



Decision on how the European Commission handled two infringement complaints about planning laws concerning retail space in Germany (joint cases 2238 and 2249/2021/MHZ)

Decision

Case 2238/2021/MHZ - Opened on 01/02/2022 - Decision on 16/12/2022 - Institution concerned European Commission (Maladministration found) |

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The complainants are two retail companies, IKEA and Decathlon, which alleged that the European Commission failed to handle appropriately infringement proceedings against Germany concerning planning laws and retail space. The complainants took issue with the time taken for the proceedings, with the initial infringement complaint having been submitted in 2008. They also took issue with the differing explanations given by the Commission for the delay.

In the course of the inquiry, the Ombudsman issued preliminary findings to the Commission, notably that the Commission had taken an unreasonably long time (more than thirteen years) to deal with the initial administrative stages of the infringement procedure. She suggested that the Commission should take a decision on the next stage of the procedure without further delay.

In reply to the Ombudsman's findings, the Commission gave explanations seeking to justify the time taken, and indicated that intended to take a decision in early 2023.

The Ombudsman took the view that the time taken could not be justified. She closed the inquiry with a finding of maladministration. She considered that it would serve no purpose to make a recommendation, as the Commission committed to take a decision in the coming months. The Commission should report back to the Ombudsman by end March 2023.

Background to the complaints

1. In 2008, IKEA Retail Germany submitted a complaint to the European Commission against Germany. The complaint concerned planning restrictions on retail establishments in two German federal states (Nordrhein-Westfalen and Baden-Württemberg), which apply to large retail premises (of more than 800 square metres). [1]

2. IKEA argued that the laws undermine the right of free establishment [2] and the EU



Services Directive [3] . The Commission opened an infringement procedure [4] into the complaint, sending a 'letter of formal notice' to Germany on 25 June 2009. Germany replied two months later.

3. In 2014, Decathlon Germany submitted a complaint to the Commission about the same matter. The Commission decided to deal with the complaints of IKEA and Decathlon jointly. On 18 June 2015, it sent the German authorities an additional letter of formal notice. Germany replied in August 2015.

4. Since then, IKEA and Decathlon have been in contact with the Commission about the infringement procedure, including through meetings with relevant Commission staff members and through correspondence.

5. In 2018, the Court of Justice of the EU (CJEU) issued a judgement in a case concerning restrictions on retail space (Visser case). [5]

6. In December 2020, the Conference of German Ministers of Spatial Planning drafted guidelines for the federal states, clarifying derogations to the rules restricting the freedom of establishment of retailers.

7. Between October 2020 and August 2021, the complainants and the Commission exchanged letters, and had a meeting in January 2021. In their letters, Decathlon and IKEA expressed their dissatisfaction over how the Commission had handled the infringement procedure and the fact that it appeared to be "*blocked politically*". The Commission explained that it was looking for a satisfactory solution, and that it planned to reopen the discussions with the German authorities after the German presidency of the Council of the EU had concluded (December 2020).

8. In August 2021, the Commission informed the complainants that the German federal government had stated that, in addition to the guidelines mentioned above, it was considering modifying the federal law on spatial planning, with a view to setting out more explicit provisions on when state authorities may grant exemptions to planning restrictions for retail space. It indicated that this amendment could be adopted in 2022.

9. On 17 December 2021, IKEA and Decathlon turned to the European Ombudsman. The inquiry

10. The Ombudsman opened an inquiry into the complainants' concern that the Commission has failed to handle appropriately infringement proceedings against Germany following two complaints about planning laws and retail space (2008/4946 and 2015/4207).

11. The inquiry looked into: (i) the time taken by the Commission to deal with the infringement procedure; (ii) the reasons given by the Commission for the delay.

12. On 22 March 2022, the Ombudsman inquiry team met with the Commission and inspected the Commission's files. The complainants made comments on the Ombudsman's report on the meeting with the Commission and the inspection [6] . On 15 July 2022, the



Ombudsman sent to the Commission her preliminary findings [7] . The Commission's reply of 14 October 2022 was forwarded to the complainants. They submitted their comments on 16 November 2022.

Delay and its justification

Initial arguments presented to the Ombudsman

13. The complainants argued that the procedure had taken a disproportionate amount of time (more than 13 years so far), and that the reasons the Commission gave for the delay lacked credibility and had changed over the years. The complainants have been led to understand that political considerations and national influence have prevented the infringement procedure from being concluded.

14. During the meeting with the Ombudsman inquiry team, the Commission argued that the cases are complex, involving a conflict between the right to the freedom of establishment in the EU and concerns relating to town and county planning, including environmental and consumer protection. It also pointed to the complexities of the federal system in Germany as having played a role in the delay.

