

Decision of the European Ombudsman in the own initiative inquiry OI/2/2001/(BB)OV

Decision

Case OI/2/2001/(BB)OV - Opened on 30/04/2001 - Decision on 27/06/2002

Strasbourg, 27 June 2002

Mr President,

On 30 April 2001 I started an own initiative inquiry into the limitation of the citizen's right to work, through the imposition of age limits for recruitment to the Community institutions and bodies. This own initiative inquiry concerned all Community institutions, bodies and decentralised agencies.

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

THE INQUIRY

The reasons for the inquiry

On 7 December 2000, in Nice, the Presidents of the European Parliament, the Council and the Commission jointly proclaimed the Charter of Fundamental Rights of the European Union (1) . The European Council welcomed the joint proclamation, noting that the Charter combines in a single text the civil, political, economic and societal rights hitherto laid down in a variety of international, European or national sources (2) .

It follows from the above that the European Council, the European Parliament, the Council and the Commission have acknowledged, on behalf of the Community, the rights contained in the Charter. Failure by a Community institution or body to respect the rights contained in the Charter would therefore be an instance of maladministration.

Article 15 (1) of the Charter of Fundamental Rights recognises to engage in work by providing that *"Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation"*.

Article 21 (1) of the Charter contains the principle of non-discrimination by providing that *"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, **age** or sexual orientation"* (bold added).



The Convention which drafted the Charter refers in its explanation of this provision to, amongst others, Article 14 of the European Convention on Human Rights. According to the established case-law of the European Court of Human Rights, a difference in treatment is discriminatory if it has no objective and reasonable justification: that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

According to the Court of Justice of the European Communities, a breach of the prohibition of discrimination occurs in cases of unequal treatment where the discrimination is not objectively justified (3) .

The inquiry

For the reasons given above, the Ombudsman considered that, unless there is an objective justification for age limits in the recruitment to the Community institutions and bodies, their use would constitute a discriminatory limitation of the citizen's right to work.

The Ombudsman therefore requested all Community institutions, bodies and decentralised agencies to inform him, by 31 July 2001, whether they use age limits in their recruitment. In case of a positive answer, the Ombudsman also requested to be informed of the age limit of limits prescribed and of their objective justification and legal basis.

The opinions from the Community institutions, bodies and decentralised agencies

From the opinions received it appears that none of the eleven decentralised agencies (4) apply age limits in their recruitment procedures. Age limits are neither applied by the Committee of the Regions, the European Investment Bank, the European Central Bank and Europol.

On the other hand, the Commission, the Parliament, the Council, the Court of Justice (and Court of First Instance), the Court of Auditors and the Economic and Social Committee all apply age limits for the recruitment at basic grades. The age limit which is generally applied for competitions is 45 years.

As regards the objective justification for applying age limits in their recruitment, the Commission, the Parliament and the Council provided the following explanation to the Ombudsman:

The Commission observed that the 45 years age limit is intended to allow career perspectives for its officials and to guarantee that the officials exercise their activity a minimum period of time, this in relation with the rights of the Staff Regulations concerning pensions. The Commission is of the opinion that these justifications constitute a reasonable and objective ground for the application of age limits: they have a legitimate aim and the measures applied are proportional to the aim pursued, and therefore compatible with Articles 21 and 15 of the Charter.

Part II of the Commission's White Book on Reform and the Consultation Document for competitions and recruitment of 28 February 2001 (SEC(2001)294/4) have reiterated the Commission's intention to abandon age limits in the future. On basis of the latter document, consultations were organised with the Commission's services and the other European institutions as well as with staff representatives. As these negotiations were not concluded by 1



July 2001, the competitions published since then still retain the age limit of 45 years for competitions at the basic grades.

The Commission also referred to the progress on the creation of an Interinstitutional Recruitment Office. In this context, the Commission observed that it will be for the Future Management Board of this Office to take a decision concerning age limits applicable to competitions. On basis of the recommendation of the working group, the Office should be operational by 1 January 2003.

The Parliament stated that it since the Bureau's decision of 20 October 1997, it applies an age limit of 45 years for open competitions. This decision is to be reviewed by the Bureau in the near future, in the light of a report on the matter prepared by the DG Personnel. A copy of this report was enclosed with the opinion. The Parliament equally observed that the question of age limits would be referred to the future Management Board of the Interinstitutional Recruitment Office.

