

Decision on how the European Commission applied the moderation policy for its staff intranet to a post on a discussion forum (case 9/2022/NH)

Decision

Case 9/2022/NH - Opened on 20/01/2022 - Decision on 01/06/2022 - Institution concerned European Commission (No maladministration found) |

The case concerned a message related to the COVID-19 pandemic that was posted on the European Commission's intranet forum, which is reserved for Commission staff members. The complainant, a Commission staff member, had reported the message as hate speech and wanted the Commission to remove it. The Commission refused and the complainant turned to the Ombudsman.

The Ombudsman found that the Commission's decision not to remove the message was reasonable because it did not consider the message to be hate speech or contrary to its moderation policy. The Ombudsman closed the inquiry with the conclusion that there was no maladministration in this case.

Background to the complaint

1. The complainant is a staff member working for the European Commission. As a staff member, he has access to the *My IntraComm* website (the Commission's intranet), which hosts the *Have your say* section, a staff forum where Commission staff can share their opinions, make comments or ask a question. The *Have Your Say* forum is accessible for Commission staff members only.

2. In December 2021, the complainant reported a post submitted by another user of the *Have your say* forum containing the following text: “ *Unvaccinated people violate human rights of other people* ”. He did so by sending an e-mail to the Commission's team responsible for moderation of the *Have your say* forum. The post was part of a longer exchange of messages between different staff members related to the COVID-19 pandemic and vaccines in general.

3. The complainant argued that the statement “ *Unvaccinated people violate human rights of other people* ” was in breach of the *My IntraComm* moderation policy [1] because it was “ *a direct attack against a specific group of people simply based on their free choice* ”.



4. The Commission's moderation team replied that the statement was not in breach of the *My IntraComm* moderation policy and that it would not be removed.
5. The complainant wrote back to the moderation team and challenged the decision not to remove the statement. He argued that the moderation policy said “ *We ask you to avoid inflammatory, insulting or offensive comments. (...) We say no to (...) defamation and hate speech against colleagues or any group of people.* ” He contended that the statement was hate speech and should have been removed.
6. The Commission's moderation team replied to the complainant and explained that it endeavours to strike a delicate balance between freedom of speech and avoiding comments that are offensive to staff members. The team follows a “six eyes check” before removing or leaving a comment reported by a user, and takes into account the general context of the discussion. The team confirmed to the complainant that it would not remove the statement.
7. Dissatisfied with how the Commission had handled his request to remove the statement, the complainant turned to the European Ombudsman in December 2021.

The inquiry

8. The Ombudsman opened an inquiry into the complaint about whether the Commission had been wrong not to remove a post on a discussion forum on its intranet.
9. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint. The Commission also sent the Ombudsman a copy of the contested post and the full exchange that had taken place on the *Have your say* forum, because it was not accessible to the Ombudsman inquiry team. The Ombudsman also subsequently received the comments of the complainant in response to the Commission's reply

Arguments presented to the Ombudsman

10. The complainant argued that, by refusing to remove the contested message, the Commission deliberately allowed hate speech on the *Have your say* forum. It ignored its own internal rules to prevent hate speech in an online forum accessible to more than 30 000 staff members.
11. The complainant further argued that the statement “ *Unvaccinated people violate human rights of other people* ” is a defamatory statement without any possible positive reading, a direct attack against a specific group of people simply based on their free choice. He said that replacing the words “ *unvaccinated people* ” with any other community or group of persons would be considered as hate language.



12. In its reply, the Commission explained the procedures in place within the moderation team to implement the moderation policy. When the Commission receives a report about an allegedly abusive message, at least three members of the moderation team assess the message (the “six-eyes check”) before a decision is taken on either leaving or removing the message in question. As a rule, the assessment is based on whether the post falls under the definition of hate speech or contains insulting language towards a named individual; the context in which the post was submitted and the entire discussion; and whether deleting the post would distort the balance of opinions expressed.

13. The Commission uses the definition of hate speech found in EU law, [2] which encompasses “ *public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin* ”. In the case of the complainant, the Commission concluded that the contested statement cannot be considered hate speech, as defined above, because criticising a group of people for their actions cannot be commensurate to criticism based on the characteristics of a person (for example, race, nationality, religion, or sexual orientation).

14. The Commission further argued that the author of the contested statement later posted another message in which he clarified that other people were denied the right to appropriate medical treatment, which he considered as a human right. In light of this clarification, and of the general context of the discussion in which different opinions were expressed on the topic, the Commission considered that the contested statement was not “inflammatory”.