15. The Commission acknowledged that the case is among the longest infringement procedures to date, having been opened in 2008. In 2017, the procedure was suspended pending the final judgement in the Visser case. After the judgement was issued in 2018, the Commission relaunched the cases.

16. However, the Commission stated that the German elections in 2017 and the change in ministerial portfolios also contributed to the delay. It added that it has continued to analyse related changes, such as the guidelines issued by the Conference of German Ministers of Spatial Planning.

17. The Commission also detailed other steps it had taken, while the infringement procedure was ongoing, with a view to ensuring that Member States comply with the right to freedom of establishment. In 2018, the Commission published a communication on the retail sector [8] , which identified best practices to guide Member States' reforms in the sector, as well as a practical guide [9] for national or regional authorities on reforming the retail sector. The Commission also organised workshops and other initiatives including stakeholders.

18. The Commission argued that it had consciously chosen to address the matter through dialogue with the authorities in Germany, rather than by advancing through the formal steps of an infringement procedure. It said that this "*has made progress in these cases a slow process*".

19. The Commission organised a considerable number of bilateral meetings and other types of meetings with relevant authorities in Germany. This included a meeting in January 2019 involving the complainants, federal and state authorities in Germany and the Commission (with representatives from the Legal Service and the Directorate-General for Trade).



20. The Commission said that it does not expect to close the infringement procedure any time soon, since its dialogue with the authorities in Germany is still ongoing and the German authorities have several more steps to take.

21. The Commission stated that it might be an option to close this case on 'opportunity grounds'. It stated that it can take such a decision even if it finds that the national law/practice is clearly not compatible with EU law. In such cases, the Commission's closing letter details the legal situation and why it is incompatible with EU law, as well as the specific circumstances in a Member State that lend themselves to closing the case. This letter can then be used by complainants as part of a legal challenge at national level. If a complainant decides to bring a case that has been closed on opportunity grounds to a national court, the national court can decide to ask for a preliminary ruling from the Court of Justice of the EU (CJEU), a procedure in which the Commission regularly intervenes.

22. In their comments on the inspection report [10], the complainants argued that, notwithstanding the views of the Commission about the complexities of the case, the Commission failed to respect the applicable rules, in particular Article 258 of the Treaty on the Functioning of the EU (TFEU) [11]. If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it should issue a 'reasoned opinion' on the matter. The Commission has sent two letters of formal notice, indicating it considers this to be the case, and there is no indication that it has changed its views. The judgement in the *Visser* case only strengthened the Commission's legal assessment.

23. In the complainants' view, apart from the meeting in January 2019, the steps taken by the Commission in this case served the purpose of delaying the procedure.

24. The complainants expressed concern at the Commission's indication that it could close their case on 'opportunity grounds'. While the Commission referred to the possibility to bring a legal challenge at national level, the Commission is aware that they have already done so. The complainants made their infringement complaints after the Federal Administrative Court of Germany found that the restrictions in the German planning law are justified (proportionate). If the infringement procedure were to be closed on opportunity grounds, the complainants contended that the German administrative court would not look into the matter and would not forward their case to the CJEU.

25. The complainants also said that, while the Commission's desk officers who dealt with their case had maintained good communication with them, they had not been given reasons for the ongoing delay, since the judgement in the *Visser* case. During this period, the relevant legal provisions in Germany had not changed.

The Ombudsman's preliminary assessment

26. Over thirteen years have passed since the Commission opened the infringement procedure, but it has not been able to indicate when the procedure will end. **The Ombudsman took the preliminary view that such a significant delay is not reasonable.**



The different arguments put forward by the Commission to explain the delay appeared, in part, to be cumulative and the result of the Commission's own failure to take a decision on whether or not to proceed with the matter. By any objective view, thirteen years is a disproportionately long amount of time for dealing with the administrative stages of an infringement procedure. The delay has had undeniably negative implications for the complainants.

27. Against this background, **the Ombudsman found that it is incumbent on the Commission to take a decision on the next stage in this infringement procedure and invited the Commission to do so without any further unjustified delay .**

The Commission's reply to the Ombudsman's preliminary assessment and the complainants' comments on that reply

28. The Commission referred to its most recent actions concerning the complainants' infringement cases. After the meeting with the Ombudsman inquiry team in March 2022, the Commission met German authorities online in April 2022. In May 2022, the Commission sent a list of detailed questions to the German government on the guidelines for derogation procedures issued by the German Conference of Spatial Planning Ministers in December 2020. In August 2022, the German government replied. In the meantime, in July 2022, the Commission discussed the cases with the German government. In September and October 2022, the Commission had further exchanges with the German authorities. The Commission also had further contacts with the complainants and it scheduled a meeting with them in October 2022.

