

Decision of the European Ombudsman closing his inquiry into complaint 230/2011/(TS)EIS against the European Commission

Decision

Case 230/2011/EIS - Opened on 16/03/2011 - Decision on 12/10/2012 - Institution concerned European Commission (Critical remark) |

The background to the complaint

1. The present case concerns the European Commission's handling of infringement complaint 2004/4404 against Finland, regarding an allegation of discrimination against men in voluntary additional pension schemes.
2. Upon Finland's accession to the European Economic Area on 1 January 1994, Finland had to equalise pension benefits for men and women. To this end, it enacted law 1038/97 on equalising measures in voluntary additional pension schemes (hereinafter the 'Equalising Act'), applicable retroactively from 1 January 1994. Before the entry into force of the Equalising Act, women could retire between the ages of 60 and 63. The retirement age for men was 65 years. The Equalising Act gave both men and women the possibility to choose a lower or a higher retirement age.
3. On 28 March 2002, the Finnish Ombudsman for Equality submitted an infringement complaint to the Commission. In her complaint, she pointed out that, in some cases, the calculation of pension benefits on the basis of the Equalising Act gave rise to unfavourable results for male employees compared with their female counterparts. If a man chose to retire earlier under the new rules, his employment period prior to 1994 would not be taken into account, whereas if a woman did so, that period would be taken into account. Thus, a male employee with an employment history starting prior to 1 January 1994 and opting for a lower retirement age would receive a smaller pension than his female counterpart in the same circumstances. In her infringement complaint, the Finnish Ombudsman for Equality raised the issue whether the Equalising Act is in conformity with what is now Article 157 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') and the relevant secondary legislation (Directive 2006/54/EC [1] , which replaced former Directive 86/378/EEC [2]).
4. After an exchange of correspondence with the Finnish Government, the Commission opened



infringement proceedings in 2004. It sent a letter of formal notice to Finland in January 2005, which was followed by a complementary letter of formal notice in October 2006. In June 2007, the Commission sent a reasoned opinion, which was followed by an additional reasoned opinion in September 2008.

5. The complainants in the present case are two Finnish men, Mr K and Mr S, whose pension rights may be affected by the outcome of infringement complaint 2004/4404. Mr S also represents Mr P, who is the complainant in the original case brought before the Finnish Ombudsman for Equality. In October 2010, Mr S contacted the Commission to complain that, until then, the Commission had not brought an action against Finland before the Court of Justice of the European Union (hereinafter the 'Court of Justice') in case 2004/4404.

6. On 1 December 2010, the Commission replied to Mr S, stating that the case was complex. For that reason, it was not possible to give any indication as to when the decision concerning the next steps would be taken or what the content of that decision would be. It further explained that it had three options: (i) issue a second additional reasoned opinion, (ii) decide to refer the case to the Court of Justice or (iii) close the case.

7. On 14 January 2011, the complainants turned to the European Ombudsman.

The subject matter of the inquiry

8. The Ombudsman opened an inquiry into the following allegation and claim:

Allegation

The Commission failed to reach a decision within a reasonable time on whether or not to refer the matter to the European Court of Justice under Article 258 of the Treaty on the Functioning of the European Union.

Claim

The Commission should reach a decision on whether or not to refer the matter to the Court.

The inquiry

9. On 16 March 2011, the Ombudsman requested the Commission to submit an opinion on the complainants' allegation and claim. The Commission sent its opinion on 27 September 2011. After having received the Commission's opinion, the Ombudsman decided to inspect the Commission's file on infringement complaint 2004/4404, as well as files on other infringement complaints against other Member States which the Commission referred to in its opinion and



which it had decided to close some time before. The Ombudsman's services carried out the inspection on 14 November 2011. The Commission's opinion and a copy of the inspection report were forwarded to the complainants with an invitation to make observations.

10. On 7 December 2011, the Commission informed the Ombudsman that, on 24 November 2011, it decided to close infringement case 2004/4404 against Finland.

11. That same day, the Ombudsman's services forwarded a copy of the Commission's above-mentioned letter to the complainants who took that letter into account when submitting their observations on 15 December 2011.

