

Decision of the European Ombudsman on complaint 1291/2005/TN against the European Commission

Decision

Case 1291/2005/TN - Opened on 18/04/2005 - Decision on 06/12/2005

Strasbourg, 6 December 2005

Dear Mr B.,

On 15 March 2005, you made a complaint to the European Ombudsman concerning the European Commission's alleged failure to give a complete reply to your complaint of 23 January 2005 against Germany.

On 15 April 2005, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 18 July 2005. I forwarded it to you with an invitation to make observations, which you sent on 8 September 2005, with further information provided by you by letter of 26 October 2005.

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

THE COMPLAINT

According to the complainant, the relevant facts are, in summary, as follows:

By letter of 23 January 2005, he made a complaint to the Commission against Germany concerning the allegation that the German Federal Constitutional Court had decided, on 14 October 2004, that it is not bound by decisions of the European Court of Human Rights. In his complaint to the Commission, he argued that the German Federal Constitutional Court's decision constitutes a gross violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") and in particular Article 46 thereof, which states that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Through its violation of the ECHR, Germany has also violated the Treaty of Maastricht ("the EU Treaty"), in particular Article 6(2) thereof, which stipulates that the Union shall respect fundamental rights, as guaranteed by the ECHR. In his complaint to the Commission, he further argued that the EU Treaty, in particular its articles on freedom of movement and on human rights, implies that each citizen seeking employment or residence in an EU county should expect to benefit from standards of democracy and justice



matching those of other EU countries. These guarantees are not upheld in Germany, mainly because of its unilateral abrogation of its international treaty obligations under the ECHR.

In his complaint to the Ombudsman, the complainant stated that the Commission, in its reply to his complaint, advised him to turn to the European Court of Human Rights. It was the complainant's intention to do so, but he still considered that Germany had also violated the EU Treaty, for compliance of which the Commission, not the European Court of Human Rights, is responsible.

The complainant alleged, in summary, that in replying to his complaint of 23 January 2005, the Commission failed to address the question of Germany's alleged violation of the EU Treaty.

THE INQUIRY

The Commission's opinion

In its opinion of 18 July 2005, the Commission made, in summary, the following comments:

In his complaint to the Commission of 23 January 2005, the complainant condemned a decision of the German Federal Constitutional Court, which, according to the complainant, held that it is not bound by decisions of the European Court of Human Rights. The complainant therefore argued that Germany does not comply with fundamental rights; that it should be expelled from the Council of Europe; and that it should be subject to appropriate sanctions.

Having established that the Commission is not competent to take actions in a case relating to alleged non-compliance with decisions of the European Court of Human Rights, the relevant Commission department sent the complainant a reply to this effect on 1 March 2005.

In response to the complainant's complaint to the Ombudsman regarding the matter, it should be noted that there were no factors in the complainant's complaint against Germany that required the Commission to take action. Commission competence of the kind in question is established only in the event of a violation of fundamental rights under Community law. However, in his complaint to the Commission, the complainant did not invoke a specific violation of a fundamental right protected under Community law. Nor did his allegations establish that there was a clear risk of a serious violation of fundamental rights, or a serious and persistent violation of such rights, which could necessitate the application of one of the procedures provided for under Article 7 of the EU Treaty.

The complainant's observations

In his observations and further information, the complainant made, in summary, the following comments:

As regards the Commission's assertion that there was no risk of a serious violation of fundamental rights, or a serious and persistent breach of such rights, the complainant pointed out that, in his complaint to the Commission, he argued on formalistic grounds, namely that the decision of the German Federal Constitutional Court poses a significant threat to fundamental rights, which was an argument accepted for the purpose of admissibility before the European



Court of Human Rights. However, the fact that, at the time of submitting his observations, he had brought the case before the European Court of Human Rights, does not absolve the Commission from its responsibility to act, since the Commission exercises control at a level lower than the control exercised by the European Court of Human Rights and would be more effective in its actions. The complainant asked the Commission for EU sanctions against Germany, which are not the same sanctions as the ones that can be imposed by the European Court of Human Rights. The complainant would not have had to complain to the European Court of Human Rights, had the Commission done its work properly.

