

Decision of the European Ombudsman on complaint 1053/2003/(ADB)PB against the European Commission

Decision

Case 1053/2003/(ADB)PB - Opened on 21/07/2003 - Decision on 15/09/2004

Strasbourg, 15 September 2004

Dear Mr and Ms G.,

On 5 May 2003, you made a complaint to the European Ombudsman concerning the alleged failure by the Commission properly to deal with your infringement complaint against Germany.

On 21 July 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 18 November 2003. I forwarded it to you with an invitation to make observations by 31 January 2004.

On 20 December 2003, your lawyer sent me a legal opinion.

On 21 December 2003, you asked me to provide you with a copy of a German application decree referred to in the Commission's opinion.

On 5 January 2004, your lawyer sent me a new legal opinion.

On 26 January 2004, I sent you a copy of the German application decree referred to above.

On 29 January 2004, I received your observations, sent on 21 January 2004.

On 5 February 2004, you sent me a letter in which you expressed a wish to submit additional observations. In response to this, I set a deadline of 31 March 2004 for your additional observations.

On 8 February 2004, your lawyer sent me another legal opinion.

On 14 February 2004, you sent me another letter.

On 21 March 2004, you sent me another letter to inform me about a decision of the German Constitutional Court.



On 20 April, 21 June and 15 August 2004 you sent me additional communications.

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

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into your complaint have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission.

THE COMPLAINT

The complaint was submitted by two German citizens in March 2003, and concerned the alleged failure by the European Commission to take Germany before the Court of Justice in respect of legislation on certain dog breeds.

The background to the complaint was a line of legislative measures taken at the regional and the national levels in Germany to reduce or eliminate the perceived danger posed by dogs popularly referred to as "fighter" dogs. The measures were sparked by an incident in 2000 where two dogs killed a six-year old boy. The complainants in the present case were owners of dogs belonging to the breeds in question.

Starting in July 2000, the complainants informed the Commission about existing or proposed German legislation, asking the Commission to take action against Germany. The complainants described a situation which in their view would lead to the unwarranted killing or suffering of thousands of dogs. The Commission repeatedly informed the complainants that it was examining the matter and would reply as soon as possible.

In a letter dated 2 October 2000, the Commission's Directorate-General (DG) for Health and Consumer Protection wrote, in summary, the following to the complainants: First, the situation described by the complainants did indeed give cause for concern from the point of view of animal protection. Furthermore, Member States were not allowed to act arbitrarily when adopting measures that negatively influence the free movement of animals in the European Union. However, the protection of human beings against certain dog breeds was not regulated at the Community level. It was therefore for the national courts to assess whether measures adopted at the national level for the protection of human beings were consistent with any legislation on animals rights.

The complainants sent further letters to the Commission, describing what they saw as unwarranted killing and cruel treatment of dogs.



On 23 November 2000, Commissioner David Byrne's cabinet wrote to the complainants to explain that the Community's competence was limited with regard to the protection of animal rights. The letter to the complainants stressed, however, that an issue that might be relevant for the Commission to examine was Germany's intended ban on the import of certain specified dog breeds, as this would affect the free movement of animals within the European Union.

On 13 December 2000, the Commission's DG Health and Consumer Protection informed the complainants in writing that the Commission had formally contacted the German authorities within the framework of Directive 98/34/EC (1) . With reference to Articles 28-30 of the Treaty establishing the European Community, the Commission had asked the German authorities to submit scientific evidence to justify the planned ban on the import of the Staffordshire Bull Terrier, Pitbull Terrier and the American Staffordshire Terrier. In addition, the Commission had asked the German authorities to consider the less drastic measures adopted in France and in Great Britain.

The complainants sent additional letters to the Commission, and received a reply from Commissioner David Byrne, dated 30 January 2001, which repeated the content of the letter of 13 December 2000.

The complainants sent further letters to the Commission, in reply to which they received acknowledgements of receipts.

