

## **Decision of the European Ombudsman on complaint 1045/2002/GG against the European Commission**

Decision

**Case 1045/2002/GG - Opened on 12/06/2002 - Recommendation on 22/04/2003 -  
Decision on 10/07/2003**

Strasbourg, 10 July 2003

Dear Mr S.,

On 2 June 2001, you made a complaint to the European Ombudsman concerning complaint 99/4916 SG(99) A/9472/2 that you had lodged with the European Commission on 25 November 1998.

On 12 June 2002, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 8 October 2002. I forwarded it to you on 9 October 2002 with an invitation to make observations, which you sent on 28 October 2002.

On 12 November 2002, I wrote to the Commission in order to propose a friendly solution. You were informed accordingly in a letter sent the same day. The Commission sent its opinion regarding my proposal on 16 January 2003. I forwarded it to you on 27 January 2003 with an invitation to make observations, which you sent on 22 February 2003.

On 22 April 2003, I addressed a draft recommendation to the Commission. The Commission sent its opinion on 26 June 2003. I forwarded it to you on 27 June 2003 with an invitation to make observations. On 1 July 2003, you informed my services by telephone that you were satisfied with the outcome of this case.

I am writing now to let you know the results of the inquiries that have been made. Since you kindly offered that the Ombudsman could use Swedish, French or English in order to avoid translation costs, I write to you in English. Should you nevertheless wish to receive a German translation of this text, please let me know.

### **THE COMPLAINT**

The complainant, a German national, studied in Sweden. In order to obtain a telephone subscription from Telia, a Swedish telecommunications company, he had to provide a deposit of



5 000 SEK (or a declaration by a Swedish citizen that he would guarantee for this sum). It appears that such a deposit was requested of all foreigners who did not possess a Swedish social security number. The complainant considered that this was an instance of discrimination contrary to Article 12 of the EC Treaty, given that Swedish nationals did not have to provide such a deposit.

On 25 November 1998, the complainant submitted a formal complaint to the Commission's representation in Sweden. The latter informed the complainant on 2 December 1998 that the complaint had been forwarded to the Secretariat-General in Brussels.

On 3 September 1999, and further to a reminder from the complainant dated 20 August 1999, the Commission's Secretariat-General informed the complainant that the case had been registered under reference 99/4916 SG(99) A/9472/2.

In his complaint to the Ombudsman lodged in June 2002, the complainant alleged that despite several further reminders (12 July 2000, 18 October 2000 and 18 November 2001) the Commission had neither informed him about the state of the procedure nor about whether it intended to commence infringement proceedings against Sweden.

## THE INQUIRY

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

In its opinion, the Commission made the following comments:

The Commission had first consulted several of its Directorates-General (Internal Market, Justice and Home Affairs, Information Society) in order to check whether the incriminated behaviour derived, directly or indirectly, from a provision of Swedish law. This examination lasted until the summer of 2000. Its result was that Telia had imposed the relevant obligation of its own accord.

Since thus the behaviour of an undertaking was at issue, the Commission's Directorate-General (DG) Competition had subsequently examined whether Article 82 of the EC Treaty had been infringed. On 25 August 2000, Telia had been asked by DG Competition to provide explanations. In its reply of 25 September 2000, Telia had explained that the amount of 5 000 SEK served the purpose of securing debts of subscribers of whom Telia, in the absence of a Swedish social security number, might lose track in the case of a move. The Commission had considered that this explanation justified the difference in treatment between holders of a Swedish social security number and persons who did not have such a number. It had thus decided not to make any further inquiries.

In the light of this result, the matter had thereafter had less priority, particularly in view of the fact that DG Competition had to deal with numerous other cases from the telecommunications sector.

The above-mentioned circumstances had resulted, to the regret of the Commission, in a certain delay as regards the information of the complainant about the first conclusions of the



examination of his complaint and about the Commission's intention to file the complaint.

On 8 August 2002, the Commission had sent the complainant a written reply concerning his complaint. On 5 September 2002, the Commission had furthermore telephoned the complainant to make sure that he had received the reply.

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

In his observations, the complainant confirmed that he had received the Commission's letter of 8 August 2002 and noted that the primary purpose of his complaint had thus been achieved. The complainant pointed out, however, that he was left with the bitter feeling that notwithstanding all his reminders the Commission had not considered it necessary to inform him earlier. In his view, this was more than a "certain delay" and could not be justified by a lack of staff. The complainant nevertheless took note of the Commission's regret and accepted its apologies.

