the basis of another complaint, are given the status of complainant. The Commission replied that they are if they



satisfy the criteria set out in the Annex to the 2017 Communication. Their cases are registered in CHAP and the administrative provisions on relations with complainants apply. This is regardless of the follow-up given to these complaints. The Commission noted that the existence of a pending investigation/infringement procedure is a factor to be taken into account when deciding on the follow up to the complaint.

**The Ombudsman welcomes the fact that the Commission gives the status of complainant to individuals/organisations who submit a complaint on a case the Commission is already investigating. To the extent that the Commission does not already do so, she encourages the Commission to inform the complainant of the progress of its investigation and of its decision to close the case or to open an infringement procedure.**

25. Following its initial assessment, the Commission may conclude that an infringement procedure is not the best way to solve the complainant's problem, especially when the complainant expects compensation for the damage incurred by the alleged breach of EU law. Under its new strategy, the Commission has undertaken to help citizens by raising awareness of their rights under EU law and of the different problem-solving tools available to them at national and EU levels. This includes adapting the letters used to acknowledge receipt of complaints and to inform complainants of the Commission's decision not to investigate a complaint. It will also require the Commission to develop an inventory of all the mechanisms of redress available at EU and national levels and to provide citizen-friendly information on its webpage dedicated to citizens' problems [17] .

**Among these mechanisms are non-judicial review bodies such as national and regional Ombudsmen: the European Ombudsman is currently working with the Commission and the European Network of Ombudsmen to enhance cooperation on these issues, in order to better direct complainants when the Commission decides not to investigate an individual case .**

## Keeping complainants informed during “EU Pilot”

26. Although the Commission considers “EU Pilot” as a bilateral procedure between the Commission and Member States, it has committed itself to inform complainants when it opens an EU Pilot, when it takes a final decision and when it exceeds the one-year time-limit to take a decision. Good administration also requires the Commission to acknowledge receipt of any correspondence within two weeks. The Commission further recognises that complainants can ask to receive explanations on the case at any point of the procedure, including by email or by phone.

### **Information to the complainant in case 332/2013/AN [18]**

The case concerned the Commission's four-year delay in taking a decision under “EU Pilot” and its failure to keep the complainant informed. During the inquiry, the Commission explained the reasons for the delay, resumed contacts with the complainant, and reached a



final decision. The Ombudsman concluded that there were no grounds for further inquiries but noted that the communication with the complainant had not been very smooth and that this had reduced the complainant's willingness to accept the Commission's arguments for missing the standard time-limit [19]. She reminded the Commission that smooth and regular communication with complainants is an important procedural guarantee and legitimises the Commission's role.

**27.** The Commission has no set procedure for informing complainants about Member States' replies. In some cases, informing complainants prematurely could have the consequence of jeopardising the climate of mutual trust between the Commission and Member States that is intended to characterise the informal dialogue stage of infringement proceedings. It is also clear that not all complainants express an interest in following the details of the Commission's investigation. During the inspections that took place in the context of this inquiry, the Ombudsman's staff noted, however, that complainants sometimes expressed such an interest. In one inspected file, the Commission provided the complainant with summaries of the Member State's reply, in order to obtain comments and additional information. The Ombudsman therefore believes that it is possible, on a case by case basis, to provide this type of information without harming the purpose of "EU Pilot". This possibility should be considered further.

**When complainants express an interest in closely following the progress of their case, the Ombudsman encourages the Commission to inform them of any new significant step in its investigation under "EU Pilot", including by providing them with a summary of the Member State's reply, whenever possible.**

## Informing complainants when closing a case

**28.** While the decision to open a formal infringement procedure is taken by the College of Commissioners and is publicised, the decision to close a case is normally taken within the responsible Directorate-General and is not public. The complainant is however informed by what is referred to as a "pre-closure" letter and has four weeks to submit comments. Where the complainant's comments do not persuade the Commission to reconsider its position, the case is closed and the complainant is informed accordingly. Where the complainant persuades the Commission to reconsider its position, the investigation continues.

