

Decision of the European Ombudsman closing his inquiry into complaint 104/2010/(IP)EIS against the European Commission

Decision

Case 104/2010/EIS - **Opened on** 31/03/2010 - **Decision on** 14/12/2012 - **Institutions concerned** European Commission (No maladministration found) | European Commission (Critical remark) | European Commission (No further inquiries justified) |

The complainant is an Italian citizen residing in Germany. He argued that his wife had been a victim in Germany of discrimination in employment on the grounds of age and nationality, because a company she had applied to for a job did not hire her. Following the unsuccessful outcome of court proceedings, the complainant submitted an infringement complaint to the European Commission, alleging that the German authorities failed properly to transpose into the national legal order an EU Directive on equal treatment in employment and occupation.

The complainant subsequently turned to the European Ombudsman and alleged that the Commission failed (i) to register his infringement complaint, (ii) to deal with it accordingly, and (iii) to provide convincing reasons to justify why it did not intervene in his case.

In its opinion, the Commission explained that it had registered the complainant's infringement complaint a few days after having received it. It regretted not having given the complainant prior notice of its intention to close his infringement complaint and that it did not inform him of the closure of the case. The Commission moreover explained that Germany had transposed the aforesaid Directive in an appropriate and timely manner and provided specific reasons as to why there was no need to open an infringement procedure on the basis of the complainant's submissions.

Given that the Commission had in fact registered the infringement complaint, the Ombudsman found no maladministration in this regard. Concerning the substance of the case, no further inquiries were justified, because the Commission gave specific and convincing reasons in support of its position in the course of the inquiry. The Ombudsman noted that the Commission acknowledged that it neither gave the complainant prior notice of its intention to close his infringement complaint nor informed him of the closure of the case. In addition, it did not apologise for this omission. He therefore made a critical remark.



The background to the complaint

1. The present case concerns the European Commission's handling of an infringement complaint against Germany, regarding an allegation of discrimination in employment on the grounds of age and nationality.
2. The complainant is an Italian citizen residing in Germany. According to him, his wife, who is also an Italian national, has been a victim in Germany of discrimination in employment on the grounds of age and nationality, because a company she applied to for a job did not hire her. In 2004, the complainant initiated legal proceedings before the German courts on behalf of his wife. The case was first dealt with by the Munich Labour Court [1] , which concluded that the complainant's wife could not prove that she had been discriminated against on the grounds of age and nationality. Subsequently, the complainant brought the matter before the Labour Court of the Land Bavaria [2] , the German Federal Labour Court [3] and the German Constitutional Court [4] , which all essentially upheld the decision of the Munich Labour Court.
3. Following the unsuccessful outcome of the above-mentioned court cases, the complainant initiated proceedings against Germany before the European Court of Human Rights in September 2007. That Court dismissed his application on 3 September 2009.
4. On 7 December 2009, the complainant submitted an infringement complaint to the Commission. He alleged that the German authorities failed properly to implement Directive 2000/78/EC [5] (hereinafter 'Directive 2000/78') establishing a general framework for equal treatment in employment and occupation, and that his wife was a victim of discrimination based on age and nationality in Germany.
5. On 16 December 2009, the Commission replied to the complainant and stated that it did not intend to intervene in the case.
6. On 12 January 2010, the complainant turned to the European Ombudsman.
7. The Ombudsman opened an inquiry into the following allegations and claim.

The subject matter of the inquiry

Allegations

- (1) The Commission failed (i) to register the complainant's complaint of 7 December 2009 as an infringement complaint and (ii) to deal with it accordingly.
- (2) The Commission failed to provide the complainant with convincing reasons to justify why it did not intervene in his case.

Claim



The Commission should properly deal with the complaint submitted by the complainant on 7 December 2009.

The inquiry

8. On 31 March 2010, the Ombudsman requested the Commission to submit an opinion on the complainant's allegations and claim. The Commission sent its opinion on 1 July 2010. The complainant submitted his observations on the Commission's opinion on 16 August 2010. After having received the Commission's opinion and the complainant's observations thereon, the Ombudsman considered that there was a need for further clarifications. He therefore asked the Commission to provide further information on certain aspects of the case. The Commission submitted its reply on 22 August 2011. The complainant submitted his observations on the Commission's reply on 6 October 2011.

9. In order to avoid any misunderstanding, it is important to emphasise that the scope of the present inquiry is limited to assessing the Commission's handling of the complainant's infringement complaint, as identified in the complainant's allegations and claim referred to in point 7 above.

