

## **Decision in case 364/2019/PB on how the European Commission explained its position on the alleged infringement of EU rights to free movement and access to justice in recruitments at Austrian universities**

Decision

**Case 364/2019/PB - Opened on 12/03/2019 - Decision on 09/09/2020 - Institution concerned** European Commission ( No further inquiries justified ) |

The case concerned the way in which the European Commission responded to an EU citizen's complaint about the legal redress possibilities for persons who unsuccessfully apply for professorships at Austrian universities.

The Ombudsman found that the Commission's initial response left some doubts as to whether it had fully addressed the legal situation to which the complainant referred.

In the course of the inquiry, the Commission provided information and explanations that allowed the complainant to know its position, from an EU law point of view, on the situation that he had brought to its attention. The Ombudsman therefore concluded that there were no reasons for further inquiries, and closed the case.

### **Background to the complaint**

1. Professorships at Austrian universities are filled through a procedure laid down by law, the 'University Act'. Following publication of the position, a panel examines the applications and identifies the candidates that it considers the most suitable. The university rector takes the final decision and concludes the employment contract with the chosen applicant.

2. Unsuccessful applicants cannot turn to the administrative courts for a full review of a university's rejection of their application. They can only turn to the 'ordinary courts' (civil law courts). That is because university selection procedures fall under private law.

3. This means that unsuccessful applicants who go to court will obtain a review that is different in nature, and less extensive, than if they were challenging an administrative decision before the administrative courts. Importantly, the highest ordinary court in Austria - Oberster Gerichtshof - has consistently held that unsuccessful applicants for professorships do not have legal



‘standing’ (no individual interest) to challenge the outcome of the selection procedure and seek its annulment.

4. Unsuccessful applicants can, at most, claim damages, and this primarily, if not even exclusively, based on alleged discrimination. The kinds of possible discrimination are in the first place the ones laid down in the Austrian Equal Treatment Act, which implements EU equal treatment legislation - , but also include the general right of EU citizens not to be discriminated against on the basis of their nationality. The concrete outcome of a successful claim for damages will in most cases amount to three months of lost salary.

5. The complainant is an academic of Italian nationality who unsuccessfully applied for a number of professorships at an Austrian university. He suspected that his applications were rejected for reasons that were not objective and factual.

6. Having unsuccessfully tried to challenge the outcome of the selection procedures before court, the complainant took the view that the possibilities for going to court, as described above, were too limited and contrary to EU law. He was specifically concerned that there was a breach of the right to free movement and of the right of access to justice. He therefore submitted a complaint to the European Commission.

7. The European Commission did not agree with the complainant that there was a breach of EU law, and therefore rejected his complaint.

8. The complainant considered that the Commission had not properly understood his complaint. He therefore turned to the European Ombudsman, in February 2019.

## The inquiry

9. The Ombudsman conducted an inquiry into the way in which the Commission communicated with the complainant on the matter, in particular to establish whether it had fully taken into account all relevant aspects of the legal situation to which the complainant referred.

10. In the course of the inquiry, the Ombudsman asked the Commission for two replies. The Ombudsman also consulted the federal Austrian Ombudsman Board, which in its 2018 Annual Report had been critical of the legal situation referred to by the complainant. The Austrian Ombudsman Board provided a most useful legal explanation that the European Ombudsman forwarded, together with a recent related Austrian judgement, to the Commission in her second request for a reply.

How the European Commission communicated about the alleged infringements

## The issues and views



**11.** The complainant took the view, in summary, that the nature and extent of the court access referred to in paragraphs 1-4 above breaches EU law because it does not provide for an effective remedy [1] . Relatedly, he took the view that, as such, the situation also leads to breaches of EU rights of free movement because it prevents EU citizens from other Member States to claim their rights fully and effectively when contesting the outcome of selection procedures that they suspect to have been characterised by irregularities.

**12.** The initial correspondence between the Commission and the complainant, as well as the initial reply sent by the Commission in the course of the present inquiry, left some doubts as to whether the Commission had fully taken into account the legal situation to which the complainant referred. The following account reflects the Commission's views as they were provided following the input from the Austrian Ombudsman Board and a judgement that confirmed the legal situation described by the complainant (see paragraph 10 above).