15. In his comments on the Commission’s reply, the complainant argued that the Commission had used a very narrow reading of “hate speech” based on the Council Framework Decision 2008/913/JHA, limited only to expressions of racism and xenophobia. The complainant said that other legal instruments adopted more recently [3] had a wider definition of hate speech, covering also expressions that spread, incite, promote or justify hatred, and not only limited to racism and xenophobia.

16. According to the complainant, Article 3 of the Charter of Fundamental Rights of the EU enshrines the right for everyone to decide - or not - to take any medical procedure, including COVID-19 vaccination. The author of the contested statement, the complainant argued, did not respect that right by saying that unvaccinated people violated the rights of others. In that sense, the complainant found the Commission’s arguments that the author later clarified his opinion to be wrong, because one cannot clarify hate speech.

17. The complainant said that the Commission had failed to apply the *My IntraComm* moderation policy by allowing defamatory and inflammatory comments that are offensive to a certain group of people.

The Ombudsman's assessment

18. This case relates to the fundamental right to freedom of expression on an online forum, and



the limits to that right. Freedom of expression is a key component of the functioning of our democratic societies, as sharing ideas is crucial and it allows us to engage with different perspectives and viewpoints. However, the right to freedom of expression has certain limits, particularly in order to protect other rights. The case also raises the question of the Commission's responsibility to ensure a respectful debate among staff members on its online forums.

19. The Ombudsman acknowledges that the message posted on the *Have your say* forum may have offended the complainant, in particular given the divisive nature of the debates about COVID-19 vaccines. However, the question is whether the message was contrary to the *My IntraComm* moderation policy, taking into account the right to freedom of expression as well as the need to counter hate speech.

20. In this case, the complainant has brought forward two main arguments in his complaint: first, that the contested statement constituted "hate speech"; second, that it was inflammatory, insulting or offensive.

21. The Commission has explained that it did not consider the contested statement to be hate speech, because the sentence "*Unvaccinated people violate human rights of other people*" targeted a group of people based on their *actions* and not on their *characteristics*. The Ombudsman finds this assessment to be reasonable, given the definition of a 'group' used in various provisions governing hate speech. Even taking into account the complainant's argument that the definition of a 'group' used by the Commission may be too narrow, the main element of hate speech is incitement to hatred. By stating that unvaccinated people violate human rights of other people, one can reasonably argue that the author is not inciting violence or hatred against unvaccinated people but is merely expressing an opinion. Based on the above, the Ombudsman finds that the contested statement did not constitute hate speech.

22. The statement, however, may very well be considered as insulting or offensive to certain persons. It may thus be considered "inflammatory" in the sense that it could inflame or excite the senses of certain readers. The Ombudsman notes that the Commission's moderation policy for its intranet says "*We ask you to avoid inflammatory, insulting or offensive comments and language. (...) We reserve the right to remove any posts and comments that don't respect these guidelines.*" As such, it was reasonable for the complainant to report the statement.

23. However, the Ombudsman finds the Commission's explanations concerning how it assessed the contested statement to be satisfactory. The Commission has a certain leeway when it needs to decide whether to remove a post that some users may consider "inflammatory". In this case, the Commission took into account the context of the discussion, making sure that all viewpoints had been represented. The "six-eyes approach" presented above appears to be a well-suited mechanism to ensure balance.

24. The Ombudsman considers that the approach followed by the Commission in this case is in line with a landmark judgment by the European Court of Human Rights. In that judgment the Court said that the right to freedom of expression "*is applicable not only to "information" or*



"ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population". [4]

25. The purpose of the *Have your say* forum is to provide a place where Commission staff members can exchange opinions. The Commission has made clear during the inquiry that it automatically removes messages deemed to be hate speech. It has also explained that, on the basis of its moderation policy, it endeavours to strike a delicate balance between freedom of speech and comments that may be perceived as offensive by other staff members. The Ombudsman finds the Commission's explanations convincing and, overall, that it acted reasonably in this case.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [5] :

There was no maladministration by the European Commission in this case.

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

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 01/06/2022

[1] The policy is published on the Commission's intranet and is not available to the public.

[2] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913> [Link]

[3] In particular, the complainant referred to the Commission's [Code of Conduct on illegal online hate speech](#) [Link] and the [Audiovisual Media Services Directive](#) [Link] (Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services).

[4] See the judgment of the European Court of Human Rights, *Handyside v. the United Kingdom* (Application no. 5493/72), 7 December 1976, § 49, available at <https://hudoc.echr.coe.int/eng?i=001-57499> [Link]

[5] This complaint has been dealt with under delegated case handling, in accordance with the



Decision of the European Ombudsman adopting Implementing Provisions, available at:
<https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en#hl10> [Link]