

## **Decision of the European Ombudsman on complaint 3255/2005/IP against the European Commission**

Decision

**Case 3255/2005/IP - Opened on 20/12/2005 - Decision on 08/04/2008**

Strasbourg, 8 April 2008

Dear Mr X,

In October 2005, you submitted a complaint to the European Ombudsman against the European Commission. Your complaint concerned the Commission's handling of the complaint that you, acting on behalf of your client Mr Y., had lodged with it on 29 March 2003.

On 20 December 2005, I forwarded the complaint to the President of the Commission and asked him to submit an opinion by the end of March 2006.

On 6 April 2006, the Commission informed my secretariat of delays in the preparation of a number of opinions on complaints, including yours. On 11 April 2006, I granted the Commission an extension of the deadline until 31 May 2006. On 29 May 2006, the Commission sent me its opinion, which I forwarded to you on 1 June 2006 with an invitation to make observations. You submitted your observations on 14 July 2006.

On 6 April 2008, my services contacted you by telephone in order to apologise for the delay in dealing with your case and to inform you that the examination of your file was completed.

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 were, in summary, as follows.

On 25 April 2003, acting on behalf of his client, Mr Y, the complainant wrote to the Secretariat-General of the European Commission. In that letter, the complainant asked the Secretariat-General to inform him who would be competent to deal with potential infringements of Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (1) ("Regulation 1347/2000"). In his reply, the Secretary-General



informed the complainant that the competent service to deal with the relevant issue was the Commission's Directorate-General ("DG") for Justice and Internal Affairs.

On 29 May 2003, the complainant wrote to the Commission alleging that the German authorities had failed to apply Regulation 1347/2000 correctly. In this respect, he pointed out that in December 1999 the complainant's client, an Italian national, and his former spouse, a German national, initiated divorce proceedings before an Italian court ( *tribunale* ). The Italian court granted provisional custody of the couple's children to the father. This custody order was made definitive by judgement "A". In the meantime, in August 1999, his former spouse, who had, by that time, taken the children to Germany, started legal proceedings before a court ( *Amtsgericht* ) in E. (Germany) with a view to obtaining custody of the children. On 5 January 2001, the *Amtsgericht* declared the action to be inadmissible, on the grounds that there was a case pending before a *tribunale* in Italy. This decision was appealed to the *Oberlandesgericht* of N. (Germany) which, in its judgement, awarded the mother custody of the children.

In his complaint to the Commission, the complainant argued that the *Oberlandesgericht* of N. should have declared itself incompetent to deal with the case, since another competent judicial authority in Italy was already dealing with the issue of the custody of the children. As a consequence, he argued, the German authorities violated Articles 11, 17 and 19 of Regulation 1347/2000 (2) .

The complainant further argued that Article 37 of Regulation 1347/2000 implied that Regulation 1347/2000 took precedence over the Convention of " The Hague", of 25 October 1980 (3) , and over "The Convention of Luxembourg", of 20 May 1980 (4) , (both of which had been, in the complainant's view, erroneously invoked by the *Oberlandesgericht* of N.).

By letter of 4 August 2003, the Commission informed the complainant of its intention to close the case since, in its view, there had been no infringement of Regulation 1347/2000 by the German authorities. The complainant was invited to submit further comments within one month from the receipt of the letter.

On 10 September 2003, the complainant sent his comments to the Commission. In his comments, he expressed his disagreement with the Commission's decision to close its inquiry into his complaint. Having received no reply from the institution, the complainant wrote a further letter to the Commission on 10 November 2003 asking to be informed about developments in relation to his complaint.

On 20 November 2003, the Commission sent a holding letter to the complainant. The complainant was informed that, in view of (i) the complexity of the issues raised in his complaint and (ii) a new argument submitted in his letter of 10 September 2003, concerning the refusal by the German authorities to recognise and enforce the judgment delivered by the Italian *tribunale* in April 2002 (5) , his case was still under investigation. The Commission further stated that the complainant would receive a reply as soon as possible and within six weeks at the latest. However, no reply was sent to the complainant within this deadline. On 26 March 2004 and 22 April 2004, the complainant sent two messages to the Commission, followed by a letter of 18



May 2004 in which he stated that, in accordance with the content of the Commission's letter of 20 November 2003, he should have received a reply concerning his case. The complainant asked for this reply.