10. The Ombudsman notes that, in his observations, the complainant expressed criticism of what he considers to amount to conduct that is typical of the German judicial authorities. In this respect, the Ombudsman points out that pursuant to Article 2(1) of his Statute, his mandate is limited to investigating possible instances of maladministration in the activities of the institutions, bodies, offices and agencies of the European Union. It follows that the Ombudsman is not empowered to deal with any grievances about national authorities, such as the German judicial authorities.

11. In his observations on the Commission's opinion and its reply to the Ombudsman's request for further information, the complainant also (i) expressed the view that Germany had concealed from the Commission the fact that its courts had no intention to apply Directive 2000/78 in their judgments, and (ii) disagreed with the merits of the judgments of the German courts referred to in footnotes 1 to 4 above. In this regard, he stated that the Munich Labour Court, the court of first instance in the complainant's case, made a mistake when indicating his wife's date of birth in the judgment. While his wife was actually born in 1950, the court indicated 1959 as her year of birth. The complainant argued that this mistake was deliberate and led to the dismissal of her allegations and claims.

12. As regards the issues mentioned in the previous point, the Ombudsman must reiterate that, pursuant to Article 2(1) of his Statute, his mandate is limited to investigating possible instances of maladministration in the activities of the institutions, bodies, offices and agencies of the European Union. He also points out that, pursuant to Article 1(3) of his Statute, he may not intervene in cases before courts or question the soundness of a court's ruling. The Ombudsman is thus not empowered to address these issues in his decision.



13. Given their factual connection, it is appropriate to consider the complainant's claim to encompass both of his allegations.

14. In his complaint to the Ombudsman, the complainant alleged that the Commission failed (i) to register his complaint of 7 December 2009 as an infringement complaint and (ii) to deal with it accordingly. He claimed that the Commission should register his complaint and deal with it accordingly.

15. In its opinion, the Commission explained that, after the introduction, in September 2009, of the CHAP database [6] for the registration of enquiries and complaints on the application of EU law, it pursued to this effect a "*policy of registering either as an inquiry or as a complaint correspondence which clearly indicates the intention of the author*". The Commission pointed out that the complainant's letter of 7 December 2009 was registered in the CHAP database as a complaint, on 15 December 2009. The Commission regretted that its services failed to comply with the obligation (i) to inform the complainant that they intended to propose that no action would be taken on his case and (ii) to inform him that his case had been closed.

16. In his observations, the complainant took the view that the German Commission staff member in charge of his complaint "*boycotted*" his complaint.

17. The Ombudsman notes that, in its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [7] (hereinafter referred to as 'the Commission's Communication'), the Commission made certain commitments as regards its handling of infringement complaints. In accordance with its point 3, "*[a]ny correspondence which is likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission*".

18. In the case at hand, the Commission pointed out that it registered the complainant's complaint of 7 December 2009 as an infringement complaint on 15 December 2009, that is, eight days after having received it. The complainant did not dispute this statement. On this basis, the Ombudsman concludes that the Commission fulfilled its obligation under point 3 of the Commission's Communication. There was thus no maladministration in relation to point (i) of the complainant's allegation.

19. As regards point (ii) of the complainant's allegation and the corresponding aspect of his claim, the Ombudsman notes that, in its reply of 16 December 2009 to the complainant's infringement complaint, the Commission merely explained to him in brief why it did not intend to open an infringement procedure against Germany. In this respect, the Ombudsman emphasises that point 10 of the Commission's Communication provides that "*where a Commission department intends to propose that no further action be taken on a complaint, it will 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 comment within a period of four weeks*". Furthermore, according to point 7 of the Commission's Communication, "*Commission*



departments will contact complainants and inform them in writing, after each Commission decision [...] of the steps taken in response to their complaint". The Commission's failure to comply with these commitments in the present case constitutes an instance of maladministration.

20. In its opinion, the Commission acknowledged and regretted that, in the case at hand, it did not live up to its above-mentioned obligations. The Ombudsman welcomes this statement. However, the Ombudsman considers that, in circumstances such as those of the case at hand, it would have constituted good administrative practice to offer an apology. No such apology was extended, however.

21. The Ombudsman points out that, as deplorable as the Commission's omission was, he is unable to share the complainant's view that his complaint was "*boycotted*". In any event, the complainant did not substantiate his views in this respect. This, however, does not affect the Ombudsman's conclusion that the Commission's failure to (i) give the complainant prior notice of its intention to close his infringement complaint, and (ii) inform him of the closure of the case amounted to maladministration.

