

Decision of the European Ombudsman on complaint 519/2003/GG against the European Commission

Decision

Case 519/2003/GG - Opened on 22/04/2003 - Decision on 10/10/2003

Strasbourg, 10 October 2003

Dear Sir,

On 14 March 2003, you lodged a complaint concerning the European Commission's refusal to start infringement procedures against Germany pursuant to Article 226 of the EC Treaty in relation to your case. On 15 March 2003, you sent me a further letter relating to this complaint.

On 22 April 2003, I forwarded the complaint and your further letter to the President of the European Commission.

On 10 April 2003, you sent me further information concerning your complaint which I forwarded to the Commission on 28 April 2003.

On 26 April 2003, you sent me a copy of the judgements to which you had referred in your complaint. I forwarded a copy of these documents to the Commission on 5 May 2003.

The Commission sent its opinion on 1 July 2003. I forwarded it to you on 7 July 2003 with an invitation to make observations, which you sent on 11 July 2003.

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

THE COMPLAINT

The complainant, a German citizen, obtained a "Master of Science (MSc) in Conservation" in the UK. On 11 April 1994, he asked the competent authority of the Land Berlin (Germany) to recognize this diploma. The complainant took the view that he should be allowed to use the German academic title "Diplom-Ingenieur Landschaftsplanung" and to use the corresponding denomination of the profession. This request (which appears to have been more fully developed only during the subsequent litigation before German courts) was based on Articles 1, 3 and 11 of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC in conjunction with



Council Directive 89/48/EEC (1) of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (2) and Articles 10, 12, 39 and 43 of the EC Treaty.

Article 1 of Council Directive 92/51/EEC contains the following provisions:

"For the purposes of this Directive, the following definitions shall apply:

(e) regulated profession: the regulated professional activity or range of activities which constitute this profession in a Member State;

(f) regulated professional activity: a professional activity the taking up or pursuit of which, or one of its modes of pursuit in a Member State, is subject, directly or indirectly, by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence. The following in particular shall constitute a mode of pursuit of a regulated professional activity:(...)"

Article 3 (1) of the Directive provides:

"Without prejudice to Directive 89/48/EEC, where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, as defined in this Directive or in Directive 89/48/EEC, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorize a national of a Member State to take up or pursue that profession on the same conditions as those which apply to its own nationals:

(a) if the applicant holds the diploma, as defined in this Directive or in Directive 89/48/EEC, required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State; or

Article 11 (1) of the Directive is worded as follows:

"The competent authorities of host Member States shall recognize the right of nationals of Member States who fulfil the conditions for the taking up and pursuit of a regulated profession in their territory to use the professional title of the host Member State corresponding to that profession."

The German authority rejected the complainant's request. The complainant then turned to the German courts. However, his appeal against the decision of the German authority was rejected by the Verwaltungsgericht Berlin (judgement of 22 November 1997). The complainant unsuccessfully appealed against this judgement to the Oberverwaltungsgericht Berlin (judgement of 24 February 2000) and the Bundesverwaltungsgericht (decision of 23 January 2001). A complaint to the Bundesverfassungsgericht (German Constitutional Court) was also rejected (decision of 30 March 2001).

On 30 November 2002, the complainant then wrote to the Commission and asked the latter to



commence infringement proceedings against Germany, given that the German authorities had in his view infringed Community law. The Commission rejected this request. In a letter of 20 January 2003, the Commission pointed out that directives 89/48/EEC and 92/51/EEC obliged the authorities of a Member State to allow a citizen to exercise a profession and to use the name corresponding to this profession in its territory if the citizen had acquired, in another Member State, the qualification necessary for admission to the *same* profession. The Commission took the view that it was for Member States to regulate the individual professions, and that it was therefore not in a position to decide which profession in Germany corresponded to the profession in the United Kingdom for which the complainant had qualified. Both the British and the German authorities which the Commission had contacted were however of the opinion that the diploma "Master of Science in Conservation" did not lead to the profession of "Ingenieur"(engineer). Since in view of this information there appeared to be no infringement of Community law, the Commission was unable to take any further steps. The Commission further explained that where a citizen who had obtained an academic title in one Member State wished, on the basis of this title, to use an academic title of another Member State, an academic recognition by the latter was necessary, given that directives 89/48/EEC and 92/51/EEC only envisaged the usage of the academic title of the state of origin in the language of this country. This recognition was not governed by Community law itself but fell within the sphere of competence of Member States.

In his reply of 28 January 2003, the complainant alleged that in the whole course of the litigation before German courts it had never been doubted that the diploma he had acquired in the United Kingdom led to the same profession as the one for which the study "Diplom-Ingenieur Landschaftsplanung" (graduate engineer for landscape planning) was required. The German courts had however denied that directives 89/48/EEC and 92/51/EEC were applicable, given that the relevant profession was not a 'regulated' one in Germany. In the complainant's view, this question ought to have been submitted to the European Court of Justice for a preliminary ruling.