In his observations, the complainant referred to a number of examples of violations of the ECHR by Germany, such as the Summary Punishment Order, which infringes the right to a public hearing, and the fact that the rules of procedure in criminal cases are unduly complex which, among other things, violates Article 6(3)(d) of the ECHR since the defendant has to call his own witnesses. The complainant characterised the violations to which he made reference on the basis of what he termed the Low Level Abuse Model ("LLAMs") (1) , which means that the violations primarily occur at a low level, where they remain largely unnoticed. These subtle ways of violating human rights are not detected by traditional organisations, such as Amnesty International . In order to illustrate further his point, the complainant referred to a 'live case' concerning the alleged failure by a bank to pay the full amount of a loan. In this case, the plaintiff was denied the right to freedom of expression; the right to hear witnesses; and the right to legal representation. The latter right was refused on the basis of Nazi laws introduced in the 1930s to keep Jews out of the legal profession. According to the complainant, these Nazi laws were never repealed despite the fact that they violate Article 6(3)(c) of the ECHR.

Since the Commission appeared to accept responsibility on the basis of persistent violations of fundamental rights, the complainant wondered what the Commission is doing to ensure that the required fundamental rights standards are upheld and what kind of periodic or unannounced inspections it carries out in this regard.

THE DECISION

1 The alleged failure to address Germany's violations of the EU Treaty

1.1 The complaint concerns the Commission's alleged failure to give a complete reply to the complainant's complaint against Germany, submitted on 23 January 2005. The complainant made a complaint to the Commission against Germany concerning the allegation that the German Federal Constitutional Court had decided, on 14 October 2004, that it is not bound by decisions of the European Court of Human Rights. In his complaint to the Commission, the complainant argued that the German Federal Constitutional Court's decision constitutes a gross violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and in particular Article 46 thereof, which states that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Through its violation of the ECHR, Germany has also violated Article 6(2) of the EU Treaty, which stipulates that the Union shall respect fundamental rights, as guaranteed by the ECHR. In his complaint to the Ombudsman, the complainant stated that the Commission, in its reply to his complaint, advised him to turn to the European Court of Human Rights. It was the



complainant's intention to do so, but he still considered that Germany also had violated the EU Treaty, for compliance of which the Commission, not the European Court of Human Rights, is responsible. The complainant alleged, in summary, that in replying to his complaint of 23 January 2005, the Commission failed to address the question of Germany's alleged violation of the EU Treaty.

1.2 The Commission argued that there were no factors in the complainant's complaint against Germany that required it to take action. Commission competence of the kind in question is established only in the event of a violation of fundamental rights protected under Community law. However, in his complaint to the Commission, the complainant did not invoke a specific violation of a fundamental right. Nor did his allegations establish that there was a clear risk of a serious violation of fundamental rights, or a serious and persistent violation of such rights, which could necessitate the application of one of the procedures under Article 7 of the EU Treaty.

1.3 According to the complainant's observations on the Commission's opinion, he argued on formalistic grounds in his complaint to the Commission, namely that the decision of the German Federal Constitutional Court poses a significant threat to fundamental rights, which was an argument accepted for the purpose of admissibility before the European Court of Human Rights. However, the fact that, at the time of submitting his observations, he had brought the case before the European Court of Human Rights, did not absolve the Commission from its responsibility to act. The complainant referred to a specific case to support his view that Germany violated human rights, namely the right to a public hearing; the right to freedom of expression; the right to hear witnesses; and the right to legal representation. According to the complainant, the latter right was refused on the basis of Nazi laws introduced in the 1930s to keep Jews out of the legal profession. According to the complainant, these Nazi laws were never repealed despite the fact that they violate Article 6(3)(c) of the ECHR. Since the Commission appeared to accept responsibility on the basis of persistent violations of fundamental rights, the complainant wondered what the Commission was doing to ensure that the required fundamental rights standards were upheld and what kind of periodic or unannounced inspections it carried out in this regard.

1.4 The Ombudsman notes from the document enclosed with the Commission's opinion that, following its reply to the complainant of 1 March 2005, it sent a further letter to the complainant on 12 May 2005, explaining its position in more detail and enclosing the "Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based" ("Commission Communication") (2). In its letter of 12 May 2005, the Commission explained, among other things, that it "does not have general competence as regards fundamental rights under the terms of the Treaties on the European Union and establishing the European Community, and may only intervene in the event of fundamental rights violations in the field of the application of Community legislation". The Commission further stated that, on the basis of the complainant's complaint against Germany, it could not establish any violation of Community law. The hypothetical violations of fundamental rights referred to by the complainant did not constitute a clear risk of a serious breach by Germany of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, nor did they constitute



a serious and persistent breach by Germany of the above principles. The Commission finished its letter by explaining that the application of Article 7 of the EU Treaty was therefore not possible.

