

Decision of the European Ombudsman on joint complaints 3452/2004/JMA et al. against the European Commission

Decision

Case 3452/2004/JMA - Opened on 31/01/2005 - Decision on 19/10/2005

The Ombudsman received a large number of complaints against the European Commission concerning its decision to start infringement proceedings against Spain in connection with the free lending of books by the Spanish public libraries.

The Spanish public libraries used to lend books to the public subject to no charge. It appears that the Commission took the view that this practice was contrary to the provisions of Directive 92/100/EEC on rental rights related to copyright in the field of intellectual property, and therefore, the institution decided to open an inquiry under Article 226 EC. The Commission sent a reasoned opinion to the Spanish authorities in which it requested a number of changes in the national legislation. As a result of this request, the Spanish authorities announced that they intended to modify the national legislation transposing the Directive, including new provisions establishing that citizens borrowing books from public libraries should pay a charge.

In the complainants' view, the Commission's request and the ensuing reply by the Spanish authorities did not respect the rights of the public or those of librarians. They alleged that the Commission's interpretation of Directive 92/100/EEC and its subsequent decision to pursue infringement proceedings against Spain undermined the existence of public libraries as a basic public service, and went against the fundamental rights of citizens to have access to culture.

The Commission argued that it had decided to initiate infringement proceedings against a number of Member States, including Spain, because their authorities had not transposed Articles 1 and 5 of Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property correctly. The Commission considered that the Spanish authorities had failed to ensure that authors were remunerated for the lending of their works through public libraries. The institution acknowledged the important role played by public libraries in acting as a conduit for culture and information, and stated that, by no means, had it intended to make it more difficult for European citizens to gain access to culture. It explained that in view of the



situation, if had decided to refer the matter to the European Court of Justice (Case C-36/05).

Having reviewed the factual situation in this case, the Ombudsman took the view that the facts of the complaints lodged with him do not appear to be identical to those in Case C-36/05, to the extent that the complainants before the Ombudsman and the parties in the case are not the same. On the basis of the available information, however, it appeared that the European Court of Justice, in the framework of Case C-36/05, will be called upon to decide whether or not the Commission's interpretation of the relevant provisions of Directive 92/100/EEC is legally correct, and therefore if the institution's decision to pursue infringement proceedings against Spain was justified. The Ombudsman therefore considered that the findings of the European Court of Justice in Case C-36/05 would have a direct bearing on, and should considerably influence his inquiry. The Ombudsman decided to file the outcome of the inquiries carried out without further action. The Ombudsman nevertheless underlined that his inquiry, in particular his co-operation with national ombudsmen, had helped the complainants to clarify the reasons for the Commission's actions and the possibilities for a correct implementation of the Directive.

Strasbourg, 19 October 2005

The Ombudsman received a large number of complaints against the European Commission concerning the institution's decision to start infringement proceedings against Spain in connection with the free lending of books by Spanish public libraries. As all the complaints concerned the same subject-matter and involved identical allegations, I decided to deal with all of them in a joint inquiry. The list of all complaints grouped under this inquiry has been annexed to the end of this decision.

On 31 January, 30 March and 15 April 2005, I forwarded your complaint together with all the related complaints to the President of the Commission, with a request for an opinion. On the same date, I informed the Spanish Ombudsman of my initiative, since it appeared that the legislative proposals made by the Spanish authorities in response to the Commission's requests, constituted the object of an inquiry he was carrying out. In order to foster mutual cooperation, I undertook in my letter to the Spanish Ombudsman to send him a copy of the reply provided by the Commission, for the purposes of his own inquiry.

On 2 May 2005, the Commission sent its opinion, which I forwarded to all the complainants with an invitation to make observations. A copy of the opinion was also sent to the Spanish Ombudsman. On 27 May and 2 June 2005, I received observations from two of the complainants in case 1417/20005/JMA. A number of complainants in cases 337/2005/JMA, 356/2004/JMA and 1417/2005/JMA acknowledged receipt of the Commission's opinion, even though they did not send any observations.

The results of the inquiries that have been made are described below.

THE COMPLAINTS

The facts of the case, according to the complainants, are, in summary, as follows:

Spanish public libraries have traditionally lent books to the public without charge. It



appears that the Commission took the view that this practice was contrary to the provisions of Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (1) . Accordingly, the institution decided to open an inquiry under Article 226 EC. The Commission sent a reasoned opinion to the Spanish authorities in which it requested a number of changes to the relevant national legislation. As a result of this request, the Spanish authorities announced that they intended to modify the national legislation transposing the Directive, including new provisions establishing that citizens borrowing books from public libraries should pay a charge.

In the complainants' view, the Commission's request and the ensuing reply by the Spanish authorities did not respect either the rights of the public or those of librarians. They argued that the Commission's interpretation of Directive 92/100 undermines a basic public service and goes against the rights of citizens to have access to culture. They therefore asked the Ombudsman to intervene.

The complainants allege, in summary, that:

The Commission's interpretation of Directive 92/100/EEC as regards the free lending of books by Spanish public libraries and the institution's subsequent decision to pursue infringement proceedings against Spain undermines the existence of public libraries as a basic public service, and goes against the fundamental rights of citizens to have access to culture.

THE INQUIRY The Commission's opinion

In its opinion the Commission gave first some factual background to the case. It explained that, in its report on the public lending right in the European Union (COM(2002) 502 final) (2) , its services had noted that a number of Member States, including Spain, had not transposed Articles 1 and 5 of Directive 92/100/ EEC correctly because they had failed to ensure that authors were remunerated for the lending of their works through public libraries. Accordingly, the Commission initiated infringement proceedings against Spain, which is one of a number of similar cases that have been brought against France, Ireland, Italy, Luxembourg and Portugal.