In a letter dated 14 February 2001, the complainants wrote to the Commission again, asking it to start infringement proceedings against Germany in respect of German national legislation on so-called dangerous dogs. The legislation contained provisions that would ban the importation and other free movement of specified dog breeds. It appears that the legislation referred to was the *Hundeverbringungs- und einfuhrbeschränkungsgesetz* (2) - law concerning the keeping and import limitation of dogs - that entered into force on 12 April 2001 (hereinafter "the national dog legislation").

In a letter dated 23 February 2001, the Commission's DG Health and Consumer Protection informed the complainants that the Commission had still not received any reply from the German authorities.

On 16 March 2001, the Commission's DG Health and Consumer Protection confirmed receipt of the complainants' letter of 14 February 2001, informing them that it had registered a formal infringement complaint in their name and under reference number 2001/4226.

In a letter dated 9 April 2001, the Commission's DG Health and Consumer Protection informed the complainants that the positions of the different Member States in the matter were very different, and that the Commission did not possess conclusive evidence or statistical information which made it possible to determine the dangerousness of specific dog breeds. The letter also stated that at the European level, there was no definition of the term "dangerous dog".



Subsequently, the complainants sent the Commission a number of letters and documents intended to prove that the concept of inherently aggressive or "dangerous" dogs was unfounded.

On 27 April 2001, the complainants' lawyer sent the Commission a legal opinion in which he put forward that the German national dog legislation was unjustified.

In a letter dated 8 December 2001, the Commission's DG Health and Consumer Protection confirmed to the complainants that the Commission was still examining whether Germany was breaching the right to free movement.

The complainants sent further letters to the Commission, in response to which they received acknowledgements of receipt.

On 20 March 2002, the Commission DG Health and Consumer Protection sent the complainants a letter that, in summary, contained the following information: the Commission had received numerous complaints regarding alleged mistreatment of the dogs concerned. However, it was very difficult to identify a Community dimension that would enable the Commission to take any action, as the public safety issue concerned was perceived to be a subsidiarity-matter solely for the Member States to address. Commissioner Byrne (responsible for Health and Consumer Protection) had therefore decided to give priority to areas of animal protection with a clear Community dimension.

This letter also informed the complainants that attempts to address the matter in the context of justice and home affairs, agricultural policy and free movement had been equally unsuccessful.

The complainants sent the Commission further materials, and received acknowledgements of receipts.

On 29 August 2002, the Commission's DG Health and Consumer Protection sent the complainants a letter containing its formal conclusion on their infringement complaint 2001/4226. The letter informed the complainants that DG Health and Consumer Protection would propose to the Commission that the file on their infringement complaint should be closed. It stated in brief terms that the letters and materials received from the complainants did not suffice for the Commission to take action against Germany in respect of the legislation concerned. The letter emphasised that the Commission could only take action in cases where the Member State in question has breached Community law. In accordance with the procedural guarantees afforded to persons submitting infringement complaints, the letter informed the complainants that they could submit new evidence to support their complaint within one month.

On 8 September 2002, the complainants sent the Commission their reply with additional materials in support of their complaint.

On 16 December 2002, DG Health and Consumer Protection informed the complainants that it maintained its intention to recommend that the file on their complaint be closed. A similar letter



was sent to the complainants on 13 February 2003. The complainants sent additional letters and documents to the Commission, among others a letter dated 27 February 2003 addressed to European Commission President Prodi.

On 25 March 2003, the DG Health and Consumer Protection replied to the complainants' letter of 27 February 2003 on behalf of the President of the European Commission. The letter informed the complainants, again, that DG Health and Consumer Protection saw no reason not to propose to the Commission that the file on their infringement complaint should be closed. The letter stated that the keeping and breeding of dogs perceived to be dangerous was a purely national matter, and that the Member States were therefore entitled to adopt the measures that they considered necessary. The letter emphasised that the Member States were naturally obliged to respect Community law when adopting such measures.

The complainants thereafter sent additional letters to the Commission.

On 5 May 2003, the complainants submitted their complaint to the European Ombudsman. In their complaint, the complainants alleged that the Commission had disregarded clear infringements of Community law and therefore did not start an infringement procedure against Germany.