The report prepared by the DG Personnel stated that a new increase in the age-limit or its abolition would have as a result an increase in the number of candidates to competitions (with the corresponding management problems), an increase in both older and the average age of competition laureates and in the average age of recruitment of officials.

This would mainly have three consequences, namely 1) difficulties in terms of dissatisfaction or frustration of the newly recruited officials as regards their classification at the moment of their engagement (normally at the basic grade), 2) on the long term, an ageing of the personnel of the General Secretariat of the European Parliament and 3) financial consequences on the social security regime of officials of the European Communities, at the level of the pensions and the illness insurance.

The Council stated that the fixing of an age limit of 45 years for recruitment at basic grades is necessary and objectively justified for the following reasons:

Firstly, career perspectives imply that the personnel should be recruited at a young age. Also, the costs linked to recruitment at the basic grade can not be profitable if the officials do not work for a long period.

Secondly, the necessity of an efficient management of human resources (classification, integration, career and pensions) requires a minimum of coherence between the grade, function and age. Every derogation in this field is source of difficulties. The Staff Regulations and the management of human resources in principle prohibit to recruit officials who, by their age, would not be able to benefit from career perspectives.

The Council observed that these justifications are objective. They are based on principles linked to the nature itself of the public function and to the necessity of an efficient functioning of the services of the General Secretariat of the Council. The Council concluded that the application of age-limits for the recruitment is good administration and is not a restriction to the "right to work".



Like the Commission and the Parliament, the Council also referred to the creation of an Interinstitutional Recruitment Office. The Council also stated that the question of age-limits could also be raised in the framework of the proposals for amending the Staff Regulations on which the Council will have to decide as legislator. Before the results of these works are known, it does not seem appropriate to change the current practice applied at the Council.

The Ombudsman's evaluation of the reasons given for the use of age-limits

As justification for maintaining an age-limit of 45 years in the recruitment procedures, the Commission, Parliament and Council gave together mainly 6 reasons, which can be summarised as follows:

- (1) career perspectives imply that officials should be recruited at a young age; an efficient management of human resources (classification, integration, career and pensions) requires a minimum of coherence between grade, function and age;
- (2) costs for recruitment at the basic grade are not profitable if the officials do not work for a minimum period of time;
- (3) abolishing age-limits would lead to an increase in the number of candidates;
- (4) abolishing age-limits would lead to an ageing of the personnel of the institutions;
- (5) abolishing age-limits would lead to dissatisfaction or frustration of the newly recruited officials as regards their classification at the moment of engagement;
- (6) abolishing age-limits would create financial problems for the social security regime of the European Communities (pensions and illness insurance);

Evaluation

As regards argument (1), the Ombudsman notes that it is not substantiated as no explanation is provided why an efficient management of human resources would need the setting of age-limits. As regards the career perspectives, the Ombudsman considers that it is up to the candidate to decide whether, and at what age, he or she wants to become a Community official.

As regards arguments (2) and (6) relating to costs and financial problems, the Ombudsman recalls that according to the established case-law of the Court of Justice budgetary considerations as such cannot justify discrimination (5) .

As regards argument (3) concerning the number of candidates, the Ombudsman considers that considerations related to administrative workload are not substantial enough to justify the non-application of a right as fundamental as that of non- discrimination.

The Ombudsman notes that argument (4) it is not an argument, but an admission that older people would be less valuable.

Argument (5) appears not to be substantiated, as candidates always know on beforehand the conditions of their possible recruitment. There is no proof that older candidates would be



dissatisfied or frustrated by the posts they have consciously applied for.

On basis of the above the Ombudsman considers that the 6 reasons invoked by the Commission, the Parliament and the Council do not appear to be acceptable or are unsubstantiated.

Also, the Committee of the Regions, the European Central Bank, the European Investment Bank, Europol, as well as the 11 decentralised agencies which do not apply age-limits do not appear to encounter the kind of problems which would, according to the Commission, the Parliament and the Council, require the setting of an age limit.

As other reasons for still applying age limits, all three institutions refer to the fact that the matter will have to be decided by the Management Board of the future Interinstitutional Recruitment Office. Further reasons invoked by the Commission, respectively the Council, for still applying age limits were that negotiations were not concluded by 1 July 2001 or that it is not appropriate to change the current practice as long as the results of the ongoing works are not known. Again, these kind of reasons linked to administrative delays do not appear to be substantial enough to set aside the application of a right as fundamental as the non-discrimination on basis of age.