22. When the Ombudsman finds an instance of maladministration, he addresses, where appropriate, a friendly solution proposal or a draft recommendation to the institution concerned. However, in view of his findings concerning the substance of the case (see points 34 to 40 below), the Ombudsman considers that it would not serve any useful purpose to make a friendly solution proposal or a draft recommendation in this regard. Accordingly, the Ombudsman will make a critical remark below.

23. In his complaint, the complainant argued that the Commission failed to provide him with convincing reasons to justify why it did not intervene in his case, that is to say, why it did not open an infringement procedure against Germany. He claimed that the Commission should provide convincing reasons to justify its position.

24. In its letter of 16 December 2009, the Commission provided the complainant with a brief outline of Directive 2000/78, namely, of its aim and scope, and in which cases exceptions to the prohibition of age discrimination can be made. The Commission then stated that the legislation which implemented Directive 2000/78 in Germany, namely, the *Allgemeines Gleichbehandlungsgesetz* ('AGG'), complies with the Directive as regards the provisions on age discrimination.

25. The Commission also mentioned its role of guardian of the Treaties, in the exercise of which it closely monitors "*the implementation of Community law at national level and takes the necessary measures as provided for by the EC Treaty, should Member States be found in breach of Community law.*" The Commission pointed out that it cannot intervene in questions of interpretation and application of national law, which are within the remit of the Member State concerned alone. Therefore, the Commission concluded that it is, in principle, up to individuals to initiate legal proceedings available under national law and to contest possible infringements of EU law before national courts.



26. In its opinion, the Commission essentially reiterated the position set out in its letter to the complainant and added that the most appropriate means for an individual to obtain a ruling on the application of EU law to a specific set of facts is through the national courts.

27. In his observations on the Commission's opinion, the complainant essentially maintained his complaint and reiterated his view that the discrimination suffered by his wife was the consequence of the German authorities' failure to implement Directive 2000/78 in a timely manner. According to the complainant, the Commission also failed (i) to provide convincing reasons for its decision not to open an infringement procedure against Germany, and (ii) to explain why it granted an additional period of three years to the German authorities to implement the provisions of the said Directive [8] .

28. The Ombudsman subsequently sent an information request to the Commission and invited it to comment on the complainant's argument that his wife suffered detriment due to the fact that Germany implemented Directive 2000/78 after the deadline for doing so had lapsed.

29. In its reply, the Commission explained that, as regards protection against discrimination on grounds of age, Article 18 of Directive 2000/78 enabled Member States to make use of an additional period of three years to transpose the Directive. Germany had informed the Commission that it wished to make use of this option. Concerning the transposition of Directive 2000/78, the Commission further pointed out that it opened an infringement procedure against Germany in 2004. The case concerned the failure correctly to transpose the provisions of the Directive regarding disability, religion and sexual orientation. This infringement procedure led to a judgment of the Court of Justice of the European Union [9] which was delivered on 23 February 2006 and in which the Court confirmed that Germany had failed correctly to transpose into national law the provisions of the Directive concerning the above-mentioned grounds of discrimination. Moreover, in this respect, another infringement procedure was opened against Germany in 2007. The case was closed in 2010, after Germany had provided certain clarifications to the Commission. However, the Commission stressed that the provisions concerning age discrimination did not form part of the two infringement cases.

30. In view of the above explanations, the Commission concluded that it had fulfilled its obligation to control and ensure the correct implementation of Directive 2000/78 by Germany. It had also correctly informed the complainant that no infringement procedure had been opened against Germany with regard to age discrimination.

31. Regarding the complainant's argument that his wife suffered detriment due to the fact that Directive 2000/78 was transposed belatedly, the Commission pointed out that the judgment of the German Federal Labour Court [10] in the complainant's case was delivered when the AGG was already in force. The first two judgments, on the other hand, were delivered before Directive 2000/78 had been transposed, but the court of second instance [11] assessed the case as if the burden of proof rules contained in Directive 2000/78 were already applicable. All the courts nevertheless came to the conclusion that the complainant's wife had not established facts from which it could be deduced that discrimination had occurred.



32. The Commission concluded that it was not in a position to provide legal advice to the complainant's wife as to which further legal steps she could take. Under EU law, there were no further remedies apart from the right to complain to the Commission, and the complainant had already exercised that right. The Commission thus suggested that the complainant's wife seek legal advice or choose other options which might be available under national law.

