

Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/2/2011/OV against the European Commission

Recommendation

Case OI/2/2011/OV - **Opened on** 18/04/2011 - **Recommendation on** 28/05/2014 - **Decision on** 10/04/2014 - **Institution concerned** European Commission (Critical remark) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the complaint

1. On 5 September 2007, the Commission launched its " *EU Pilot* " Project via its Communication entitled *A Europe of Results - Applying Community Law* [2] . The EU Pilot Project introduced a novel way of dealing with complaints concerning alleged infringements of EU law. In this framework, the Commission also introduced a new system entitled " *Complaints Handling - Accueil des Plaignants* " (CHAP) for registering complaints and inquiries relating to the application of EU law by a Member State.

2. Four years have passed since the EU Pilot started operating in April 2008. The Ombudsman's inquiries into complaints concerning the way in which the Commission deals with infringement complaints have shown that it is essential to clarify the relationship between the EU Pilot and the procedural guarantees for complainants set out in the Commission's 2002 *Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* [3] ("the Communication"). It therefore became necessary to examine whether the Communication needs to be revised to take account of the CHAP registration system and the EU Pilot.

The subject matter of the inquiry

3. The Ombudsman opened an own-initiative inquiry into the Commission's application of the procedural rules set out in the 2002 Communication. The Ombudsman asked the Commission to inform him of its position on the relationship between the EU Pilot and the Communication and whether it proposed to revise the said Communication in light of the experience and insights derived from the application of the EU Pilot in the handling of infringement complaints.



In the event the Commission indeed intended to revise the Communication, the Ombudsman also asked to be informed (a) of the timetable for such a revision, (b) of the state of its thinking and reflections on the matter and (c) whether it envisaged consulting the European Ombudsman in this context.

The inquiry

4. On 18 April 2011, the Ombudsman opened his own-initiative inquiry and asked the Commission to submit an opinion. The Commission sent its opinion on 24 October 2011.

The Ombudsman's analysis and conclusions

A. Preliminary remark

5. As a preliminary remark, the Ombudsman underlines that, in his view, the EU Pilot constitutes a positive development as regards how the Commission deals with possible infringements of EU law by Member States. The EU Pilot, which is now used by 25 Member States, allows for quicker and more efficient handling of infringement complaints. The *Second Evaluation Report on EU Pilot* [4], published by the Commission on 21 December 2011, shows that Member States are given ten weeks to react to cases introduced in the EU Pilot and that there is a further deadline of ten weeks for the Commission to examine and assess the Member State's reply. The Report underlines that the observance of these deadlines by both parties is essential to ensure that the decision, either to send a letter of formal notice or to close the case, is taken within one year from the date of the registration in the CHAP or the creation of an own-initiative inquiry in the EU Pilot. As regards the "success rate" of cases introduced in the EU Pilot, the Report shows that 80 % of the responses by the Member States were assessed by the Commission as being "acceptable" (that is, in line with EU law), thereby enabling the relevant cases to be closed without the need to launch an infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU). The Commission also noted a reduction in the volume of new infringement proceedings since 2010.

6. The Ombudsman very much welcomes these positive developments in dealing with infringement cases.

7. The present own-initiative inquiry however concerns the continued adherence, under the new system introduced by the EU Pilot and the CHAP, to the procedural guarantees for the complainants set out in the Communication.

B. The revision of the Communication



Arguments presented to the Ombudsman

8. In its opinion on the own-initiative inquiry, the Commission pointed out that, when monitoring the application of EU law, it always has the interests of the citizens in mind. It stated that, in recent years, it has undertaken several initiatives to ensure and improve the protection of these interests. The following constitute illustrative examples of such initiatives:

- Along with the acknowledgement of receipt to complainants, the Commission always sends to the complainants a note on administrative guarantees and on the infringement procedure. This practice has been in place for a long time. The Europa website contains information on how citizens can exercise their rights.

- Since April 2008, the "EU Pilot" system has allowed for the rapid handling of potential infringement cases and complaints, in cooperation with the Member States, and has helped to deliver better and quicker responses to problems faced by citizens.

- Since September 2009, the "CHAP" system, designed to register and process complaints about the application of EU law, goes beyond the earlier practice. Correspondence is now handled as an inquiry or as a complaint, depending on the information provided by the correspondent.

9. In its comments on the Ombudsman's own-initiative inquiry I/03/2009/MHZ, the Commission indicated that *"the purpose of EU Pilot is to better organize work which the Commission has to do in trying to respond to citizens' and businesses' enquiries and complaints on the application of EU law. The Commission initiated [the] EU Pilot to test increased commitment, co-operation and partnership between the Commission and Member States in responding more quickly and better to these enquiries and complaints. EU Pilot is designed to achieve increased efficiency in the work of the Commission and therefore to accelerate and improve results obtained, thereby ensuring a more effective use of its resources. It does not have the purpose to compensate for any excess in volume of complaints over the administrative capacity to deal with them"*.

10. The Commission argued that the EU Pilot system was designed and developed in the framework of the 2007 Communication *A Europe of Results - Applying Community Law*, and in accordance with the Communication. The complainants are fully informed that the EU Pilot is being used to deal with their correspondence and enjoy all the guarantees foreseen by the Communication. The Commission underlined that the introduction of the EU Pilot did not modify the 2002 Communication, apart from informing complainants that, following registration in the CHAP, complaints and inquiries could be examined further in cooperation with the Member State concerned.