In its reply of 6 March 2003, the Commission pointed out that according to the British authorities, the complainant's diploma did not lead to the profession of engineer. The Commission further took the view that if the profession of landscape planner was not regulated in Germany, the complainant could exercise this profession without any need for the recognition of his British diploma.

In his complaint to the Ombudsman, the complainant alleged that the Commission was wrong to refuse to start infringement proceedings against Germany pursuant to Article 226 of the EC Treaty in relation to his case on the basis of the considerations set out in its letters of 20 January and 6 March 2003.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:



The complainant possesses a British diploma "Master of Science in Conservation" and wishes to have this diploma recognised by the German authorities in order to be able to work as "Diplom-Ingenieur Landschaftsplanung".

(1) Analysis with regard to the profession of engineer

As regards the professional recognition of diplomas, the profession of engineer was governed by the "general system of recognition" established by directives 89/48/EEC and 92/51/EEC. According to these directives, a person fully qualified to exercise a profession in one Member State (the "Member State of origin") is in principle entitled to the recognition of his professional qualifications in another Member State (the "host Member State") in order to be able to exercise the same profession in that Member State, provided that the profession concerned was regulated in the Member State where the recognition was sought. A profession is 'regulated' within the meaning of the directives where the taking up, the pursuit or one of the modes of pursuit of this profession is subject, by virtue of laws, regulations or administrative provisions, to the possession of certain qualifications. Where the profession which the applicant wishes to exercise is not regulated, there is no legal obstacle to its exercise and the directives are not applicable.

The Commission's services had contacted the British and the German authorities in order to establish whether the profession the complainant wishes to exercise ("Diplom-Ingenieur Landschaftsplanung") was regulated in Germany and whether the complainant's diploma gave access to the same profession in the United Kingdom.

It emerged from the information in the possession of the Commission that the usage of the title of engineer was regulated in Germany. In order to be able to use this title, it was thus necessary for the complainant to obtain the recognition of qualifications acquired in another Member State, in conformity with directives 89/48/EEC and 92/51/EEC. As indicated above, this recognition could only be awarded if the complainant was fully qualified to exercise the same profession in the Member State of origin. According to the information provided by the British authorities, however, the diploma "Master of Science in Conservation" did not constitute a professional qualification opening access to the profession of engineer in the United Kingdom. The complainant was therefore not entitled to have this diploma recognized in Germany in order to use the title "Ingenieur" there.

(2) Analysis with regard to the profession of landscape planner

According to the information provided by the complainant, the national courts that dealt with the matter considered that the profession of landscape planner was not regulated in Germany, to the extent that this profession did not require the possession of a title of engineer.

From the very beginning of its correspondence with the complainant, the Commission had informed the latter that the regulation of professions belonged to the exclusive competence of Member States. The complainant had also been informed that if the profession of landscape planner was not regulated in Germany, there were no legal problems in so far as diplomas were



concerned and that, in this case, the above-mentioned directives were not applicable.

(3) Conclusion

Given that the complainant thus did not fulfil the conditions foreseen in directive 92/51/EEC in order to benefit from the recognition of his professional qualifications, there had been no elements allowing the conclusion that there had been an infringement of Community law by German authorities.

Together with its opinion, the Commission submitted a considerable number of documents concerning the complainant's case, including a note dated 6 August 1997 from the Council of the Permanent Conference of the Ministers in charge of Culture of the German Länder.

The complainant's observations

In his observations, the complainant maintained his complaint. In his view, the German authorities had infringed Articles 10, 12, 39 and 43 of the EC Treaty by refusing to recognize his British diploma as a German diploma "Diplom-Ingenieur Landschaftsplanung". In this context, the complainant referred to the arguments he had developed in his complaint to the German Constitutional Court.

As regards the Commission's argument that the relevant profession was regulated in Germany but that directive 92/51/EEC was not applicable since the diploma "Master of Science in conservation" did not open up access to the profession of engineer in the United Kingdom, the complainant pointed to the definition of "regulated professional activity" laid down in Article 1 lit. f of directive 92/51/EEC in conjunction with Article 1 lit. d of directive 89/48/EEC. According to the complainant, one of the modes of pursuit and the taking up of the profession for which the diploma "Master of Science in Conservation" was required in the United Kingdom was regulated by Part II, Section 6 (2) lit. b of The Education (Teachers) Regulations 1993 (3). The complainant also referred to similar regulations that were contained in several German rules.

In so far as the right flowing from Article 11 (1) of directive 92/51/EEC was concerned, it was irrelevant whether the taking up, the pursuit or one of the modes of pursuit of the profession in the United Kingdom, for which the diploma "Master of Science in Conservation" was required, was regulated.