33. In his observations, the complainant essentially stated that the Commission failed to clarify the specific reasons why it opened a second infringement procedure against Germany for a 'partial breach' of Directive 2000/78. He also argued that the Commission should have opened an infringement procedure concerning the whole Directive, and not only with regard to some parts of it (namely, the parts concerning discrimination on grounds of disability, religion and sexual orientation, as stated in point 29 above). According to him, if a part of a Directive is not transposed correctly or in a timely manner, the Member State concerned should be considered to be in 'total' breach of that directive, and not only 'partially' in breach thereof.

34. 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.

35. However, it follows from settled case-law of the Court of Justice of the European Union that 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 [12] .

36. 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(2)(c) of the Charter that this right includes " *the obligation of the administration to give reasons for its decisions* ". This duty is also enshrined in Article 18 of the European Code of Good Administrative Behaviour [13] .

37. The Ombudsman considers that, in its reply of 16 December 2009 to the complainant's infringement complaint and in its opinion of 1 July 2010 on the present complaint, the Commission did not provide sufficient reasons as to why it had decided not to take further action with regard to the complainant's infringement complaint.

38. However, in its reply to the Ombudsman's request for further information, the Commission provided a clear and reasonable explanation in this regard. It first dismissed the complainant's argument that Germany had failed to transpose the provisions of Directive 2000/78 concerning age discrimination in a timely manner, by referring to the option to extend the transposition period foreseen by Article 18 of that Directive, of which Germany made use. The Commission



argued that, since Germany had correctly transposed the provisions of the Directive concerning age discrimination, there was no need to open an infringement procedure in this regard. It also thoroughly analysed the facts of the complainant's case and gave advice. In this context, the Commission's argument that the German court of second instance assessed the case as if the burden of proof rules contained in Directive 2000/78 were already applicable is of particular significance. The complainant did not dispute the Commission's statement.

39. In his observations on the Commission's reply to the request for further information, the complainant essentially argued that the Commission should have opened an infringement procedure with regard to the entire Directive 2000/78, and not only to the provisions concerning discrimination on grounds of disability, religion and sexual orientation. The complainant appears to assume that, when some provisions of a Directive are not transposed correctly or in a timely manner, this gives rise to an infringement of the entire Directive.

40. However, the Ombudsman is not convinced by the complainant's argument. As stated in point 35 above, in the exercise of its role of guardian of the Treaties, the Commission enjoys a wide margin of discretion when assessing complaints submitted by citizens. Furthermore, it appears only reasonable for the Commission to open an infringement procedure with regard to those particular provisions of EU law that, in its view, a Member state has failed to implement properly. On this basis, the Ombudsman concludes that there are no grounds for further inquiries into the complainant's second allegation and the corresponding aspect of his claim.

The Ombudsman's analysis and conclusions

A. Preliminary remarks

B. Allegation that the Commission failed to register the complainant's complaint as an infringement complaint and to deal with it accordingly and corresponding aspect of the claim

Arguments presented to the Ombudsman

The Ombudsman's assessment

C. Allegation that the Commission failed to provide the complainant with convincing reasons to justify why it did not intervene in his case and corresponding aspect of the claim



Arguments presented to the Ombudsman

The Ombudsman's assessment

D. Conclusions

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

In its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, the Commission committed itself to (i) giving prior notice of its intention to close infringement complaints, and (ii) informing the person concerned of the closure of the case. In the case at hand, the Commission failed to comply with these obligations. This amounts to maladministration.

There has been no maladministration as regards the alleged failure to register the complainant's infringement complaint.

As regards the remainder of the complaint, there are no grounds for further inquiries.

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 14 December 2012

[1] Judgment of *Arbeitsgericht München* of 2 March 2006.

[2] Judgment of *Landesarbeitsgericht München* of 19 October 2006.

[3] Judgment of *Bundesarbeitsgericht* of 29 March 2007.

[4] Judgment of *Bundesverfassungsgericht* of 4 June 2007.

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.



[6] CHAP is a system run by the Commission's Secretariat-General. It enables [complaints and enquiries \[Link\]](#) to be recorded in a central registry.

[7] 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.

[8] In this respect, the complainant took the view that Germany had transposed Directive 2000/78 too late, that is, only by means of a law that was adopted on 18 August 2006. In his view, the deadline to transpose the provisions on the protection against discrimination in employment matters expired on 2 December 2003.

[9] Case C-43/05 *Commission v Germany* [2006] ECR I-33.

[10] See footnote 3 above.

[11] See footnote 2 above.

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

[13] " 1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. "