In so far as the substance of the case was concerned, the complainant considered that the reasons given by the Commission for closing its inquiry were not fully convincing. In the complainant's view, there had been an infringement of Article 82 of the EC Treaty. The complainant considered that the explanation Telia had offered for its behaviour failed to convince, given that Telia was in any event able to pursue debtors abroad. He agreed that this might be more difficult than pursuing debtors in Sweden itself. The complainant considered, however, that this could not serve as a justification for discriminations. If the Commission were to accept Telia's arguments, this would run counter to the logic of the EU's efforts to simplify the enforcement of claims in other member states.

The complainant also took the view that Telia could resort to other means to protect itself, for example by asking non-Swedish EU nationals to provide a copy of their identity card or passport. In his view, this information could help to 'trace' the debtor. The complainant also queried whether the mere fact of possessing a Swedish social security number made it easier to reach the debtor in cases where he moved abroad.

The complainant therefore asked the Ombudsman to support his complaint and to try and make the Commission continue its inquiries.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to all the complainant's allegations.

#### **The proposal for a friendly solution**

Article 3 (5) of the Statute of the Ombudsman (1) directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complaint. The Ombudsman's provisional conclusion was that the Commission's decision to close the file on the grounds that Telia's approach appeared to be justified could be an instance of maladministration.



The Ombudsman therefore made the following proposal for a friendly solution to the Commission:

The European Commission should reconsider the complaint submitted to it by the complainant.

**The Commission's opinion**

In its opinion, the Commission made the following comments:

The Commission had, in accordance with the Ombudsman's proposal, reconsidered the matter in the light of the new arguments put forward by the complainant. Telia's approach had the aim of ensuring that its customer was solvent at the time when it concluded a subscription contract with him. This could be achieved in three ways – by providing the social security number, by furnishing a deposit or by submitting evidence as to the purchase of a house or apartment in Sweden.

The Swedish social security number ("personnummer") was given to every Swedish citizen and to every foreigner residing for more than one year in Sweden. It was composed of several digits that in particular allowed to know the age of the person and his place of birth. This number served the purpose of identifying the person for administrative purposes. It was used for the purposes of social security, but not exclusively. The translation "social security number" should not obscure this fact.

The number was used by tax authorities and private bodies in order to set up financial data bases. By consulting such a data base, it was thus possible to verify whether a given person had unpaid debts. When a person having a "personnummer" wished to subscribe to Telia's services, the company consulted a data base in order to check whether the applicant had any unpaid debts. Obviously financial information was only available on that data base if the person had been followed up by the various administrative or private bodies in Sweden.

Telia's approach of asking for the social security number, a deposit or evidence as to the purchase of a house or apartment in Sweden was independent of nationality. A foreign national who lived and worked in Sweden possessed a "personnummer". Besides, a non-resident Swedish national could also be required to provide a deposit if he came to Sweden for a short time as a student. Although this person had a "personnummer", no financial information was available on the data base regarding this person since he did not reside in Sweden.

As every telecommunications operator, Telia needed, when accepting a new subscriber, to have the relevant data of the person and a means to trace him in case he did not pay his bills. Many telecommunications operators within the EU covered this risk by asking for a copy of the subscriber's identity card. This was practised notably by agencies of operators that favoured the sale of subscriptions in the physical presence of the subscriber. However, Telia's situation was different. On the one hand, the company frequently sold subscriptions by telephone. On the other hand, it legitimately wished to assure itself as to the solvency of the client at the time when it concluded the contract. Telia therefore did not ask for a copy of the identity card. In order to assure itself as to the solvency of the client, the company asked those clients who had



one for their "personnummer". Where no access to financial data on the customer that had been validated by a third party or no evidence of property was available, a deposit was requested. In fact, Telia granted unlimited usage of the telephone line to its customers between two bills, that is to say during a period of three months. The relevant options furthermore covered the risk that a bill should remain unpaid.

The practice of telecommunications operators in Europe as to the conditions for the grant of a line, the conditions of invoicing and the period during which the line was maintained and allowed to be used where the customer failed to pay the bills were very varied. Other operators such as British Telecom or France Telecom also foresaw that deposits like the one asked for by Telia were necessary in certain cases.

According to Telia's system, total and unlimited usage of a telephone line was possible for a period of five months between the date when the last invoice was paid and the date when the line was effectively blocked in the absence of payment. Other operators limited this period to three months and certain of them blocked usage of the line for external calls shortly after the failure to pay a bill was detected.

Telia had reduced its system of deposits that now amounted to 3 000 SEK or 333 € instead of 5 000 SEK at the time when the complainant had turned to the Commission. This amount appeared to be appropriate to the aim pursued (333 € as a deposit for five months' free usage of the line).

The principal reason of the obligation to provide the "personnummer" (or a deposit or evidence proving ownership of accommodation) was not to avoid the risk that the company might have to pursue its claims in other member states.