THE INQUIRY

The Commission's opinion

In its opinion on the complaint, the Commission made the following comments:

1. The complainants had submitted, on 14 February 2001, a complaint to the Secretary-General of the Commission on the draft German legislation on dangerous dogs banning certain breeds in the interests of public safety. In their complaint, the complainants had taken the view that the German legislation did not comply with the *acquis communautaire*.
2. The Commission had registered the complaint under No. 2001/4226, and had informed the complainants accordingly by letter dated 16 March 2001.
3. The German authorities had been informed of the above-mentioned legislation in the framework of the Directive 98/34 procedure. The Commission had informed the German authorities that the ban on the import into Germany of certain breeds was not in line with article 28 of the Treaty establishing the European Community nor with article 4 of Regulation 827/68/CEE, because it constituted an infringement of the rules on the free movement of goods. Following the Commission's remarks, an application decree was adopted by Germany (3) , which included exceptions to the import ban in order to comply with the above-mentioned rules of the Treaty.
4. After having taken into account the text of the application decree and having carefully evaluated all the elements of the complaint, the Commission had decided to close the file because it considered that Germany was not in breach of Community law. The examination



made by the Commission services into this matter had been particularly thorough and had involved various Commission services. The Directorates-General for Agriculture, Justice and Home Affairs, and the Internal Market had been consulted on the issue.

5. The position of the Commission services in this matter had been summarised to the complainants in a letter dated 29 August 2002. The complainants had been informed that in view of the results of the examination of the Commission services into the matter, it would be proposed that the Commission should close the file on their infringement complaint.

6. Since no new relevant information had been given by the complainants in their letter dated 8 September 2002, the decision to close the file had been taken on 16 October 2002.

7. The Commission's decision to close the file had been based on the fact that the issues raised by the complainants were not actually covered by the *acquis communautaire*.

8. It should be noted that the complaint lodged with the European Ombudsman did not contain any complaint against the procedure followed in this case. The complainants were basically not satisfied with the fact that the Commission could not act against Germany because of the lack of a legal basis and expressed merely general accusations relating to the "wrong policy" of the German authorities which, in the complainants' view, was supported by the Commission. In fact, this complaint contained once again the same elements that had already been dealt with by the Commission in its letters sent to the complainants during the preceding 3 years.

The complainants' observations

The complainants submitted their observations by letters dated 21 January, 8 February and 23 February 2004. In summary, it was put forward in these submissions that the German national dog legislation breached the Treaty establishing the European Community because the trade-restriction contained therein was unjustified. In their view, this breach had not in any way been removed by the German application decree referred to in the Commission's opinion. The complainants therefore maintained their allegation that the Commission had disregarded clear infringements of Community law.

On 26 March 2004, the complainants drew the Ombudsman's attention to a judgement of the German Constitutional Court (4). The judgement, which was published on 16 March 2004, concerned the legality of the German national dog legislation. It had been contested before the Court that the legislation was disproportionate and scientifically unjustified, and that the legislation breached Community free movement rights. In its decision, the Court expressly stated that it could not review the legislation's consistency with Community law (Part B., II, paragraph 55). It reviewed, however, whether the import ban was proportionate and scientifically justified. While recognising that scientists appeared consistently to agree that the dangerousness of a dog cannot be inferred *solely* from the genetic make-up of the dog, the Court also found that it could not be excluded that the genes may *contribute* to the level of dangerousness (Part C, I., paragraph 75). It concluded, therefore, that given the high value of human life in the German Constitution, the German legislator had an adequate basis for adopting the legislation in question (Part C, I., paragraph 79), and that the legislation was proportionate (Part C, I., paragraph 80).



THE DECISION

1 Preliminary remark

1.1 In addition to their allegation that the Commission had disregarded clear infringements of Community law, and therefore did not start an infringement procedure against Germany, the complainants have made the further allegation that the Commission has wrongly failed to propose measures to address the German authorities' treatment of dogs in Germany.