On 5 July 2004, the Commission replied to the complainant and confirmed its decision, announced in its letter of 4 August 2003, to close his case. The Commission further added that, in order to carry out a more in-depth analysis of the case, its Legal Service had been asked to provide an opinion on the case, and that the complainant would receive a reply as soon as the institution had carried out a further examination of his dossier.

According to the complainant, no further reply was given to him by the Commission.

In his complaint submitted on 10 October 2005, the complainant alleged that the Commission had still not given him the reply it had promised in its letter of 5 July 2004.

The complainant claimed that the Commission should provide him with a coherent and sufficient reply in relation to i) the comments that he had made in his letter of 10 September 2003 and ii) the alleged violations of Regulation 1347/2000 by Germany.

## THE INQUIRY

### The Commission's opinion

The opinion of the Commission can be summarised as follows.

The Commission recalled the factual aspects of the case and the exchange of correspondence between its services and the complainant.

The Commission stressed that, in its letter of 4 August 2003, it provided the complainant with a detailed explanation of the reasons why there had been no breach of Community law by the German authorities and informed him of its intention to close its inquiry into the complainant submitted to it.

Dissatisfied with this answer, the complainant again wrote to the Commission on 10 September 2003. The complainant questioned the legal arguments submitted by the Commission and reiterated his complaint that there had been a breach of Community law by the German authorities. He also stated that the German authorities had wrongly refused to recognise and enforce the April 2002 judgment of the Italian *tribunale*.

In its reply of 5 July 2004, the Commission informed the complainant of its intention to maintain its decision to close his case. However, in view of the new elements submitted by the complainant in his letter of 10 September 2003, concerning the issue of recognition and enforcement of the 4 April 2002 judgement of the Italian *tribunale*, the Commission informed the complainant that it needed to consult its Legal Service in order to provide him with a more detailed response. In its opinion to the Ombudsman, the Commission noted that the detailed reply was sent to the complainant in May 2006.



A copy of this reply was attached to the Commission's opinion sent to the Ombudsman. In that opinion, the Commission stressed that in the complainant's case two aspects were to be identified. The first concerned the competence of the German courts concerning the parental responsibility of the children of the complainant's client. In this regard, the Commission stated that, on the basis of the information provided by the complainant in his complaint, it emerged that the legal proceedings for the divorce between the complainant's client and his former spouse and the parental responsibility for their two children were started in June 1999 before the Italian *tribunale*. Since the legal proceedings were initiated before the entry into force, on 1 March 2001, of Regulation 1347/2000, the said Regulation 1347/2000 was not applicable. Consequently, it could not have been infringed, in the case in question, by the German authorities.

The second aspect of the complainant's complaint concerned the refusal, on 23 July 2003, of the N. *Oberlandsgericht* to execute the judgment delivered by the Italian *Tribunale*. In the complainant's view, the German judge should have applied Regulation 1347/2000 on the basis of Article 42(2) (6). The Commission took the view that the German courts had made a detailed analysis of the condition for the application of Article 42(2) of the Regulation before reaching the conclusion that it was not applicable in the case in question. The Commission further remarked that it was not in its power to interfere with the procedure of domestic courts or to adjudicate on a decision taken by German courts. It finally recalled that there was no case-law of the European Court of Justice on this issue that could provide guidance and invited the complainant to submit a preliminary reference to the Court of Justice.

#### **The complainant's observations**

In his observations on the Commission's opinion, the complainant made in summary the following points.

He recalled that there were three legal proceedings related to his case, which were as follows.

- Separation proceedings which included the issue of the children's custody. These proceedings were initiated in June 1999 before a *tribunale* in Italy and concluded by judgment No "A". which granted custody of the children to the father, that is, the complainant's client.
- Proceedings for the custody of the children were also initiated in Germany by the mother of the children in August 1999. These proceedings were concluded by a ruling of the N. *Oberlandsgericht*, in Judgement No "B", granting the custody of the children to the mother.
- Proceedings initiated before the Amtsgericht of Nuremberg requesting the execution of the Italian custody judgment (that is, Judgment No "A") (7). An appeal with respect to the decision of the Amtsgericht of Nuremberg granting the execution of Judgment No "A" was made before the *Oberlandsgericht* of N. by the mother of the children. In its judgment No "B", the *Oberlandsgericht* of N. refused to enforce the Italian custody judgment.