The Commission noted that the infringement proceedings in question had not been initiated because public libraries in Spain lend books free of charge. Respect for the right of copyright and related rights and the remuneration of these rights, as provided for in Directive 92/100/EEC, does not mean that borrowers may no longer borrow books free of charge, nor does it mean that libraries are required to pay additional fees. In most Member States, this remuneration is financed by the relevant public authorities.

The Commission justified its decision to initiate infringement proceedings in this case because authors from Spain and other EU Member States are not receiving the remuneration which is due to them. In accordance with Directive 92/100/EEC, in particular Article 1, authors have exclusive rights as regards the public lending of their works; the right of authors to receive remuneration, which is provided for in Article 5(1), already



represents a derogation from this fundamental principle. This derogation has been made in order to strike a fair balance between the interests of authors, whose rights concerning their works must be protected, and of the public, whose right to freely access information and knowledge is not in doubt.

The Commission acknowledged the important role played by public libraries in acting as a conduit for culture and information. It stated that it, by no means, intended to make it more difficult for European citizens to gain access to culture. However, the protection of copyright is a prerequisite to disseminating information and knowledge. The Directive ensures a fair balance between these two requirements. Moreover, the Spanish authorities did not submit any draft document or a timetable to the Commission to ensure that the proceedings in question could be halted.

In view of the situation, the Commission decided to refer the matter to the European Court of Justice (Case C-36/05 *Commission v Spain*), which is currently considering the case.

The complainants' observations

The observations received by the Ombudsman repeated the allegations made in the original complaints.

Comments from national and regional ombudsmen in the European Network of Ombudsmen

Given that Directive 92/100/EEC has to be implemented in all Member States of the European Union, the Ombudsman considered that it would be useful to exchange information on the subject with his national and regional counterparts in the European Network of Ombudsmen. The aim of this initiative was to ascertain whether or not there could be alternative ways of correctly implementing Directive 92/100/ EEC that would not necessarily involve charging individuals for borrowing books from public libraries. Accordingly, the Ombudsman asked for the help of his EU national and regional counterparts in replying to a number of questions related to this situation.

This initiative elicited widespread reaction from national ombudsmen, including those of Denmark, Finland, France, Greece, Latvia, Lithuania, the Netherlands, Portugal and Sweden, as well as from the German Bundestag's Petitions Committee. On the basis of the information submitted by these national authorities, it appears that most Member States have been able to correctly implement Directive 92/100/ EEC by means that do not necessarily involve charging individuals for borrowing books from public libraries. In some other cases, however, the correct transposition of the Directive 92/100/EEC appears to be in dispute, and the Commission has raised doubts about the implementing national rules. Accordingly, this institution had requested additional information from the Greek authorities; it had opened infringements proceedings against Finland; and it had taken legal action against Portugal before the European Court of Justice.

THE DECISION 1 Preliminary remark

1.1 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 in this case have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission. The European Ombudsman has no competence to inquire into the activities of Spanish authorities.

2 The Commission's decision to pursue infringement proceedings against Spain

2.1 The complainants allege that the Commission's interpretation of Directive 92/100/EEC as regards the free lending of books by Spanish public libraries, and the institution's subsequent decision to pursue infringement proceedings against Spain undermines the existence of public libraries as a basic public service, and goes against the fundamental rights of citizens to have access to culture.

2.2 The Commission argues that it had decided to initiate infringement proceedings against Spain, as well as against other Member States, such as France, Ireland, Italy, Luxembourg and Portugal, because their authorities had not transposed Articles 1 and 5 of Directive 92/100/EEC correctly. The Commission considers that the Spanish authorities failed to ensure that authors were remunerated for the lending of their works through public libraries.

The Commission justifies its decision to initiate infringement proceedings in this case because authors from Spain and other EU Member States are not receiving the remuneration that is due to them. The institution acknowledges the important role played by public libraries in acting as a conduit for culture and information, and states that it, by no means, intends to make it more difficult for European citizens to gain access to culture.

In view of the situation, the Commission explains that it decided to refer the matter to the European Court of Justice (Case C-36/05 *Commission v Spain*), which is currently considering the case.

2.3 Having carefully reviewed the factual situation in this case, the Ombudsman takes the view that the facts of the complaints lodged with him do not appear to be identical to those in Case C-36/05, to the extent that the complainants before the Ombudsman and the parties in the case are not the same.

On the basis of the available information, however, it appears that the European Court of Justice, in the framework of Case C-36/05, will be called upon to decide whether or not the Commission's interpretation of the relevant provisions of Directive 92/100/EEC is legally correct, and therefore if the institution's decision to pursue infringement proceedings against Spain was justified. It is clear from the above considerations that the findings of the European Court of Justice in Case C-36/05 shall have a direct bearing on, and should considerably influence, the Ombudsman's inquiry.

As set out in Article 195 EC:



"In accordance with his duties, the European Ombudsman shall conduct inquiries for which he finds grounds [...]."

Taking into account that the very same issue that the Ombudsman has been called upon in his inquiry constitutes the object of a case pending before the European Court of Justice, the Ombudsman does not consider it justified to pursue any further inquiries as regards these complaints.

3 Conclusion

In view of the results of his investigation, the Ombudsman considers that no further inquiries into these complaints are justified. He therefore closes the cases.

The President of the Commission will also be informed of this decision. Taking into account the interest of the Spanish Ombudsman in this inquiry, a copy of this decision will also be forwarded to him.

FURTHER REMARK

The Ombudsman finds it appropriate to underline that his inquiry in this case and especially the co-operation with national ombudsmen has helped the complainants to clarify the reasons for the Commission's actions and the possibilities for a correct implementation of the Directive.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27/11/1992 p. 0061-0066.

(2) Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union, COM(2002) 502 final.