The Commission has explained that the European Union does not have any competence to legislate or otherwise address the issues of animal welfare referred to by the complainants, and that the Commission is therefore not in a position to propose or adopt any measures in this regard. It appears that this conclusion was the result of an extensive dialogue with the Member States on whether the principle of subsidiarity would allow the Union to act.

1.2 The Treaty establishing the European Community and the Statute of the European Ombudsman set precise conditions as to the admissibility of a complaint. The Ombudsman can only start an inquiry if these conditions are met. One of these conditions is Article 2.2 in the Statute of the European Ombudsman (5) :

"Any citizen of the Union (...) may (...) refer a complaint to the Ombudsman in respect of an instance of maladministration ..."

Complaints pertaining to the Commission's power to propose legislation do not concern possible instances of maladministration, but a political competence of that institution. The Ombudsman does not, therefore, consider that it would be within his competence to review the complainants' allegation that the Commission has wrongly failed to propose measures to address the treatment of dogs in Germany.

2 Allegation that the Commission disregarded clear infringements

2.1 In their infringement complaint to the Commission, the complainants alleged that German legislation on the importation and keeping of certain dog breeds was contrary to Community law. They claimed that the Commission should take action against Germany. The Commission registered the complaint and informed the complainants accordingly. The Commission subsequently informed the complainants that in view of its examination of the matter, it would not bring Germany before the Court of Justice.

In their complaint to the Ombudsman, the complainants alleged that the Commission had disregarded clear infringements of Community law.

2.2 In its opinion, the Commission explained that the above-mentioned legislation had been communicated to the German authorities in the framework of the Directive 98/34 procedure (6) . The Commission had informed the German authorities of its view that the ban on the import into Germany of certain breeds was not in line with article 28 of the Treaty establishing the European Community nor with article 4 of Regulation 827/68/CEE (7) , because it constituted an infringement of the rules on the free movement of goods. Following the Commission's remarks,



an application decree (8) had been adopted by Germany, which included exceptions to the import ban in order to comply with the above-mentioned rules of the Treaty.

After having taken into account the new text of the application decree and after having carefully evaluated all the elements of the complaint, the Commission had decided to close the file because it considered that Germany was not in breach of Community law. The examination made by the Commission services into this matter had been particularly thorough and had involved various Commission services. The Directorates-General for Agriculture, Justice and Home Affairs, and the Internal Market had been consulted on the issue.

2.3 In their observations, the complainants maintained their allegation.

2.4 The Ombudsman recalls that his present inquiry is directed towards examining whether there has been maladministration in the activities of the European Commission. This means that the Ombudsman examines whether the Commission has dealt with the infringement complaint in accordance with its duties of good administration, and whether its conclusion has been reached within the limits of the Commission's legal authority and without manifest errors of assessment.

From the evidence available to the Ombudsman, it appears that the Commission informed the German authorities that the relevant German legislation in its view infringed Community law, and that this led to the adoption of a German application decree aimed at correcting the infringement. It furthermore appears that the Commission thereupon concluded that Germany was no longer infringing Community law, and that it did so after extensive cross-service consultation.

On this basis, the Ombudsman does not consider that the complainants' allegation that the Commission disregarded clear infringements of Community law can be regarded as having been established. It appears, therefore, that there has been no maladministration on the part of the Commission.

3 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) Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204, p. 37.



- (2) Bundesgesetzblatt I 2001, Nr. 16, S. 530.
- (3) Verordnung über Ausnahmen zum Verbringungs- und Einfuhrverbot von gefährlichen Hunden in das Inland, 3. April 2002, BGBl I 2002, 1248.
- (4) Decision of the Court of 16 March 2004 (*BVerfG, 1 BvR 1778/01 vom 16.3.2004*) .
- (5) OJ 1994, L 113, p. 15.
- (6) Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204, p. 37.
- (7) Regulation (EEC) No 827/68 of the Council of 28 June 1968 on the common organisation of the market in certain products listed in Annex II to the Treaty, OJ 1968 L 151, p. 16.
- (8) Verordnung über Ausnahmen zum Verbringungs- und Einfuhrverbot von gefährlichen Hunden in das Inland, 3. April 2002, BGBl I 2002, 1248.