On basis of the above analysis, the Ombudsman concludes that none of the three institutions presented objective justifications for the use of age-limits.

Further inquiry

In parallel with the present inquiry, the Ombudsman wrote on 7 March 2002 to the Presidents of the European Parliament and of the European Commission with regard to the draft Decision setting up the European Recruitment Office (6) . The reason for this letter was that the draft Decision contained a provision that would allow the Management Board of the Office to decide to impose age-limits.

In his letter to the Presidents (7) , the Ombudsman drew the attention to the prohibition of age discrimination contained in Article 21 of the Charter of Fundamental Rights of the European Union which was proclaimed on 7 December 2002 by the Presidents of the European Parliament, Council and Commission.

The Ombudsman then quoted from several statements made on the occasion of the proclamation of the Charter by the then President of the European Parliament, Mrs Nicole Fontaine, and by the President of the Commission and from a communication concerning the proclamation of the Charter made by President Prodi and the responsible Commissioner Mr Vitorino. Referring to these statements, the Ombudsman observed that they gave citizens reason to feel confident that the Charter will be properly followed by the institutions whose Presidents signed it.

The Ombudsman therefore concluded that he could not agree to sign any decision that does not make clear that the European Recruitment Office must not discriminate on the grounds, including age, that are prohibited by the Charter of Fundamental Rights of the European Union.



He therefore requested the Presidents to take the following measures:

- deletion of the provision concerning age limits in competitions, foreseen in point 2.6.2 of the "Draft agreement between the Secretary Generals on the common principles for a shared selection and recruitment policy"
- inclusion in the "draft decision of the Secretary Generals on the organisation and operation of the European Communities Recruitment Office" of a reference to Article 21 of the Charter of Fundamental Rights".

The Commission's and Parliament's opinions

On 10 April 2002, the President of *the Commission* replied that Vice-President Kinnock had taken the decision to abolish age limits for all competitions run by the Commission with immediate effect, and that no Commission competitions published after 10 April 2002 will apply an upper age limit for applicants. The Commission also stated that it will amend its detailed proposals for changes to the Staff Regulations to ensure that they more clearly reflect this position.

The Commission further observed that within the framework of the European Recruitment Office, it will strongly advocate the abolition of age limits and that it is confident that the abolition of age limits will be confirmed on an inter-institutional basis, given the strong support also of the European Parliament.

The Commission further stated that its decision to discontinue the use of age limits with immediate effect would resolve the problem for the few competitions that it will be running before the European Recruitment Office will take over the organisation.

On 29 April 2002, the President of *the European Parliament* replied that the Bureau had decided, at its meeting of 8 April 2002, that the Parliament will no longer apply age limits to any selection procedure it launches nor agree to the use of age limits in any selection procedure organised by the European Recruitment Office once it is established.

THE DECISION

1.1 On 7 December 2000, the Presidents of the European Parliament, the Council and the Commission jointly proclaimed the Charter of Fundamental Rights of the European Union. The European Council welcomed the joint proclamation, noting that the Charter combines in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources.

1.2 The Presidents of the Parliament and the Commission made the following significant statements on 7 December 2000. Mrs Nicole Fontaine, the then President of the Parliament stated that "*A signature represents a commitment (.). I trust that all the citizens of the Union will understand that from now on (.) the Charter will be the law guiding the actions of the Assembly (.). From now on it will be the point of reference for all the Parliament acts which have a direct or*



indirect bearing on the lives of citizens throughout the Union".

1.3 Mr Romano Prodi, President of the European Commission, stated that *"In the eyes of the European Commission, by proclaiming the Charter of Fundamental Rights, the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote (.). The citizens of Europe can rely on the Commission to ensure that the Charter will be respected"*.

1.4 In the Communication from the President of the Commission and Commissioner Vitorino of 13 March 2001, it is stated about the Charter that *"There can be no doubt as to its fundamental nature. (.) The Commission, like the other institutions, must look to the practical implications of this historic event and make compliance with the rights contained in the Charter the touchstone for its action. This must be an overriding requirement in the Commission's day-to-day business, both in relations with the general public and with those to whom our decisions are addressed and in our internal rules and procedures. But it must also be reflected in the way the Commission exercises its right to initiate legislation and its power to lay down rules. Any proposal for legislation and any draft instrument to be adopted by the Commission will therefore, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter"*.