**29.** The Commission enjoys considerable discretion in deciding on whether or not, and if so when, to launch an infringement procedure even when the investigation reveals a breach of EU law. This is particularly difficult for complainants to understand and most complaints lodged with the Ombudsman in the area of infringement challenge the Commission's decision to close an infringement complaint.

**30.** The Ombudsman has consistently taken the view that, while the Commission does have a margin of discretion in this regard, it should always give valid reasons for a decision to close an infringement complaint. The Ombudsman also considers that good administration requires the Commission to act diligently and to fully examine all the complainant's



arguments [20] . Where the complainant submits new arguments following receipt of the pre-closure letter, and where the Commission nevertheless maintains its decision to close the complaint, in the letter confirming the closure of the case, the Commission should address the new arguments and explain in detail why they are not sufficient to change its position.

### **Failure to properly justify a decision in case 995/2011/KM [21]**

A citizen accused the Commission of not properly explaining why it was not investigating his infringement complaint in which he alleged that a Member State was not correctly implementing the E-Privacy Directive. The Ombudsman considered that the Commission's explanations should not only be correct, but also clear and unequivocal. She criticised the Commission for not providing sufficient reasoning about why it was not taking action on two of the issues raised in the complaint, that is, how the Member State stored and processed data as well as its e-marketing rules.

**31.** In this context, the Ombudsman welcomes the fact that the Commission's new templates for pre-closure letters clearly distinguish between the following: (i) the problem has been solved, following the Commission's intervention or by other means; (ii) the problem is not solved but the Commission will not pursue the case, in accordance with the criteria set out in its 2017 Communication [22] ; (iii) the matter will not be pursued because there is no breach of EU law or the evidence available is insufficient, or the pursuit of the case is prevented by the need to protect confidentiality, as requested by the complainant [23] .

**32.** The Ombudsman notes, however, that the template to confirm that the case will be closed has not been changed and does not clearly provide for the obligation to reply to the complainant's further arguments.

**In most complaints she has received, the Ombudsman concluded that the Commission had provided a valid explanation to the complainant. The Ombudsman however suggests that Commission departments be particularly careful in separately addressing all aspects of the complainant's complaint in the pre-closure letter.**

**The Ombudsman also encourages the Commission, in its letter confirming that the case will be closed, to respond adequately to any further arguments made by the complainant in cases where the Commission nevertheless decides to close the complaint.**

**33.** The Ombudsman notes that the Commission's dedicated webpage [24] and online complaint form [25] clearly describe the process for handling complaints and the limits of the Commission's action. They explain that the Commission cannot solve individual problems such as annulling an individual decision taken at national level or awarding the complainant compensation for damage. While noting that it has discretionary powers, the Commission is less clear on the possible criteria for closing an infringement complaint.

**The Ombudsman suggests that the Commission provides citizen-friendly information**



on its website and in the complaint form about the various criteria it takes into account when deciding to close a case.

## C. Public information on EU Pilot cases

**34.** Access to documents in infringement cases is governed by Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. The EU Courts acknowledge a general (though rebuttable) presumption according to which documents relating to the pre-litigation stage of infringement procedures cannot be disclosed. This extends to ongoing EU Pilot dialogues [26]. Access to documents concerning closed infringement procedures is in principle granted, subject to the standard exceptions to disclosure provided for in the Regulation.

**35.** The list of formal infringement procedures is publicly available. In December 2014, the Commission launched a new register of infringement cases which provides a list of ongoing infringement procedures specifying the policy area, the title of the alleged infringement, the Member State concerned and the status of each procedure (formal notice, reasoned opinion, closing of the case or referral to Court) [27]. There is however no public list of “EU Pilot” dialogues, which makes it difficult for citizens to submit requests for access to documents, including request made after the case has been closed [28].

**36.** EU Pilot dialogues concern areas such as human rights, environment or the single market, areas which are of great interest to citizens and businesses [29]. When reflecting on how to improve the transparency of “EU Pilot”, it is necessary to balance the risk of harming the climate of mutual trust which makes pre-infringement tools effective, and the benefits of increasing public scrutiny on issues of potential major interest. In addition to allowing citizens to more effectively use their right of access to documents, increased public scrutiny could have a positive impact on the timely handling of cases.