29. The purpose of all these meetings and exchanges was to collect information with a view of taking a decision on the infringement procedure by early 2023.

30. In the Commission's view there are various reasons for the delay.

31. In particular, the cases are legally complicated and politically sensitive because of two conflicting interests: the economic interest of the freedom of establishment in the retail sector, and public interest objectives such as environmental protection, consumer protection and social and territorial cohesion. The cases are linked to ongoing political debates about urban regeneration, land use, transport policy and climate action and sustainable development. In Germany (as in other federal EU Member States), the regulatory framework for the retail sector is the responsibility of the federal states, while municipalities have certain autonomy in applying this framework.

32. The Commission emphasised that it has been constantly following the issue of retail establishment in various Member States. The situation across the EU is very complex, comprising various rules and regulations at national, regional and sometimes local level.



33. The Commission reiterated that the delay was partly down to the need to await the outcomes of court proceedings [12] , and the implementation of the Services Directive (which was supposed to be fully implemented by 2010).

34. The Commission also pointed out that, while before the Visser ruling, Germany contested the view of the Commission, since the ruling, German government has engaged 'constructively' to accommodate the concerns expressed by the Commission. These discussions were complex and time-consuming.

35. It argued that although modifying the legal framework while these discussions were ongoing was unrealistic, strengthening the existing instrument of derogation procedures under German law offers in practice " *some potential for ensuring better EU law compliance*" of the German retail establishment framework. The Commission is fully committed to actively work with the German authorities to develop a viable system for retail establishment for the benefit of economic operators such as the complainants.

36. The Commission disagrees with the complainants' argument that it has failed to respect Article 258 TFEU on the grounds that it was obliged to deliver a reasoned opinion. The CJEU has constantly recognised that the Commission enjoys discretionary power in deciding whether or not, and when, to start infringement procedure or to refer a case to the CJEU. The Commission can close a case on 'opportunity grounds' although a national law or practice is clearly not legally compatible with EU law. The Commission is not obliged to deliver a reasoned opinion even if it considers that a Member State has failed to fulfil an obligation under the Treaties.

37. The complainants welcomed the Commission's actions taken after its meeting with the Ombudsman inquiry team in March 2022. However, the Commission got back in contact with the complainants only in September 2022.

38. The complainants agree with the Commission that the cases are legally complex. However, they argued that either the German laws comply with the right to the freedom of establishment or not. Since the Commission has sent two letters of formal notice, the Commission's view was clear even before the two CJEU judgements supported their legal stance. The complainants acknowledged that the Commission has discretion in dealing with infringement cases. However, if it considers that there is a clear violation of the fundamental freedoms, it has to assess the breach of law in its discretionary decision, which it has not done in this case.

39. The complainants stated that they have already turned to the German courts in relation to their cases but the Federal Administrative Court decided not to refer the case to the CJEU. As such, if the Commission were to close their case on opportunity grounds, considering the matter would be better remedied by national courts, it would be essentially accepting that the right to the freedom of establishment would be undermined. This would undermine the Commission's credibility' as the 'guardian of the Treaties'.

40. The complainants are concerned about the Commission's views that increased use of



derogation procedures could ensure compliance with EU law. In their complaints to the Commission, the complainants explained that the requirements of the derogation procedures are unclear and the authority in charge of granting derogation has full discretion to do so. Any modification of the derogation clause will not change the situation under German spatial planning law if the applicants do not have a right of a derogation from those regulations which do not comply with EU law. It is thus hard to see how the derogation procedure may ensure compliance in practice.

The Ombudsman's final assessment

41. The Commission has indicated that it will take a decision on the complainants' infringement cases by **early 2023**. If it does so, it will have been almost 14 years since the first complaint was submitted. While the Commission has certainly not been inactive on the file throughout that period, the Ombudsman maintains her preliminary finding that this delay is not reasonable having regard to the matter at stake. In all its activities, the Commission must comply with principles of good administration, which include the requirement that decisions must be taken within a reasonable time frame.

42. The Ombudsman finds that the reasons given by the Commission for the delay are mostly attributable to the Commission. The Commission argued that the time it has needed to deal with this infringement procedure is due to the complex legal situation and national politics. Clearly, legal particularities of EU federal states are not new to the Commission and, over a 13-year period, the national political landscape may change several times. This reality should be taken into account in the Commission's strategy on dealing with an infringement procedure. Furthermore, the Commission's staff that deals with infringement complaints has considerable legal expertise and should be able to deal with the complex legal matters in a reasonable time period.