1.5 Article 6 (2) of the Treaty on European Union provides that *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."* The Ombudsman is of the opinion that, since the proclamation of the Charter of Fundamental Rights, the European citizens are entitled to believe that the fundamental rights that the Union promises to respect, in the above mentioned Article 6 (2), are those set forth in the Charter.

1.6 Article 21(1) of the Charter contains the fundamental right of non-discrimination by stating that *"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, **age** or sexual orientation **shall be prohibited** "* (bold added).

1.7 The Ombudsman notes that, further to his letter of 7 March 2002 to the Presidents of the Parliament and the Commission concerning the draft Decision setting up the European Recruitment Office in which he underlined the above commitments, both institutions decided in April 2002 i) to abolish age limits with immediate effect for all competitions organised henceforth and ii) not to agree to the use of age limits in any selection procedure organised by the European Recruitment Office once it is established.

1.8 From the present inquiry it appears that, in the actual situation, the European Commission and the European Parliament do not apply age limits anymore. Age limits are neither applied by the Committee of the Regions, the European Investment Bank, the European Central Bank,



Europol and the eleven decentralised agencies (8) . With regard to these institutions and bodies, no further inquiries appear to be necessary.

1.9 The only institutions and bodies which today continue to apply age limits are the Council, the Court of Justice (and Court of First Instance), the Court of Auditors and the Economic and Social Committee. It appears however that the question of age limits applied by these institutions and bodies will be the subject of a decision by the Management Board of the European Recruitment Office which is to be set up by the end of 2002.

1.10 Considering that two of the main institutions, namely the European Commission and the European Parliament, have declared that they will strongly advocate the abolition of age limits in that context and will not agree to vote in the opposite sense, the Ombudsman is confident that the abolition of age limits will be decided on an inter-institutional basis by the Management Board of the European Recruitment Office.

1.11 In view of the above, the Ombudsman considers that no further inquiries are justified. However, until the definitive abolition of age limits by the Management Board of the European Recruitment Office, the Ombudsman will continue to investigate complaints on an individual basis which allege age discrimination by those institutions and bodies which have not yet abolished them.

Conclusion

On the basis of the Ombudsman's inquiries into this own initiative inquiry, there appears to have been no maladministration by the institutions and bodies mentioned in paragraph 1.8 of the decision. As regards the other institutions and bodies, no further inquiries appear to be justified. The Ombudsman therefore closes the case.

Yours sincerely,

Jacob SÖDERMAN

(1) OJ 2000 C 364/1.

(2) Presidency Conclusions, Nice European Council meeting, 7 , 8 and 9 December 2000, paragraph 2.

(3) Joined cases 198 to 202/81, Fernando Micheli and others v. Commission, 1982, ECR 4145 - 4160.

(4) 1) The European Centre for the Development of Vocational Training (CEDEFOP), 2) The European Foundation for the Improvement of Living and Working Conditions, 3) the European Environment Agency (EEA), 4) The European Agency for the Evaluation of Medicinal Products (EMA), 5) The Office for the Harmonisation in the Internal Market (OHIM), 6) The European Training Foundation, 7) The European Monitoring Centre for Drugs and Drug Addiction, 8) the



Translation Centre for Bodies of the European Union, 9) The European Agency for Safety and Health at Work, 10) The Community Plant Variety Office, 11) the European Monitoring Centre on Racism and Xenophobia.

(5) Case C-226/98, Jørgensen, ECR [2000] I-2447, paragraph 29. This case concerned sex discrimination, but there is no reason why the same argument should not apply to discrimination on basis of age.

(6) SG D(2002) D/8487 27 February 2002.

(7) The letter to President Pat Cox can be found on the Ombudsman's website : <http://www.ombudsman.europa.eu>.

(8) 1) The European Centre for the Development of Vocational Training (CEDEFOP), 2) The European Foundation for the Improvement of Living and Working Conditions, 3) the European Environment Agency (EEA), 4) The European Agency for the Evaluation of Medicinal Products (EMA), 5) The Office for the Harmonisation in the Internal Market (OHIM), 6) The European Training Foundation, 7) The European Monitoring Centre for Drugs and Drug Addiction, 8) the Translation Centre for Bodies of the European Union, 9) The European Agency for Safety and Health at Work, 10) The Community Plant Variety Office, 11) the European Monitoring Centre on Racism and Xenophobia.