The Ombudsman's analysis and conclusions

Preliminary remarks

12. In order to avoid any misunderstanding, it is important to emphasise that the scope of the present inquiry is limited to assessing whether the length of time it took the Commission to handle infringement complaint 2004/4404 was reasonable.

13. The Ombudsman notes that the Commission has, in the meantime, adopted a decision to close the infringement complaint. In their observations, the complainants put forward a number of arguments concerning the *merits* of the Commission's decision and argued as follows. First, after the Court of Justice handed down judgments against Italy and Greece in comparable cases, the Commission apparently changed its approach in the pending cases against other Member States. In its plea presented in the case against Greece in 2007, the Commission considered Member States' arguments relating to possible cost implications on national budgets to be devoid of purpose. However, in the end, cost effects were apparently one of the main reasons underlying the Commission's decision to close infringement case 2004/4404 against Finland. The explanations provided by the Commission concerning those cost effects were, on the other hand, hypothetical and marginal. Second, the complainants also referred to another reason the Commission gave for closing infringement case 2004/4404. This was that it wanted to be consistent with other similar infringement cases in which it had not asked the Member States concerned retroactively to rectify the incorrect implementation and in which the discriminated parties had not been indemnified. The complainants argued that the reasons which the Commission gave for closing the case against Finland were artificial, since in infringement complaint 2004/4404, no financial compensation had been requested. Third, the complainants also questioned the Commission's reasons for not having referred the case to the Court of Justice, whereas in similar cases against other Member States it did so successfully. Finally, they asked the Ombudsman to verify whether the reasons the Commission gave to close infringement case 2004/4404 were sufficient and legally valid.

14. The Ombudsman points out that, pursuant to Article 2(4) of his Statute, complaints to him must be preceded by appropriate administrative approaches to the institution concerned. While



it is true that, in his reply of 26 October 2011 to the Commission's pre-closure letter of 7 October 2011, one of the complainants, acting on behalf of Mr P, challenged the Commission's intention to close the case, it does not appear that the complainants have already raised all or at least most of the issues referred to in point 13 above with the Commission. In these circumstances, the Ombudsman takes the view that the complainants have not yet made all appropriate administrative approaches to the Commission. The Ombudsman is thus unable to address those issues in his present decision. Naturally, the complainants remain free to submit a new complaint to the Ombudsman if, after turning to the Commission, they do not receive a satisfactory reply within a reasonable time.

15. As a second preliminary remark, the Ombudsman notes that, in the part of their observations referring to the inspection report, the complainants took the view that the Commission did not present all the relevant documents to the Ombudsman's representatives when they inspected the files. The Ombudsman recalls that, as stated therein, the inspection report only lists those documents of which his representatives decided to take copies during the inspection. However, this is not to say that during the inspection they did not have access to all documents considered relevant, and thus also to documents not listed in the report.

16. As a third preliminary remark, the Ombudsman observes that the complainants also expressed an intention to bring an action against the Commission for failure to act pursuant to Article 265 TFEU. They indicated that they would do so on behalf of Mr P, the original complainant before the Finnish Ombudsman for Equality. In this respect, it should be noted that, according to the case-law of the Court of Justice, "*in requesting the Commission to commence proceedings under Article [258 TFEU] the applicant is in fact seeking the adoption of acts not of direct and individual concern to it ... , which would in no way be open to it to challenge in annulment proceedings*". An "*action is inadmissible inasmuch as it seeks a declaration of a failure to act on the part of the Commission and of the unlawfulness of its failure to initiate the procedure provided for under Article [258] of the [TFEU]*" [3] .

17. It is appropriate to consider the complainants' allegation and claim together.

A. As regards the Commission's handling of the infringement complaint

Arguments presented to the Ombudsman

18. In their complaint to the Ombudsman, the complainants alleged that the Commission failed to reach a decision within a reasonable time on whether or not to refer the matter to the Court of Justice under Article 258 TFEU. They claimed that the Commission should take a decision forthwith.