The complainant emphasised, first, that, in his view, the Commission did not, in its letter of 4 August 2003, explain why the refusal, by the *Oberlandsgericht* of N., to grant the status of *lis pendens* to the divorce proceedings before the Italian *tribunale*, was not a breach of Regulation 1347/2000. Second, in his view, the Commission did not, in its letter of 3 May 2006, explain why, in its judgment No "B", the *Oberlandsgericht* of N. had failed to enforce the



judgment of the Italian *tribunale*. The complainant considered the answers provided to him by the Commission in August 2003, and in May 2006, to be contradictory, incoherent and not legally grounded.

The complainant noted that, in its letter of 3 May 2006, the Commission stated that Regulation 1347/2000 was not applicable to a case, such as the one before the Italian *tribunale*, lodged before its entry into force. In the complainant's view, however, the criteria of application for Articles 2 and 3 of Regulation 1347/2000 had been fulfilled by the time the divorce proceedings were concluded in Italy.

The complainant further referred to the fact that, in its letter of 3 May 2006, the Commission stated that, in the event the complainant's client was dissatisfied with the position of the German court, he should have asked for a preliminary reference from the European Court of Justice on the interpretation of Article 42 of Regulation 1347/2000. In this regard, the complainant stressed that a request for a preliminary reference was at the discretion of the national judge and that it could not be introduced by an individual.

## THE DECISION

### **1 The alleged failure by the Commission to provide the complainant with the reply promised in its letter of 4 July 2004**

1.1 In his complaint submitted to the European Ombudsman on 10 October 2005, the complainant alleged that the European Commission had failed to provide him with an adequate reply to his complaint that a German court, the *Oberlandesgericht* of N. (Germany), had, in breach of Regulation 1347/2000, refused to recognise and enforce a judgment delivered by an Italian court.

1.2 In its opinion, sent to the Ombudsman on 29 May 2006, the Commission recognised that it had failed to deal with the complainant's case properly. The Commission explained that, given the complexity of the case, it was necessary to carry out an in-depth analysis of the arguments developed by the *Oberlandesgericht* of N. in its decision of 23 July 2003. On the basis of this in-depth analysis, the Commission explained, a reply was, sent to the complainant on 3 May 2006.

1.3 Principles of good administration require that institutions should reply to citizens' correspondence within a reasonable period of time. Point 4 of the Commission's Code of Conduct (8) concerns enquiries and provides that:

*" (...) A reply to a letter addressed to the Commission shall be sent within 15 working days from the date of receipt of the letter by the responsible Commission department. (...) If a reply cannot be sent within 15 working days, and in all cases where the reply requires other work on it (...) the member of staff responsible should send a holding reply, indicating a date by which the addressee may expect to be sent a reply in the light of this additional work, taking into account the relative urgency and complexity of the matter. (...) "*



1.4 In the present case, it appears that, in its reply dated 4 July 2004, the Commission informed the complainant that it was going to consult its Legal Service as regards the further arguments put he had put forward and that it would inform him of the results of this inquiry as soon as possible.

The Commission, however, only replied to the complainant on 3 May 2006, after the Ombudsman opened the present inquiry. Indeed, the reply was sent only a few weeks before the Commission sent the Ombudsman its opinion regarding the complainant's allegation and claim.

1.5 Even if a certain delay in responding to the complainant occurred, which is regrettable, the Ombudsman notes, however, that in the course of the present inquiry, the Commission recognised its failure and stated that, in the meantime, a reply has been provided to the complainant. In light of the above, the Ombudsman does not consider it necessary to inquire further into this aspect of the case (9) .

## **2 The complainant's claim that he should receive a coherent and sufficient reply**

2.1 In his complaint to the Ombudsman, the complainant claimed that the Commission should provide him with a coherent and sufficient reply.