**13.** The Commission recognised that the legal situation challenged by the complainant does not provide for the possibility to request the annulment of a university's recruitment decision. It emphasised that this procedural limitation applies to Austrian and EU applicants equally and "[t] herefore, the Commission does not find this in breach of Article 45 TFEU [(Treaty on the Functioning of the European Union)] or Article 47 of the [EU] Charter [on Fundamental Rights]".

**14.** The Commission also more specifically took the view that "*the possibility to contest before the competent civil court alleged irregularities and to claim damage constitutes, in the Commission's opinion, an effective legal remedy within the meaning of Article 47 of the [EU] Charter [on Fundamental Rights] [2] [Link].* "

**15.** With regard to the compensation practices, the Commission considered that "*provided there is no discrimination on grounds of nationality as regards the proceedings for claiming compensation, this is a matter for national law.* "

**16.** On a related issue concerning the fact that the Austrian Equal Treatment Act appears to expressly exclude nationality-discrimination from its specific remit, the Commission stated that "*in contrast to other EU legislation on equal treatment (e.g. concerning gender or age), Article 45 TFEU and [related EU legislation] are directly applicable and do not require implementation into national law* ".

**17.** In addition to the above-mentioned statements, the Commission made a number of contextual observations in its two replies. The Ombudsman considers it appropriate to include these here in the decision.

**18.** The Commission stated that it has no indication that applicants from other EU Member States are systematically discriminated against by Austrian Universities. In fact, the Austrian legislation requires that vacant ordinary professor posts must be published by the universities at least EU-wide in order to attract suitable candidates also from other Member States, possibly worldwide. The publicly available database of the University of Vienna shows that, in 2017 and



2018, the majority of professor appointments were candidates coming from abroad. In addition, the statistical database of the Austrian Federal Ministry of Science, Research and Economy shows, for all Austrian universities during 2015 – 2017, a high numbers of appointed professors previously active in other (Member) States.

**19.** The Commission also addressed a question of whether the Austrian courts fail, in a systematic manner, to refer questions of EU law to the Court of Justice. It did so to address a concern that the complainant had expressed about the fact that no Austrian court had yet asked the Court of Justice for its opinion on the EU-law issues that he had raised in his complaint to the Commission. The Commission stated that it is aware of numerous recent cases in which Austrian courts had referred questions to the Court of Justice on the interpretation of national legislation in conjunction with Article 45 TFEU. It therefore saw no systemic problem in this regard.

## The Ombudsman's assessment

**20.** The European Commission has particularly wide discretion when it comes to examining Member States' possible infringements of EU law. It is also relevant to note that the Commission does not act as a redress body when it handles individual cases.

**21.** The Ombudsman's examination of the Commission's handling of complaints about alleged infringements of EU law is thus necessarily limited. The Ombudsman can examine the Commission's communication with the complainant, for instance by looking at whether it gave clear and understandable information for why it closed a case. If the Commission appears not to have properly addressed certain important underlying facts, the Ombudsman may ask it to do so. As mentioned above in paragraph 12, this was the situation in this case.

**22.** The Ombudsman benefitted from the established cooperation within the European Network of Ombudsmen, asking the Austrian Ombudsman Board for legal explanations that she could then forward to the Commission when asking it to clarify further its understanding of the contested legal situation.

**23.** Following that request, the Commission provided a reply in which it maintained the view that the contested legal situation does not reveal a breach of EU law. However, it more clearly recognised a key factual aspect in the legal situation as presented to it by the complainant. It confirmed its related legal view (interpretation) on the EU law issues raised by the complainant and provided additional contextual information.

**24.** The Ombudsman finds that the Commission has in the course of the present inquiry provided information and explanations that allow the complainant to know its position, from an EU law point of view, on the situation that he brought to its attention. The Ombudsman therefore concludes that, within the scope of her examination of the Commission's actions, there are no reasons for further inquiries.



**25.** Based on the inquiry, the Ombudsman closes this case with the following conclusion:

**There are no reasons for further inquiries.**

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

Emily O'Reilly European Ombudsman

Strasbourg, 09/09/2020

[1] [\[Link\]](#) Article 47 of the EU Charter on Fundamental Rights: “ *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*”

[2] [\[Link\]](#) Footnote-text in the Commission’s reply: “ *On the suitability of a compensatory redress to be considered as an effective remedy, see the [relevant] case-law of the European Court of Human Rights on Article 13 of the European Convention on Human Rights (ECHR) in the light of which Article 47 of the Charter should be interpreted .*”