19. In its opinion, the Commission pointed out that the Court of Justice has consistently held that the Commission alone is competent to decide whether the pre-litigation procedure should



be followed by a referral to the Court. The Commission has the " *right, but not the duty, to commence proceedings before the Court for a declaration that the Member State concerned is in breach of its obligations* " under EU law [4] . The Commission further emphasised, with reference to the case-law of the Court of Justice [5] , that " *the rules of Article 169 [now Article 258 TFEU] of the Treaty must be applied with no attendant obligation on the Commission to act within a specific period, save where the excessive duration of the pre-litigation procedure laid down by Article 169 [now Article 258 TFEU] is capable of making it more difficult for the Member State concerned to refute the Commission's arguments and of thus infringing the rights of defence.* " Furthermore, the Commission emphasised that it enjoys a wide discretion which " *excludes the right for individuals to require it to adopt a specific position* " [6] , and it is " *not even for the Court to decide whether that discretion was wisely exercised* " .

20. In its opinion (which preceded its decision to close infringement case 2004/4404), the Commission also conceded that, in the present case, no formal decision was taken after September 2008. It argued, however, that its services had continuously been working on the file ever since. At the beginning of 2011, the Commission asked Finland to provide further information, which the Finnish Government did at the end of March 2011. Furthermore, the Commission had not long before closed several similar infringement cases concerning unequal pension entitlements and pensionable age in occupational pension schemes. In those cases, issues of retroactivity and of equalising measures for pension entitlements were also at stake. The Commission concluded that the case was complex and it had to adopt an approach that was consistent with its approach in all the similar cases against the other Member States concerned.

21. In their observations, the complainants, in brief, pointed to the following issues. First, they stressed that the Commission disposed of sufficient information to conclude that the Finnish Equalising Act infringed EU law. When it initiated the infringement proceedings, the Commission took the view that Finland's alleged discrimination against men could easily be ascertained. However, at some point after 2009, the Commission apparently changed its position. Second, the Commission recently successfully brought two similar cases before the Court of Justice, namely, one against Italy [7] and another against Greece [8] . In these two cases, the Court concluded that, by maintaining provisions pursuant to which the retirement conditions vary according to whether officials are men or women, the Member States concerned failed to fulfil their obligations under Article 141 EC [9] . The case against Italy was basically identical to the one against Finland. There was no legal reason to treat the Finnish case differently from the Italian one. Besides, in its judgment in the *Niemi* [10] case, the Court of Justice held, as regards a gender-differentiated retirement age, that " *a pension such as that paid in accordance with [the Finnish State Pension Act] falls within the scope of Article 141 of the Treaty [now Article 157 TFEU]* ". Mr P's views on the pre-closure letter of 7 October 2011 were not taken into account.

22. Finally, the complainants pointed out that, according to point 8 of the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (hereinafter 'the Commission's Communication') [11] , the Commission should investigate complaints with a view to arriving at



a decision either to take further action or to close the case within one year of the date of registration of the complaint. However, since September 2008, the Commission had taken no decision in the case at hand.

The Ombudsman's assessment

23. The Ombudsman points out that complaints by citizens constitute an essential means for informing the Commission of possible infringements of EU law. They enable the Commission effectively to fulfil its role of guardian of the Treaties.

24. The Ombudsman further notes that equal pay for men and women is a founding principle of the European Union enshrined in Article 157 TFEU. It follows from the case-law of the Court of Justice that pensionable age as well as benefits related to pension entitlement and other rights have to be the same for men and women [12] .

25. According to the settled case-law of the Court of Justice, the Commission enjoys a wide margin of discretion when assessing complaints submitted by citizens and it is not obliged to commence infringement proceedings in every instance where a Member State has violated EU law. Citizens are therefore not entitled to require the Commission to adopt a particular position with regard to the substance of their infringement complaints [13] .

26. However, the fact that the Commission enjoys wide discretion clearly does not mean that in the handling of infringement complaints it is free from constraints flowing from fundamental rights and from principles of good administration. In this respect, Article 41 of the Charter of Fundamental Rights of the European Union, which provides for a right to good administration, is of particular relevance. It follows from the wording of Article 41(1) of the Charter that "[e] very person has the right to have his or her affairs handled ... within a reasonable time by the institutions, bodies, offices and agencies of the Union. "

27. Moreover, the Ombudsman notes that, in the Commission's Communication, the Commission has made certain commitments as regards its handling of infringement complaints. Point 8 of the Communication provides that " *as a general rule, Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint* ". The Ombudsman has consistently taken the view that this provision means that the Commission has committed itself to doing its utmost to complete the investigation, and to decide whether to open infringement proceedings or to close the case, within one year. However, it is not excluded that more time may be needed in certain situations [14] . This understanding is corroborated by the last sentence of point 8, according to which, " *where this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing* ".