In the absence of a discrimination or of an unjustified practice, the Commission considered that there were not enough grounds to justify opening a procedure for an infringement of Article 82 of the EC Treaty.

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

In his observations, the complainant maintained his complaint. He alleged that Telia's approach resulted in an indirect discrimination of non-Swedish nationals since in reality, the latter could only obtain a "personnummer" after one year. According to the complainant, Telia's general terms of business provided that a deposit was required where there was reason to assume that the customer would not pay his invoices. The complainant argued that by assuming that this was the case where no "personnummer" was available, Telia in fact disadvantaged nationals of other member states.

In the complainant's view, there was a substantial difference between asking for a "personnummer" and asking for a deposit. In the former case, proof of solvency was sufficient whereas in the second case the customer had to provide financial resources to Telia, and that without receiving interest.

The complainant added that the comparison with British Telecom and France Telecom was not



convincing, given that the conditions of these companies indiscriminately dealt with the cases where a deposit was required. There were other telecommunications operators that did not ask for a deposit at all (like Deutsche Telekom) or only when problems had arisen (like Telekom Austria).

## THE DRAFT RECOMMENDATION

On the basis of the evidence submitted to him, the Ombudsman arrived at the conclusion that a friendly solution was not possible. The Ombudsman therefore made the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The European Commission should reconsider the complaint submitted to it by the complainant.

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

In its detailed opinion, the Commission made the following comments:

As to the substance of the complaint that the complainant had submitted to the Commission, there remained a difference of opinion between the complainant, the Ombudsman and the Commission. The person that was principally concerned, that is to say Telia, had not been involved in the exchange of correspondence. It remained to be clarified whether Telia's practice constituted an abuse of a dominant position within the meaning of Article 86 of the EC Treaty. The Commission had therefore decided formally to examine this question under Article 82 of the EC Treaty. This would allow the parties concerned (the complainant and Telia) to provide their views on all elements of the present case. At the end of this examination, the Commission would be in a position to reconsider all the elements of the present case before taking a definitive decision on the substance. This new approach should not be understood as an acceptance by the Commission of the Ombudsman's comments regarding the substance of the matter.

In order to proceed rapidly, the complainant's complaint under Article 82 of the Treaty would be forwarded to Telia within the next few days.

The Commission took the view that this new approach perfectly replied to the Ombudsman's recommendation to reconsider the complaint that the complainant had submitted to it.

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

On 1 July 2003, the complainant informed the Ombudsman's services by telephone that he was satisfied with the outcome of this case.

## THE DECISION

### **1 Lack of information concerning complaint lodged with the Commission**

1.1 The complainant, a German national, studied in Sweden. In order to obtain a telephone subscription from Telia, a Swedish telecommunications company, he had to provide a deposit of 5 000 SEK. It appears that such a deposit was requested of all foreigners who did not possess



a Swedish social security number. The complainant considered that this was an instance of discrimination contrary to Article 12 of the EC Treaty, given that Swedish nationals did not have to provide such a deposit. On 25 November 1998, the complainant therefore submitted a formal complaint to the Commission. In his complaint to the Ombudsman lodged in June 2002, the complainant alleged that despite several reminders the Commission had neither informed him about the state of the procedure nor about whether it intended to commence infringement proceedings against Sweden.

1.2 In its opinion, the Commission explained how the complaint had been dealt with by it and regretted that there had been a certain delay in so far as informing the complainant was concerned. According to the Commission, the complainant was finally informed by a letter sent on 8 August 2002.

1.3 It is good administrative practice that complainants should be kept informed about the state and the outcome of complaints that they lodge with the Commission. In the present case, it took the Commission nine months and a reminder from the complainant before it informed the latter in September 1999 that his complaint had been formally registered. None of the three reminders that were subsequently sent by the complainant appear to have been answered. It was only in August 2002, and after having been informed that the complainant had turned to the Ombudsman, that the Commission finally informed the complainant about the outcome of his complaint. In these circumstances, the Ombudsman takes the view that the approach of the Commission in the present case constitutes a clear case of maladministration. However, in view of the fact that the complainant has informed the Ombudsman that he accepted the Commission's apologies the Ombudsman considers that there are no grounds to pursue his inquiries into this aspect of the complaint.

## **2 Failure to pursue the complaint to the Commission**

2.1 In its letter to the complainant and in the opinion submitted to the Ombudsman, the Commission pointed out that in the course of its inquiry into a possible infringement of Article 82 of the EC Treaty, it had asked Telia to comment on the issue. Telia had explained that the deposit it demanded served the purpose of securing debts of subscribers of whom Telia, in the absence of a Swedish social security number, might lose track in the case of a move. The Commission noted that it had considered that this explanation justified the difference in treatment between holders of a Swedish social security number and persons who did not have such a number. It had thus decided not to make any further inquiries.