**37.** It is certainly positive that the complainant is informed that an “EU Pilot” has been launched, and thus can share this information if he/she so wishes. This means that, at the very least one and potentially several members of the public are already informed that an “EU Pilot” is ongoing.

**38.** The Ombudsman therefore believes that publishing a list of ongoing EU Pilot dialogues, without publishing any related document, would help enhance the transparency of the Commission’s action without undermining any public interest. It would help inform the public and allow citizens to use their right of access to documents, without compromising the partnership approach between the Commission and the Member States.

**The Ombudsman suggests that the Commission make publicly available the list of ongoing EU Pilot dialogues and the status of each file.**

Conclusion and suggestions for improvements

Taking into account the Commission’s new strategy, the Ombudsman now closes the inquiry with the following conclusion and suggestions:



## Conclusion

The purpose of this inquiry has been largely achieved.

## Suggestions for improvement

Most of these suggestions and best practices are not specific to “EU Pilot” and are also relevant in the context of the Commission’s handling of infringement complaints in general. The Ombudsman suggests that the Commission takes them into account when updating its internal guidance for Commission departments.

Concerning the “EU Pilot” procedure:

The Commission should:

1. Inform complainants of any new significant step in its investigation under “EU Pilot” if they express an interest in closely following the progress of their case. This could include providing complainants with a summary of the Member State’s reply, whenever possible.
2. Make publicly available the list of ongoing EU Pilot dialogues and the status of each file.

Concerning relations with complainants when handling infringement complaints in general:

The Commission should:

3. Provide citizen-friendly information on its website and in the complaint form about the various criteria it takes into account when deciding to close a case.
4. Be particularly careful in addressing separately all aspects of the complainant’s complaint in the pre-closure letter.
5. Respond adequately to any further arguments from the complainant where the Commission nevertheless decides to close the complaint. This should be done in the letter confirming that the case will be closed.
6. Set an indicative deadline for initial analysis of complaints in CHAP and generalise the good practice of sending a holding reply to the complainant when the initial assessment of the complaint cannot be performed within this deadline.
7. To the extent that it does not already do so, when an individual/organisation submits a complaint on a case which the Commission is already investigating, inform the complainant of the progress of its on-going investigation and of its decision to close that case or to open an infringement procedure.



Concerning transparency of the Commission's action:

The Commission should:

**8.** Provide more information on its performance in resolving actual breaches of EU law under pre-infringement procedures - and on the average duration of the process - in its annual report on "*Monitoring the application of EU law*"

Emily O'Reilly European Ombudsman

Strasbourg, 14/09/2017

Annex I: Role of "EU Pilot" in the context of infringement proceedings

## **The various stages of infringement proceedings**

Each Member State is responsible for implementing EU law, by transposing directives and ensuring that EU legislation is correctly applied and implemented. Under Article 17(1) of the Treaty on European Union (TEU), the European Commission is in charge of monitoring the correct application of EU law by Member States. One of the main ways the Commission carries out its role of "guardian of the Treaties" is by launching infringement procedures if it considers that a Member State has failed to transpose a directive correctly or on time, or has applied EU rules incorrectly.

The Commission can investigate possible infringements on its own initiative, in response to petitions addressed to the European Parliament or on the basis of complaints. The main objective of the Commission's action is to bring the irregular situation to an end as quickly as possible: it has therefore developed pre-infringement tools to bring about solutions rather than having to initiate an infringement procedure. When the Commission detects a possible infringement, the first step is usually to obtain sufficient evidence that the alleged breach took place and to solve the problem by working in partnership with the Member State concerned. If the informal dialogue is unsuccessful, the Commission can open a formal infringement procedure, which can culminate in referring the Member State to the Court of Justice of the EU.