28. The Ombudsman has moreover made it clear that exceeding the one-year time limit is only justified if the Commission provides specific and valid reasons for the delay [15] and, in any event, if it is indeed still investigating the case. Moreover, the Commission cannot rely on its



discretion in order to justify its administrative indisposition to act [16] .

29. In the case at hand, the Finnish Ombudsman for Equality submitted infringement complaint 2004/4404 on 28 March 2002. The Commission opened infringement proceedings against Finland in 2004. On 24 November 2011, that is, more than seven years after opening those proceedings, it decided to close the infringement complaint. The Ombudsman notes that the Commission invoked two different arguments to justify why it exceeded the one-year time limit for taking a decision on the infringement complaint: first, that the issues at stake were difficult and complex and required a particularly thorough analysis; and second, that before taking further action it was appropriate for the Commission to adopt an approach that was consistent with its approach in all similar cases against other Member States concerning the retroactivity of equalising measures for pension entitlements.

30. As regards the first argument, the Ombudsman considers that the Commission did not substantiate its view that the case was complex. Nevertheless, the analysis of the inspected file has shown that many of the arguments raised were indeed factually and legally intricate. The Ombudsman therefore is unable to call into question the Commission's assessment that the arguments raised in the present case were complex. However, the complexity of a case as such cannot justify a delay in the handling of an infringement complaint, if it emerges that the Commission failed to take adequate steps in the time at its disposal.

31. The Ombudsman notes that, in spite of the recognised complexity of the case at hand, the inspection of the file revealed that the action taken by the Commission from November 2008 to November 2011 was rather limited. In addition to internal notes and the request for information mentioned in point 20 above, the Commission appears to have sent eight internal e-mails and a few e-mails to the Finnish authorities during that period of time. Moreover, it was only in 2011, after one of the complainants turned to it again in October 2010, that the Commission contacted the Finnish authorities anew.

32. Against this background, the Ombudsman is not convinced that the Commission's further information request to Finland in January 2011 was truly essential for it to take a position on infringement complaint 2004/4404. In this regard, it should be noted that Finland's reply to the Commission's information request merely confirmed certain statistical and national economic data. If a further request to the Finnish authorities was indeed necessary, the Ombudsman fails to understand why the Commission could not have reached this conclusion earlier. In the given context, it should also be recalled that the alleged infringement was brought to the Commission's attention in 2002, while the Commission only closed the case on 24 November 2011. Besides, the Commission continued working on the case even after the Court of Justice had delivered judgments against Italy and Greece in the cases referred to in footnotes 7 and 8 above. In light of the foregoing, the Ombudsman takes the view that the complexity of the issues did not justify the delay in the case at hand.

33. As regards the second of the two arguments referred to in point 29 above (consistency with other similar infringement cases), the parties disagree on whether the Commission's argument to the effect that it sought to remain consistent *vis-à-vis* other similar infringement cases against



other Member States can justify the time it took the institution to decide on the present infringement case. The Commission essentially argued that it deemed a comparison with the other cases necessary since (i) infringement case 2004/4404 and the other infringement cases all concerned unequal pension entitlements and pensionable age in occupational pensions as well as retroactive measures for pension entitlements, and (ii) the Commission had to adopt a consistent approach in all the cases concerned.

34. The Ombudsman recalls that he has taken the view that, in order to react consistently to the same kinds of infringement and to ensure equal treatment, the Commission needs to analyse similar cases against another Member State before taking a position. The Ombudsman further recognises that, as such, this fact could constitute an acceptable justification for the argument that more time is needed before reaching a *final* conclusion [17]. However, when invoking such an argument, the Commission must take due account of principles of good administration. This implies, among other things, that, when adopting a 'consistent approach', the Commission must take due account of citizens' interests. Moreover, pursuing a 'consistent approach' must not lead to unnecessary delays in the Commission's decision [18].

