

## **Decision of the European Ombudsman on complaint 1194/2000/JMA against the European Commission**

Decision

**Case 1194/2000/JMA - Opened on 17/10/2000 - Decision on 07/06/2001**

Strasbourg, 7 June 2001

Dear Sir/Madam,

On 25 September 2000, you lodged a complaint with the European Ombudsman against the European Commission. Your complaint concerned the institution's handling of a formal complaint you had sent to the institution on 22 December 1999, and which involved an alleged lack of respect of Community law by the French legislation governing the criteria for the selection of captains and officials in charge of fishing vessels.

On 17 October 2000, I forwarded the complaint to the President of the European Commission. I received the Commission's opinion on 31 January 2001, which I forwarded to you on 15 February 2001, with an invitation to make observations if you so wished. I received your observations on 7 March 2001.

I am writing now to let you know the result of the inquiries that have been made.

### **THE COMPLAINT**

The complainants, both attorneys in the law firm SJ Berwin & Co, acting on behalf of a group of French ship owners with a majority of Spanish capital, had submitted a formal complaint to the Commission on 22 December 1999. Their complaint which referred to the role of the Commission under Art. 226 of the EC Treaty, argued that French legislation requiring the French nationality as a condition for potential applicants to the posts of captain or official in a French fishing vessel was contrary to Community law.

The responsible Commission services (DG Employment and Social Affairs) replied on 28 February 2000 indicating that the facts alleged in the complainants' letter did not constitute an infringement of Community law, and suggesting that they bring their query directly before the French courts. The complainants believed that the Commission had not given proper attention to their claims, and that the institution had not respected the procedure established for the handling of formal complaints. They contacted the responsible Commission services again by



letter of 9 May 2000. In its reply of 26 June 2000, the Commission confirmed its previous arguments.

In their letter to the Ombudsman, the complainants argued that the Commission's handling of their complaint was improper, both as regards (i) the procedure followed, and (ii) the reasoning employed.

As regards the procedure, the complainants pointed out that their letter to the Commission of 22 December 1999, had been submitted to the Secretary General of the Commission as a formal complaint made on the basis of Art. 226 of the EC Treaty. They expected that their letter be registered as a complaint by the Commission's services, and accordingly follow the procedure reserved to complaints made by citizens. They pointed out that the Commission in its reply to the Ombudsman's own initiative on administrative procedures for dealing with complaints (OII 303/97/PD) had recognised that all complaints which reach the Commission are registered, with no exception to this rule. They alleged that these requirements had not been respected in their case. Moreover, the complainants considered that the Commission's Secretariat General, in addition to forwarding their letter to the DG responsible for Employment and Social Affairs, should have also consulted other relevant services such as DG Energy & Transport, or DG Fisheries.

As for the reasoning employed by the Commission not to start any inquiry into the subject-matter denounced in the letter, the complainants stated that the institution had ignored relevant case law of the Community courts. They added that the Commission's stand was in stark contrast to that adopted for pilots of air vessels. However, the complainants underlined that this aspect of the case was not the object of their complaint to the Ombudsman.

## THE INQUIRY

### **The Commission's opinion**

The Commission first explained the background to the case. It referred to the two allegations made by the complainants, namely that its services had not properly handled their letter, neither as regards the procedure followed, nor the reasoning given.

The Commission underlined that the arguments put forward by the DG Employment and Social Affairs in this case reflected the longstanding position of the institution on this matter. In a number of infringement cases against several Member States in the early 90s, the Commission had argued that any restriction based on nationality for the employment of sailors were incompatible with the principle of free movement of workers. The institution added, however, that in its applications to the Court of Justice, it had always underlined that these arguments should not apply to the posts of captain and first official. Most of the related court proceedings had been settled by the responsible Member States, except for the case brought against France. The Court's ruling on this matter of 7 March 1996 allowed the Commission's arguments to be openly known.

As regards internal consultations with other services, the Commission considered that this



matter falls within its exclusive powers. However, it added that other services, in particular those responsible for energy and transport, had been consulted on the institution's general position, as well as in the individual case submitted by the complainants.

Finally, the Commission explained that its services decided not to register the complainant's letter as a formal complaint in the view of the fact that the institution had taken an unequivocal and constant position on the subject matter denounced in the complainants' letter.

#### **The complainant's observations**

In their observations to the Commission's opinion, the complainants pointed out that the Commission had not addressed their allegation, namely its failure to register their formal complaint. They explained that such registration gives several procedural guarantees for the citizen, which in this case, had not been respected.

The complainants also contested the substantive arguments put forward by the Commission for not launching an inquiry into their complaint. They explained, that the institution has applied dissimilar criteria on admissible limitations to the free movement of workers, depending on the profession affected and the responsible Commission service involved. In their view, the institution has not fully assessed the application of the exceptions to the free movement of workers set out in Art. 39, par 3 and 4 of the EC Treaty to captains of vessels. They indicated, however, that their considerations on the reasoning of the Commission were only secondary and subsidiary to their sole claim to the Ombudsman, namely the improper handling of their letter of formal complaint by the Commission.

## **THE DECISION**

### **1. Procedures to be followed for the handling of complaints**

1.1 The complainants claimed that the Commission did not respect established procedures for the handling of their complaint. The institution did not register it as a complaint, in breach of its public commitments following the Ombudsman's own initiative 303/97/PD, and there was no proper consultation among all concerned Commission services.