## **The purpose of "EU Pilot"**

The system called "EU Pilot" structures the informal stage of infringement proceedings. The Commission announced its launch in its Communication "*A Europe of Results - Applying Community Law*" of 5 September 2007. It started to work in April 2008 as an experiment with 15 volunteer Member States (hence the term "Pilot"). All other Member States subsequently



signed up. It replaced the previous practice whereby the Commission sent administrative letters to Member States. By engaging in an informal yet structured dialogue with Member States, in a spirit of sincere cooperation, the Commission aimed to find better responses to questions on the correct interpretation, implementation and application of EU law, to accelerate the handling of infringement complaints and reduce recourse to more formal infringement procedures.

Unlike the formal infringement procedure [30] there is no specific legal basis for “EU Pilot”. It is a working method based on an online database and a communication tool used by the Commission and national governments to exchange information and legal analysis on potential infringement cases. For each case, an individual file is created and questions are submitted to the Member State concerned through the EU Pilot application. The Member State’s reply is then assessed by Commission departments, which can ask for additional information. The database manages complaints received from the public, as well as petitions from the European Parliament and the Commission’s own-initiative cases. *In 2015 the Commission opened 881 new EU Pilot files, among which 295 were triggered by complaints and 578 were opened on the Commission’s own initiative* [31] .

Until January 2017, “EU Pilot” was used in nearly all cases before the Commission decided whether to open an infringement procedure. In its new Communication “ *EU law: Better results through better application* ” of 19 January 2017 [32] (“the 2017 Communication”), the Commission announced that it would stop using “EU Pilot” automatically and that it would rely on it only when it is deemed useful.

## Procedural guarantees for complainants

Anyone can lodge a complaint against a Member State about any measure or practice from a public authority which is considered incompatible with EU law. “EU Pilot” is only one step in the handling of infringement complaints. Since September 2009, the Commission uses a system called “ *Complaint Handling - Accueil des Plaignants* ” (CHAP) for registering complaints. When the Commission receives an infringement complaint, it is first registered in the **CHAP database** . If the Commission considers that the complaint raises valid issues concerning a potential infringement case, the complaint is then transferred into the **EU Pilot application** . Finally, if the Commission decides to open a formal infringement procedure, the complaint is transferred into an infringement database called **NIF** .

The Commission receives a large number of infringement complaints every year, the majority of which are closed without opening an “EU Pilot”: in 2015 for example, the Commission handled 3 315 complaints, out of which 85 % were closed without a discussion being held with Member States because the Commission considered that it had no power to act, the correspondence did not qualify as an infringement complaint, or the complaint was not grounded [33] .

The Commission acknowledges that complaints are an important source of information and should be dealt with diligently. It has therefore established a number of administrative



guarantees for complainants through several Communications [34] .

Administrative guarantees for complainants include:

- registering all infringement complaints (subject to limited exceptions) and acknowledging receipt within 15 working days;
- informing the complainant in writing when the Commission decides to further examine the complaint with the Member State (usually through “EU Pilot”);
- informing the complainant in writing when the Commission decides to close the case or to open a formal infringement procedure;
- explaining why the Commission decides to close a case and sending what is referred to as a “pre-closure letter” inviting the complainant to submit any comments within a period of four weeks [35] .

The Commission has also set an objective to investigate complaints and decide whether to open a formal infringement procedure or to close the case **within one year** from the date the complaint is registered. Where this time limit is exceeded, the Commission must inform the complainant in writing.

[1] For a detailed explanation of the various stages of infringement proceedings, the purpose of EU Pilot and the procedural guarantees complainants enjoy, please see Annex I.

[2] See decisions closing inquiries OI/2/2009/MHZ on “public access to infringement procedure documents held by the Commission” and OI/2/2011/OV on “the Commission’s Communication on relations with complainants in respect of the application of EU law”:

<https://www.ombudsman.europa.eu/en/cases/decision.faces/en/4390/html.bookmark>  
<https://www.ombudsman.europa.eu/en/cases/decision.faces/fr/54039/html.bookmark>

[3] The handling of individual files is managed by the Directorates General (DGs), while the Secretariat General is responsible for managing the application, providing guidance to DGs and monitoring the whole process.

[4]

[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN)

[5] Source: statistics provided by the Commission during the inquiry. More precisely, 90 cases were closed without any further action and in 17 other cases a letter of formal notice was issued.