1.5 The Ombudsman notes the Commission's argument that it may only intervene in the event of fundamental rights violations in the field of the application of Community legislation. The Ombudsman recalls in this regard that, according to Article 7 of the EU Treaty, the Commission has the power to ask the Council to determine that there is either a clear risk of a serious breach, or that there exists a serious and persistent breach, by a Member State, of the principles mentioned in Article 6(1) of the EU Treaty including respect for human rights and fundamental freedoms. Accordingly, and contrary to what the Commission's argument suggests, the application of Article 7 of the EU Treaty would not appear to require the breach of the principles mentioned in Article 6(1) to be connected with the application of Community law. However, the Ombudsman does not consider it necessary to pursue this question further since, in any event, the complainant does not appear to have provided evidence of any clear risk of a serious breach, or the existence of a serious and persistent breach, by Germany of the principles mentioned in Article 6(1) of the EU Treaty.

1.6 The Ombudsman notes that the complainant argued in his complaint to the Commission that the decision of the German Federal Constitutional Court posed a significant threat to fundamental rights. The complainant referred to a paragraph in the decision saying that *"[a]s a result of the status of the European Convention on Human Rights as ordinary statutory law below the level of the constitution, the ECHR was not functionally a higher-ranking court in relation to the courts of the States parties. For this reason, neither in interpreting the European Convention on Human Rights nor in interpreting national fundamental rights could domestic courts be bound by the decisions of the ECHR."* In his complaint to the Commission, the complainant argued that the decision by the German Federal Constitutional Court means that German courts can choose whether or not to follow the decisions of the European Court of Human Rights, which in his view is a breach of Article 46 of the ECHR, under which the High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties. However, the Ombudsman considers Article 7 of the EU Treaty to apply to serious infringements, or the risk of serious infringements, of fundamental rights by a Member State, and not to the question as to how decisions by the European Court of Human Rights should be applied in that Member State in relation to national law and decisions by national courts. In the Ombudsman's view, the above is therefore not sufficient to show that there is a clear risk of a serious breach by Germany of any of the principles mentioned in Article 6(1) of the EU Treaty.

1.7 The Ombudsman further notes that, in his complaint to the Commission, the complainant referred to a paper available on the Internet entitled "The Silence of the LLAMs", which aims to demonstrate that *"substantial human rights violations are indeed being perpetrated in Germany in everyday practice"*. These alleged human rights violations were referred to in more explicit terms in the complainant's observations on the Commission's opinion in the present case. It is not clear whether the complainant has turned directly to the Commission with his explicit description of the alleged human rights violations. Given that the duty of the Ombudsman is to



examine the Commission's decision, which was based on the information provided to it by the complainant, the Ombudsman is unable to take the alleged human rights violations into account in his analysis, not knowing whether they had been brought to the Commission's direct attention at the time of making its decision regarding the matter.

1.8 In view of the above, the Ombudsman regards as reasonable the reply given by the Commission to the complainant's complaint against Germany of 23 January 2005. The Ombudsman therefore finds no maladministration by the Commission regarding the matter.

1.9 As regards the complainant's question concerning what the Commission is doing to ensure that the required fundamental rights protected under Article 7 of the EU Treaty are upheld, the Ombudsman notes that information in this regard is provided in the Commission Communication, which refers to the network of independent experts (3) . For more information regarding the matter, the Ombudsman would like to suggest the complainant to address the Commission directly.

2 Conclusion

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

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) According to the complainant "[an] LLAM consists of an aggregated package of abuses against the individual and his family perpetrated by extraneous structures within the administration, justice and industry. A full LLAM in operation, therefore, encompasses a tripartite cooperation, which is easy to organise at municipal level. It attacks using key sociological parameters which yield perfectly devastating results and very often leads to suicide of the victim."

(2) COM(2003) 606 final, available at the following website:
http://eur-lex.europa.eu/en/com/cnc/2003/com2003_0606en01.pdf [Link]

(3) As noted in the Commission Communication, more information can be found at the following website: http://www.europa.eu/comm/justice_home/cfr_cdf/index_en.htm [Link]