2.2 Before entering into the analysis of the answer provided by the Commission, the Ombudsman considers it important to recall that the present case concerns the Commission's handling of a complaint that the German authorities were not in compliance with their obligations under Community law. The Commission, in the exercise of its role as Guardian of the Treaty, has the obligation to ensure that national authorities comply with Community law. In this context, it has the possibility of initiating and pursuing infringement procedures against a Member State under Article 226 EC (10) .

2.3 The case law of the Court of Justice establishes that the Commission has discretionary powers under Article 226. This discretionary power precludes the right of individuals to *require* the institution to adopt a particular position and to bring an action for annulment against its refusal to take action.

2.4 The Ombudsman recalls, however, that when making a discretionary decision, an institution must act within the limits of its legal authority since discretionary power is not the same as arbitrary power. The Commission's 2002 Communication to the European Parliament and the European Ombudsman (11) sets out the procedural framework that the Commission should follow. This requires, in particular, that the Commission shall inform the complainant of an intention to propose that no further action be taken on an Article 226 complaint, setting out the grounds on which it is proposing to close the case.

In light of the above, the Ombudsman's inquiries in this context are limited to investigating whether the Commission, in its handling of the Article 226 complaints, has acted in accordance with the rules and principles binding upon it and within the limits of its legal authority and whether it provided the complaint with a coherent and reasonable reply to his complaint and provided him with the reasoning for its decision.



2.5 The Ombudsman also notes that the purpose of an "Article 226 procedure" is not, *per se* , to clarify the meaning of Community law, but to provide the Commission with the means of ensuring that Member States comply with Community law in cases where the Commission is of the view that an infringement of Community law has occurred. The Commission is thus not required, in the context of an "Article 226 procedure", to give, in all cases, a definitive interpretation of Community legislation.

In the exercise of its discretionary powers, if the Commission has not established that a Member State is indeed in breach of Community law, it cannot be excluded that the Commission could express the view that the precise meaning of a particular provision of Community law is, at that moment, unclear, and thus that its firm conclusion of a breach of Community law by the Member State would not be justified.

2.6 In the present case, the complainant based his complaint to the Commission on the alleged infringement of Community law by the German judicial authorities for allegedly not having applied Regulation 1347/2000.

The Ombudsman considers it necessary to first of all underline that his inquiry does not seek to evaluate the position taken by the German judicial authorities (12) . The inquiry merely seeks to evaluate the position taken by the Commission and whether the explanation it provided the complainant as regards its position was coherent and reasonable.

2.7 The Ombudsman notes that if the Commission is persuaded that national courts of a Member State are not applying Community law correctly, it has the option of launching an infringement procedure against the said Member State. However, the Commission can only take such a step if the positions taken by the national courts are of *a consistent and general nature* (13) . In sum, the applicable case-law implies that very strict requirements must be fulfilled in order for the Commission to consider launching an infringement procedure against the Member State concerned. This condition would not appear to be met, *inter alia* , in cases where the Commission itself considered that the legal rules interpreted by the national courts were unclear.

2.8 The Ombudsman first of all notes that the Commission, in both its correspondence with the complainant and its opinion to the Ombudsman, put emphasis on the complexity of the case.

The Ombudsman also notes that, in its opinion, the Commission recalled that divorce proceedings in Italy were started in June 1999 and were concluded in April 2002. Since the legal proceedings were initiated before the entry into force of Regulation 1347/2000 (14) , the rules as regards *lis pendens* set out in the Regulation could not have been infringed by the German authorities in the case in question.

Moreover, in its letter of 4 August 2003, the Commission stated that Article 3 of Regulation 1347/2000 did not apply to proceedings other than those indicated by Article 3(1) of the Regulation (15) . Since the action brought before the *Oberlandesgericht* of N. concerned a





matter of *custody of children* , and was not in the context of *proceedings for divorce* , the German authorities did not err when they decided not to apply Regulation 1347/2000. It appears that the German authorities were thus entitled to ignore Regulation 1347/2000 and apply the Hague Convention of 1961 on the protection of minors, as invoked by the *Oberlandesgericht* of N.