1.2 The Commission explained that its services decided not to register the complainant's letter as a formal complaint because they considered that its object did not constitute a breach of Community law. As for the lack of internal consultation, the Commission believed this matter falls within its exclusive powers. It added, however, that such consultation had in fact taken place.

1.3 One of the fundamental tasks of the Commission in its role of "Guardian of the Treaty" under Article 211 of the EC Treaty, is to ensure that Community law is correctly applied in all the Member States. In carrying out its duty, the Commission investigates possible infringements of Community law which come to its attention largely as a results of citizens complaints.

If as a result of its inquiry, the Commission considers that a Member State has failed to fulfil its obligations under the Treaty, Article 226 gives it the power to start infringement proceedings against the responsible Member State, and if necessary, to bring the matter before the



European Court of Justice.

The serious implications of this course of action makes it necessary that its implementation is fully respectful with the applicable substantive and procedural rules in order to preserve the rights of all concerned parties.

1.4 As regards the procedural rules to be followed by the Commission in its handling of citizens' formal complaints, the Ombudsman notes that the relevant criteria have been set out by the institution in its reply to the Ombudsman's own initiative on administrative procedures for dealing with complaints concerning member States' infringement of Community law (1) , as well as in the annex attached to its standard complaint form (2) .

In its reply to the Ombudsman's own initiative, the Commission made the following commitment:

*"[...] complaints from individuals [...] enjoy procedural safeguards which the Commission has constantly developed and improved [...].*

*[...] All complaints which reach the Commission are registered and [that] no exceptions are made to this rule. Once the Commission receives a complaint, it acknowledged receipt by letter to the complainant with an annex attached, explaining the details of the infringement proceeding".*

The annex attached to the Commission's complaint form explains in detail the procedural safeguards which result from the registration of a letter as a complaint:

*"(a) Once it has been registered with the Commission's Secretary-General, any complaint [...] will be assigned an official reference number. An acknowledgement bearing the reference number which should be quoted in any correspondence, will immediately be sent to the complainant [...].*

*(b) Where the Commission's services make representations to the authorities of the Member States against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 [confidentiality].*

*(c) The Commission will endeavour to take a decision on the substance [...] within twelve months of registration of the complaint [...].*

*(d) The complainant will be notified in advance by the relevant department if it plans to propose that the Commission close the case."*

1.5 These procedural guarantees, however, have no direct bearing on the nature of the actions to be taken by the institution in reply to the allegations made by the complaint.

As the institution itself pointed out in its annex to the complaint's standard form:

*"It should be born in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the*



*Commission."*

Regardless of the nature of the action to be undertaken by the Commission, the existence of some procedural safeguards guarantees that the handling of complaints is carried out properly.

1.6 The complainants lodged a formal complaint under Art. 226 of the EC Treaty with the Commission. In its reply to the Ombudsman's own initiative 303/97/PD on administrative procedures for dealing with complaints, the Commission undertook to register all complaints sent to the institution, without exception. Despite this public undertaking, the responsible services departed from that rule in the present case.

By not registering the complaint, the Commission ignored the procedural safeguards which the institution itself set up to secure a proper procedure.

The Ombudsman therefore considers that such failure of the Commission constitutes an instance of maladministration.

1.7 As regards the alleged lack of consultation among the different Commission services, the Ombudsman considers that matters such as the co-ordination of the different Commission departments and their degree of involvement in a particular decision, by their own nature, fall within the institution's powers of internal organisation.

Thus, in this type of cases, the Ombudsman is of the view that an inquiry would be justified only when these matters are the immediate and direct cause of the institution's failure to act in accordance with a binding rule or principle.

However, in this case it appears that the Commission had in fact carried out an internal consultation among its services. The Ombudsman has therefore concluded that there appears to be no maladministration as regards this aspect of the case.

## **2. Consideration of the complainants' allegations**

2.1 The complainants argued that the Commission had not thoroughly assessed the allegations made in their formal complaint, in particular by not taking proper account of existing case-law. However in their observations, the complainants indicated that their opinion on the soundness of the Commission's arguments was not the object of their complaint to the Ombudsman, but merely secondary and subsidiary to their claim.

2.2 In view of the previous considerations, the Ombudsman is of the view that there are no grounds to pursue an inquiry as regards this aspect of the case.

## **3. Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark:

The complainants lodged a formal complaint under Art. 226 of the EC Treaty with the Commission. In its reply to the Ombudsman's own initiative 303/97/PD on administrative procedures for dealing with complaints, the Commission undertook to register all complaints



sent to the institution, without exception. Despite this public undertaking, the responsible services departed from that rule in the present case.

By not registering the complaint, the Commission ignored the procedural safeguards which the institution itself set up to secure a proper procedure.

The Ombudsman therefore considers that such failure of the Commission constitutes an instance of maladministration.

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter, the Ombudsman has decided not to pursue his inquiry into this matter. The Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Decision in the own initiative inquiry 303/97/PD, European Ombudsman's Annual Report for 1997, pp. 271-272.

(2) Failure by a member State to comply with community law: standard form for complaints to be submitted to the European Commission; OJ C 119, 30.04.1999, p.5.