35. In the case at hand, the Commission did not specify or demonstrate why a need for consistency prevented it from deciding earlier. The Ombudsman understands that infringement case 2004/4404 against Finland and the other relevant infringement cases against Italy, Greece, France and Denmark each raised questions of retroactivity and 'transitional inequality'. The Commission also investigated all the cases essentially at the same time. However, even if there was indeed a need for consistency, it appears that such need could not possibly justify the Commission's delay in taking a decision in the present case. In this regard, it should be noted that, as stated in point 32 above, infringement case 2004/4404 was brought to the Commission's attention in 2002, but was the last of the five similar infringement cases to be closed. What is more, as far as the cases against Italy and Greece are concerned, the Commission brought them before the Court of Justice on 1 February 2007 and 17 December 2007 respectively, and the Court handed down judgments in 2008 and 2009 respectively. However, as mentioned before, infringement case 2004/4404 remained open and was only closed on 24 November 2011, that is to say, more than two years after the last of these two judgments was delivered.

36. In light of the above, the Ombudsman considers that the Commission failed to provide valid reasons for adopting a decision on infringement complaint 2004/4404 only in late 2011, that is, more than seven years after the Commission opened its investigation. This constitutes an instance of maladministration.

37. When the Ombudsman finds an instance of maladministration, he addresses, where appropriate, a friendly solution proposal or a draft recommendation to the institution concerned. In the present case, however, it should be noted that, in the course of the Ombudsman's inquiry, the Commission adopted a decision to close infringement complaint 2004/4404. In these circumstances, the Ombudsman takes the view that it would not serve any useful purpose to make a friendly solution proposal or a draft recommendation as regards the issue of delay. This does not affect the conclusion reached above that the Commission incurred undue delay.



Accordingly, the Ombudsman will make a critical remark below.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

It constitutes good administrative practice to deal with infringement complaints within a reasonable time. In the case at hand, the Commission only closed the case more than seven years after it initiated infringement proceedings against Finland, without providing valid reasons to justify its delay. This amounts to an instance of maladministration.

The complainants, the Commission and the Finnish Ombudsman for Equality will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 12 October 2012

[1] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204, p. 23.

[2] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986 L 225, p. 40.

[3] See, for example, Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraphs 11 and 13 and Case T-13/94 *Century Oils Hellas AE v Commission* [1994] ECR II-431, paragraphs 14 and 16.

[4] Case C-207/97 *Commission v Belgium* [1999] ECR I-275, paragraph 24; Case 247/87 *Star Fruit v Commission*, cited in footnote 3 above, paragraph 12; Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 46.

[5] Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461 paragraphs 15 and 16 and Case C-207/97 *Commission v Belgium*, cited in footnote 4 above, paragraph 25.

[6] Case T-571/ 93 *Lefebvre frères et soeurs and Others v Commission* [1995] ECR II-2379, paragraph 60.



[7] Case C-46/07 *Commission v Italy* [2008] ECR I-151.

[8] Case C-559/07 *Commission v Greece* [2009] ECR I-47.

[9] Article 141 EC corresponds to what is now Article 157 TFEU.

[10] Case C-351/00 *Niemi* [2002] ECR I-7007, paragraph 56.

[11] OJ 2002 C 244, p. 5. This Communication was replaced by a new one in 2012. However, the changes introduced do not affect the present case.

[12] See, in particular, Case 262/88 *Barber* [1990] ECR I-1889, paragraphs 32 to 35.

[13] See footnote 6 above.

[14] See, for instance, the Ombudsman's decision on complaint 2944/2004/(GK)(OV)ID, point 1.7 and his decision on complaint 706/2007/(WP)BEH, point 34.

[15] See references in the preceding footnote.

[16] See also the Ombudsman's decision on complaint 1480/2011/MHZ, point 28 and the Opinion of Advocate General Alber in Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 83.

[17] See the Ombudsman's decision on complaint 1480/2011/MHZ, points 36 and 37.

[18] See the Ombudsman's decision on complaint 706/2007/(WP)BEH, points 39 and 40.