The Commission also stated that the legal framework created by Regulation 1347/2000, especially concerning the identification of the competent judge in relation to parental responsibility, was not entirely clear and should be amended (16) .

The Commission further recalled that there was, thus far, no case-law of the European Court of Justice on the substantive issue raised by the complainant that could provide guidance.

In light of the above explanation, and of the case law referred to in point 2.7 above, the Ombudsman is of the view that the explanation provided by the Commission to the complainant as regards its position was coherent and reasonable and that the Commission acted within the limits of its legal authority.

2.9 The Ombudsman considers it useful to refer to the fact that, in its letter of 3 May 2006, the Commission stated that if the complainant's client wished to contest the action of the German judicial authorities, he should have asked for a preliminary reference from the European Court of Justice on the interpretation of Article 42 of Regulation 1347/2000.

In this regard, and as correctly pointed out by the complainant in his observations, it is for a national court, in case of doubts about the interpretation or validity of Community legislation, to decide whether to submit a preliminary reference to the Court of Justice. The Ombudsman notes, in this respect, that the wording used by the Commission may not have been the most appropriate since it could have misled the complainant, who could have formed the view that individuals can use the preliminary reference mechanism to gain direct access to the European Court of Justice. It would have been preferable if the Commission had stated that the complainant had the possibility to request the German court to make use of its prerogative to submit a preliminary reference to the European Court of Justice. The Commission should have pointed out that it falls within the discretion of the national court to agree to such a request to submit such a preliminary reference.

### **3 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears that there are no grounds for further inquiries into this case. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS





(1) OJ 2000 L 160, p. 19.

(2) Article 11 reads as follows:

*" 1. Where proceedings involving the same cause of actions and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*

*2. Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of the different Member States, the court second seised shall of its own motion stay in proceedings until such time as the jurisdiction of the court first seised is established.*

*3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.*

*In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.*

*(...) "*

*In accordance with Article 17, " [T]he jurisdiction of the court of the Member State of origin may not be reviewed (...) "*

*Article 19 establishes that " [U]nder no circumstances may a judgement be reviewed as to its substance ".*

(3) Convention on the civil aspects of international child abduction.

(4) European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children.

(5) The Ombudsmen notes that the complainant's original complaint appears only to concern the issue of *lis pendens* .

(6) Article 42(2) reads as follows:

*" [J]udgments given after the date of entry into force of this Regulation in proceedings instituted before the date shall be recognised and enforced in accordance with the provisions of Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted ".*



- (7) The complainant did not specify the date on which these proceedings were initiated.
- (8) Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the public, annex to the rules of procedure of the Commission, OJ 2000 L 308, p. 32.
- (9) The nature of the reply provided by the Commission will be dealt with in Section 2 below.
- (10) Article 226 EC consists of an administrative part and a possible judicial part. Concerning the administrative part, there is a first informal stage, during which the Commission makes its view about the possible violation known to the Member State, and the latter may either comply with what the Commission requires or persuade the Commission that there is no violation of Community law. If the relevant matter is not resolved informally, the Commission may begin a subsequent formal stage by issuing a formal notice on the alleged infringement to the authorities of the Member State concerned. If the matter is still not settled, the Commission may decide to issue a reasoned opinion and give a deadline to the Member State to eliminate the violation. After the deadline elapsed, the Commission may bring the matter to the Court.
- (11) COM (2002) 141 final, OJ 2002, C 244, p. 5.
- (12) In this respect, the Ombudsman underlines that Article 1(3)) of the Ombudsman's Statute states that the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling.
- (13) See Case C-129/00 *Commission v Italian Republic* [2003] ECR I-14637 paragraph 32; and case C-287/03 *Commission v Kingdom of Belgium* [2005] p. I-03761, paragraph 28.
- (14) Regulation 1347/2000 entered into force on 1 March 2001.
- (15) Article 3 reads as follows:
- " 1. *The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to a parental responsibility over a child of both spouses where the child is habitually resident in that Member State. (...)* " (Emphasis added)
- (16) In this regard, the Ombudsman notes that a Regulation repealing Regulation 1347/2000 was adopted on 27 November 2003 and entered into force on 1 August 2004 (see Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338, p. 1).