43. That said, the Ombudsman recognises that the Commission took a number of actions during the period it has been dealing with this procedure. This included the actions aimed at ensuring other Member States respect the EU right to freedom of establishment (these included the communication, guidelines and workshops) and the direct dialogue with the German authorities, which has clearly intensified in the course of the Ombudsman's inquiry. The Ombudsman also considers that the Commission was justified in deciding to await the outcome of the two court cases mentioned above, [13] even though the one-year suspension of the infringement procedure while awaiting the outcome of the Visser case [14] appears long.

44. The Commission stated that the delay was partly the result of its choice to pursue dialogue with the authorities in Germany, rather than take formal steps in the infringement procedure. While the Commission has committed to using dialogue, where possible, to convince Member States to bring their national legislation into compliance with EU law, it has also set the objective of dealing with infringement complaints and procedures in a timely manner. [15] Certainly, such dialogue cannot be used as justification for an unreasonable delay in the administrative stages of an infringement procedure.



45. The Ombudsman concludes that the Commission was not able to justify the thirteen years it has taken to deal with the administrative stages of the infringement proceedings. **This is maladministration** . Since the Commission said it would take a decision in early 2023, the Ombudsman has decided that it would serve no purpose to make a recommendation.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following finding:

The Commission was not able to justify the thirteen years it has taken to deal with the administrative stages of the infringement proceedings. This is maladministration.

Given the Commission's commitment to take a decision in early 2023, the Ombudsman invites it to report back by end March 2023.

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

Emily O'Reilly European Ombudsman

Strasbourg, 16/12/2022

[1] Such establishments are prohibited if a retail project: (a) is expected to generate more than 30% of its turnover with customers living outside the city and its surrounding area ('congruency principle'); (b) is expected to distract 10% or more of the turnover of incumbent retailers ('non-impairment principle'), and (c) its sales space is dedicated in a certain percentage to the 'city-centre relevant assortment' such as lamps, carpets, kitchenware etc. ('integration principle'). The condition (c) relates to the policy objective to protect the city centres, while the conditions (a) and (b) to economic concerns.

[2] The right to the freedom of establishment is set out in article 49 of the Treaty on the Functioning of the European Union.

[3] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0123>

[4] More information on EU infringement complaints and procedures:

https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

[5] The ruling concerned municipal zoning plans which implied banning retail trade in goods that are not bulky goods (such as shoes and clothing) in a geographical zone situated outside the city centre. The purpose of the ban was to maintain the viability of the city centre of the municipality and to avoid there being vacant premises in the city, in the interests of good town and county planning. The CJEU confirmed that: retail is a service and that it falls within



the scope of the Services Directive; the Services Directive applies to retail establishments irrespective of the way Member States regulate it (such as through planning rules); the prohibition to sell non-voluminous goods outside the city centre is a territorial restriction within the meaning of the Services Directive (Art. 15(2)a); the protection of the city centre may constitute an overriding reason relating to public interest provided that the condition of non-discrimination, necessity and proportionality are satisfied.

C-31/16 Visser v Raad van de gemeente Appingedam

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=175926&pageIndex=0&doclang=EN&>

[6] The inspection report can be found at

<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/158614> .

[7] The Ombudsman's preliminary findings can be found at:

<https://www.ombudsman.europa.eu/en/doc/correspondence/en/158615>

[8] *A European retail sector fit for the 21st Century*

<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018DC0219>

[9] *Practical guide for fostering the revitalisation and modernisation of the small retail sector*

<https://op.europa.eu/en/publication-detail/-/publication/d606c517-4445-11e8-a9f4-01aa75ed71a1/language>

[10] Report on the meeting between the Commission and the Ombudsman inquiry team, and the inspection of the Commission's documents.

[11] Article 258 TFEU is the legal basis for infringement proceedings.

[12] In addition to the Visser case, it mentioned Case C-400-08 *Commission v Spain* :

<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-400/08> .

[13] The Ombudsman has previously taken the view that it is reasonable for the Commission to wait for the outcome of a related court case before taking the next steps in an infringement procedure: Decision in cases 1234/2016/EIS, 1241/2016/EIS, 1717/2016/EIS and 1841/2016/EIS <https://www.ombudsman.europa.eu/en/decision/en/80471> .

[14] Inspected documents show that, after the judgement in the Visser case in 2018, the Commission became active again. This included holding internal meetings and exchanging with the German authorities in 2020 and 2021.

[15] In the Commission's Communication 'EU law: Better results through better application':

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2017.018.01.0010.01.ENG&toc=OJ