[6] Source: statistics provided by the Commission during the inquiry.

[7] Multiple exchanges in the same case could be required if, for instance, the Member State



has not replied comprehensively to the issues raised by the Commission, the assessment of the Member State's response led to new questions concerning compliance with EU law, or the complainant submits new information to the Commission services.

[8] Commission's annual report on '*Monitoring the application of EU law*' for 2015, p. 22. There are, however, significant differences between Member States, from 57 days for Slovakia to 85 days for France.

[9] Source: statistics provided by the Commission during the inquiry.

[10] See decisions on complaints 706/2007/BEH, 230/2011/EIS and 731/2012/JN.

[11] <https://www.ombudsman.europa.eu/cases/decision.faces/en/52917/html.bookmark>

[12] <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/49532/html.bookmark>

[13] Case n°420/2015/EIS.

[14] The number of new infringement procedures has decreased over the years, from 2.900 in 2009 to 742 in 2015.

[15] Commission's "Methodology and explanations", available at [http://ec.europa.eu/atwork/applying-eu-law/docs/annual\\_report\\_33/20160715\\_annual\\_report\\_2015\\_met](http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/20160715_annual_report_2015_met)

[16] This was not the case in 2008-2009, following the launch of "EU Pilot" and the creation of the "CHAP" application: the Commission did not update its procedures on its relations with complainants until 2012.

[17] [https://ec.europa.eu/info/about-european-union/problems-and-complaints\\_en](https://ec.europa.eu/info/about-european-union/problems-and-complaints_en)

[18] <https://www.ombudsman.europa.eu/cases/decision.faces/en/53125/html.bookmark>

[19] "*Acknowledgements of receipt have taken, at times, weeks or even months. Replies have been sent, in some cases, more than four months after the request and relevant information, such as the opening of the EU Pilot investigation, has reached the complainant belatedly and only when it explicitly requested it.*" Ibid. Para 35.

[20] See decision on complaints 503/2012/DK, 403/2014/MHZ and 25/2013/ANA.

[21] <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/60417/html.bookmark>

[22] The problem can be better addressed by another mechanism, a preliminary Court ruling is pending, the pursuit of the matter would be in contradiction with a new legislative proposal...

[23] In addition, the Commission explained that it reserves the right not to pursue certain



complaints, in accordance with the principles set out in its Communication, which points out that it will use its discretionary power regarding infringement proceedings in a strategic way. The Commission explained that it focuses and prioritises its efforts on the most important breaches of EU law by distinguishing between cases according to the added value which can be achieved by an infringement procedure. In deciding which cases to pursue, the Commission takes into account several factors including the nature and impact of the infringement, whether the case can be satisfactorily dealt with by more appropriate mechanisms at national level, etc.

[24]

<https://ec.europa.eu/info/about-european-union/problems-and-complaints/how-make-complaint-eu-level>

[25] [https://ec.europa.eu/assets/sg/report-a-breach/complaints\\_en/](https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/)

[26] Case C-562/14 P, Kingdom of Sweden v European Commission.

[27]

[http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/?lang=co](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang=co)

[28] The annual report on “ *Monitoring the application of EU law* ” only contains summarized information on the number of EU Pilot cases.

[29] Most EU Pilot files opened in 2015 related to five policy areas: Mobility and transport; Internal market, industry, entrepreneurship and SMEs; Justice and consumers; Environment; Taxation and customs.

[30] Which is governed by article 258 of the Treaty on the Functioning of the European Union (TFEU).

[31] Commission’s annual report on ‘ *Monitoring the application of EU law* ’ for 2015, p. 20.

[32]

[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN)

[33] Commission’s annual report on ‘ *Monitoring the application of EU law* ’ for 2015, p. 18.

[34] The Commission issued a first Communication “ *to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* ” in 2002, notably in response to the Ombudsman’s inquiries and remarks. The Commission updated its procedures through a second Communication “ *updating the handling of relations with the complainant in respect of the application of Union law* ” in 2012 and finally in an annex to its 2017 Communication.

[35] Unless there are exceptional circumstances requiring urgent measures.