2.2 In his observations, the complainant criticised this decision. The complainant considered that there was an infringement of Article 82 of the EC Treaty, given that Telia discriminated between Swedish nationals and other EU nationals. He further submitted that the purpose followed by Telia of securing itself against the risk of losing track of its debtors could not justify this discrimination.

2.3 The Ombudsman considered that the complainant had thus submitted a further allegation. Given the close link between the original complaint and the further allegation, he took the view that the latter should be dealt with in the context of the present inquiry. The Commission had the opportunity to comment on this further allegation in its opinion on the Ombudsman's proposal





for a friendly solution.

2.4 The Ombudsman notes that the Commission disposes of discretionary powers as regards complaints alleging infringements of EU competition law. The Commission may thus decide to close a case if it comes to the conclusion that there is no such infringement or where it considers that there is no Community interest in pursuing it because national courts or authorities would be better placed to deal with the matter. The Ombudsman notes that in the present case, the Commission closed the case because it considered that in the absence of a discrimination or of an unjustified practice, there were not enough grounds to justify opening a procedure for an infringement of Article 82 of the EC Treaty. It is thus this reasoning which has to be examined here.

2.5 When dealing with prospective subscribers, Telia distinguishes between those persons who have a Swedish social security number ("personnummer") and those who do not have such a number and who do not possess a house or an apartment in Sweden either. As the complainant correctly points out, this distinction has important repercussions: whereas the mere indication of the "personnummer" is sufficient in the first case, the customer has to provide financial resources to Telia in the second case. Contrary to what the Commission alleges, this distinction results in an indirect discrimination on the grounds of nationality. The Commission itself points out that a "personnummer" is given to every Swedish citizen and to every foreigner residing for more than one year in Sweden. This means that nationals of other EU member states who do not stay in Sweden for more than one year (such as students) do not obtain a "personnummer". By limiting the advantage of not having to provide a deposit to those persons who have a "personnummer", Telia thus necessarily disadvantages all nationals of other member states who do not have such a number. The fact that non-resident Swedish nationals could also be required to provide a deposit when they come to Sweden for a short time as a student would (if established) not affect this conclusion. In order to constitute discrimination on the grounds of nationality, the relevant measure does not have to benefit all nationals of the member state concerned. (2)

2.6 The Ombudsman considers that none of the arguments that have been put forward by the Commission can be regarded as constituting a sufficient justification for this difference in treatment. First, the Commission's explanation as to why Telia does not simply ask prospective customers for a copy of their identity card is unconvincing. If Telia's supposed preference to sell subscriptions over the telephone should make it impractical for such a paper copy to be provided, it is difficult to understand why evidence as to the purchase of a house or apartment in Sweden is nevertheless accepted. Second, the individual commercial approach of Telia (with longer periods between invoices than practised by other companies) can obviously not justify disadvantaging nationals of other member states. Third, the reduction of the deposit from 5 000 SEK to 3 000 SEK reduces the disadvantage suffered by nationals of other member states but does not eliminate it. Fourth, and most important, Telia is of course entitled to protect itself against the risk that customers might not pay their invoices. However, this does not justify a system that results in disadvantaging nationals of other member states. The Ombudsman considers that there are possibilities to ensure the legitimate aim without resorting to discriminating measures. In this context, it is not without interest to note that the Commission





has been unable to identify any other comparable telecommunications operator in the EU that would practice a system similar to Telia's. As the complainant correctly observes, the conditions of neither British Telecom nor France Telecom that have been submitted by the Commission would appear to link the obligation to provide a deposit, directly or indirectly, to the nationality of the customer.

### **3 Conclusion**

3.1 On the basis of his inquiries, the Ombudsman made a draft recommendation in which he suggested that the Commission should reconsider the complaint submitted to it by the complainant. In its detailed opinion, the Commission informed the Ombudsman that it had decided to open a formal investigation under Article 82 of the EC Treaty. The complainant subsequently informed the Ombudsman that he was satisfied with the outcome of this case.

3.2 The Ombudsman considers that the Commission has thus accepted his draft recommendation and that the measures taken or to be taken by the Commission appear to be satisfactory.

3.3 The Ombudsman therefore closes the case. The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

(2) Cf. Case C-281/98 *Angonese* [2000] ECR I-4139 paragraph 41 and Case C-274/96 *Bickel and Franz* [1998] ECR I-7637 paragraph 25. See also Case C-43/95 *Data Delecta v MSL* [1996] ECR I-4661 and Case C-323/95 *Hayes v Kronberger* [1997] ECR I-1711.