11. The Commission stated however that the introduction of the CHAP required some modifications to the Communication. The Commission now responds more directly to the interests of citizens, business and civil society by registering the correspondence either as an inquiry or as a complaint, depending on the information provided by the correspondent. The Commission therefore indicated that this change in its working method may be reflected in a



revision of the Communication. It further pointed out that the Treaty on the Functioning of the European Union also gives rise to the need for adaptations to the Communication as regards some terms which have been modified. Some corrections are also envisaged in order to clarify divergences in some linguistic versions of the Communication.

12. The Commission concluded that it intends to revise the Communication in light of the experience gained in the area of complaints over the last years, and that this revision would focus "inter alia" on alignment with the new "CHAP" system.

The Ombudsman's assessment

13. On 21 December 2011, the Commission sent to the Ombudsman its *Second Evaluation Report on EU Pilot* which covers the period from its start-up in April 2008 until September 2011. The Ombudsman has already welcomed, in the preliminary remark above, the positive elements introduced by the EU Pilot. The Ombudsman notes however that the Report is completely silent on the relationship between the EU Pilot and the CHAP, on the one hand, and the Communication on the other. Although the Report underlines the EU Pilot's positive results for citizens as well, it does not mention the Communication. Even the CHAP registration system is mentioned only once in the Report (page 4, second paragraph). More generally, the Report seems to focus exclusively on relations between the Commission and the Member States ("the parties"). The position of the complainants, which are an important source of information for possible infringement cases, seems not to have been taken into consideration in this context. The Report only mentions, at the bottom of page 3 [5], that in the event of a complaint, a response will also be prepared to inform the complainant of the outcome of the inquiry. However, there is no indication in the Report of whether complainants are also kept informed when the Commission requests information from the Member State within 10 weeks or when the latter has replied. There is, in addition, no indication in the report as to whether, in those cases where a Commission department intends to propose that no further action be taken on a complaint, the Commission will still give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments he or she may have within a period of four weeks (point 10 of the Communication).

14. The Ombudsman notes that, in its opinion, the Commission has indicated that it intends to revise the Communication, but has not put forward any timetable for such a revision or indicated whether it envisaged consulting the European Ombudsman in this context. Considering that four years have elapsed since the EU Pilot was introduced in April 2008, the Ombudsman is of the opinion that it would now be important for the Commission to revise the Communication so as to make it reflect the changes which were introduced by the EU Pilot and the CHAP, as well as by the Lisbon Treaty.

15. The Ombudsman emphasises that the present draft recommendation aims merely at updating the Communication, while retaining what the Ombudsman understands as being the objectives and the spirit of the original Communication as drafted by the Commission. The draft



recommendation is made, therefore, without prejudice to the possibility of a subsequent reform of the infringement procedure that would enhance the rights of complainants.

16. On the basis of the Commission's Second Evaluation Report on the EU Pilot, the Ombudsman examined in detail which parts of the Communication would need to be revised in order to reflect the changes which were introduced by the EU Pilot and the CHAP. He has produced to that effect a document which reflects, in track changes, the modifications which he considers appropriate. Apart from changes to the relevant Articles of the TFEU instead of the EC Treaty, reference to Union law instead of Community law and to new internet links [6], these modifications mainly concern the following points:

- In point 1 of the Communication ("*Definitions and scope*"), a distinction should be made between "complaints" and "inquiries".
- Registration and acknowledgement of complaints and inquiries could be dealt with together in one single point instead of in two separate points.
- In a further point which could be entitled "*Actions with respect to complaints and inquiries*", there should be a reference to the possibility that the Commission may deal with a complaint under the EU Pilot.
- As regards point 7 "*Communication with complainants*", it would be appropriate also to inform the complainant(s) of the Commission's decision to submit the case to the Member State through the EU Pilot and of the Commission's analysis of the Member State's reply received through the EU Pilot;
- As regards the time-limits for investigating complaints (point 8 of the Communication), the Ombudsman considers that it is appropriate to include the following new time-limits in the text of the Communication: i) to arrive at a decision to launch an EU Pilot process within ten weeks from the date a complaint is registered; ii) to request the Member State concerned to provide comments in relation to a complaint or inquiry within ten weeks from the date the EU Pilot process is launched; and iii) to examine and assess a Member State's reply within ten weeks from the date the reply is received.

17. As regards divergences between linguistic versions, the Ombudsman noted that the second paragraph of point 9 of the Communication, referred, in English, to "*the choice of the complaint*", whereas in the French and German versions, the reference is, respectively, to "*le choix des griefs*" and to "*die Wahl der Beschwerdegründe*". It would therefore be appropriate to adapt the English text which could refer instead to "*the choice of the allegations*".

18. Finally, the Ombudsman notes that, as it stands, the Communication is not available in the official languages of the Member States which acceded to the EU in 2004 and 2007. Nor is it available in Irish. On 12 March 2012, the Ombudsman therefore opened a separate own-initiative inquiry (OI/2/2012/VL) into this issue.



19. The Ombudsman considers that the above suggestions for minimum changes could help the Commission in revising the text of the Communication. The Ombudsman remains at the Commission's disposal for any further assistance it might eventually request in the framework of the said revision.

B. The draft recommendation

On the basis of his own-initiative inquiry, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should consider revising the Communication, so as to ensure that it reflects the changes that were introduced by the EU Pilot and the CHAP.

The Commission will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 30 June 2012. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 28 March 2012

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] COM(2007) 502 final, 5 September 2007.

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

[4] COM(2011) 930 final. The Second Evaluation Report was accompanied by a Commission Staff Working Paper entitled "Functioning of the system" SEC(2011) 1626 final, dated 21 December 2011.

[5] In the English version of the Report.

[6] Several internet links mentioned in the Communication as it stands do not work anymore.