The question as to whether the profession, with regard to which the taking up, the pursuit or one of the modes of pursuit the diploma "Diplom-Ingenieur Landschaftsplanung" was required, was regulated or not within the meaning of directives 89/48/EEC and 92/51/EEC was an issue of Community law. The same held true for the question as to whether the diploma "Diplom-Ingenieur Landschaftsplanung" opened access to the same profession as the diploma "Master of Science in Conservation" in the United Kingdom. These questions should be resolved by the European Court of Justice.

THE DECISION

1 Failure to open infringement proceedings



1.1 The complainant, a German citizen, obtained a "Master of Science (MSc) in Conservation" in the UK. He subsequently asked the competent authority of the Land Berlin (Germany) to recognize this diploma. The complainant took the view that he should be allowed to use the German academic title "Diplom-Ingenieur Landschaftsplanung" and to use the corresponding denomination of the profession. This request was based on Articles 1, 3 and 11 of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (4) in conjunction with Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (5) and Articles 10, 12, 39 and 43 of the EC Treaty. The complainant's request was rejected by the German authority. Appeals to the German administrative courts (Verwaltungsgericht Berlin, Oberverwaltungsgericht Berlin and Bundesverwaltungsgericht) and to the German Constitutional Court were unsuccessful. The complainant then turned to the Commission and asked the latter to commence infringement proceedings against Germany, given that the German authorities had in his view infringed Community law. The Commission rejected this request in its letters of 20 January and 6 March 2003. In his complaint to the Ombudsman, the complainant alleges that the Commission was wrong to refuse to start infringement proceedings against Germany pursuant to Article 226 of the EC Treaty in relation to his case on the basis of the considerations set out in its letters of 20 January and 6 March 2003.

1.2 In its opinion, the Commission analyses the case with regard to the professions of both engineer ("Ingenieur") and landscape planner ("Landschaftsplaner"): As regards the profession of *engineer*, the title of engineer is regulated in Germany. In order to be able to use this title, it was thus necessary for the complainant to obtain the recognition of qualifications acquired in another Member State, in conformity with directives 89/48/EEC and 92/51/EEC. This recognition could only be awarded if the complainant were fully qualified to exercise the same profession in the Member State of origin. According to the information provided to the Commission by the British authorities, however, the diploma "Master of Science in Conservation" does not constitute a professional qualification opening access to the profession of engineer in the United Kingdom. The complainant was therefore not entitled to have this diploma recognized in Germany in order to use the title "Ingenieur" there. As to the profession of *landscape planner*, the national courts that dealt with the matter considered that the profession of landscape planner was not regulated in Germany. In that case, there were no legal problems in so far as diplomas were concerned, and the above-mentioned directives were not applicable. The Commission concludes that given that the complainant thus did not fulfil the conditions foreseen in directive 92/51/EEC in order to benefit from the recognition of his professional qualifications, there were no elements allowing the conclusion that there had been an infringement of Community law by German authorities.

1.3 It should be noted at the outset that the European Commission only has the power to refer a case to the Court of Justice under Article 226 of the EC Treaty if it considers that there is an infringement of Community law. The Ombudsman considers that the arguments put forward by the Commission to support its view that there is no infringement appear to be reasonable and that the complainant has thus not established his allegation concerning the Commission's



refusal to start infringement proceedings. In his observations on the Commission's opinion, the complainant refers inter alia to Part II, Section 6 (2) lit. b of The Education (Teachers) Regulations 1993 and to Article 11 (1) of Directive 92/51/EEC in order to support his case. The Commission has not expressly dealt with these provisions, although it appears from the voluminous documents submitted by the complainant and the Commission that the complainant had invoked them earlier. However, and as pointed out in the note dated 6 August 1997 from the Council of the Permanent Conference of the Ministers in charge of Culture of the German Länder that was submitted by the Commission, the British rules concerning teachers would appear to be irrelevant in the present context, since the complainant does not seek access to the profession of teacher in Germany. Likewise, the Ombudsman considers that Article 11 (1) of Directive 92/51/EEC is of no avail to the complainant, since this provision – as noted in the judgement of the Oberverwaltungsgericht Berlin – only allows the usage of the professional title of the host Member State (in the present case, landscape planner) corresponding to the complainant's qualifications, but not the usage of the academic title (in the present case, "Diplom-Ingenieur Landschaftsplanung"). The Ombudsman therefore considers that it is unnecessary to prolong the inquiry in the present case by asking the Commission to comment on the complainant's observations.

1.4 In these circumstances, there appears to be no maladministration on the part of the European Commission.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1992 L 209, page 25.

(2) OJ 1989 L 19, page 16.

(3) Section 6 (1) of the Regulations provides that at any school or further education institution, there shall be employed a staff of teachers suitable and sufficient in numbers for the relevant needs. Section 6 (2) (b) provides that without prejudice to the generality of paragraph (1), "the staff of teachers employed at a further education institution shall have qualifications appropriate to the giving of adequate instruction in the subjects in which the courses are provided."

(4) OJ 1992 L 209, page 25.

(5) OJ 1989 L 19, page 16.

